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Yeshwant Naik
Department of Civil Law, Philosophy of Law and Medical Law
University of Muenster
Muenster, Germany

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Erster Berichterstatter: Prof. Dr. Thomas Gutmann
Zweite Berichterstatterin: Prof. Dr. Bettina Heiderhoff
Dekan: Prof. Dr. Janbernd Oebbecke
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Preface

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Abbreviations

AIR	All India Reporter
CBI	Central Bureau of Investigation
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
EConvHR	European Convention on Human Rights
FIRs	First Information Reports
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ILGA	International Lesbian and Gays Association
IPC	Indian Penal Code
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NALSA	National Legal Services Authority
NGO	Non-governmental organization
NHRC	National Human Rights Commission
OSCE	The Organization for Security and Cooperation in Europe
PIL	Public interest litigation
SCR	Supreme Court Reports, Canada
SC	Supreme Court
SCC	Supreme Court Case
UDHR	Universal Declaration of Human Rights Universal Declaration of Human Rights
UN	United Nations
UNHRC	UN Human Rights Council

Chapter 1
Introduction

1.1 Introduction

This book considers the Indian Supreme Court's jurisprudence on the legal recognition of homosexuality, same-sex unions and their right to found a family, asking specifically how the needs of LGBTI[1] persons have been met by the Supreme Court. In light of the present situation in India in which the Supreme Court has displayed a conservative attitude in their ruling on Section 377[2] of the Indian Penal Code, questions arise relating to the Supreme Court's consistency in other rulings relating to homosexuality; how the Supreme Court currently perceives homosexuality, same-sex unions and their right to family; the protection it affords sexual minorities and the impact of international human rights laws and the judgments of foreign countries on determining the constitutionality of Indian law. Though the Supreme Court has historically assumed a progressive role—protecting and guaranteeing fundamental rights—the book questions which issues may have influenced the Section 377 ruling. Thus, the central interpretative methods used by the Supreme Court are taken into account.

To further inform our understanding of the Indian Supreme Court's jurisprudence on the legal recognition of homosexuality, same-sex unions and their right to found a family, this book analyzes the general implementation and enforcement of the principle of equality and non-discrimination enshrined in international human rights laws to matters pertaining to sexual orientation and gender identity. The rights to "gender identity" and "sexual orientation" are the core focus of this study,

[1]This acronym refers to Lesbian, Gay, Bisexual, Transgender, Intersex people.

[2]Section 377 provides: "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 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.

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imbibing inclusiveness and equality. The book also examines laws on homosexuality under the aspect of the "protection of the family." Although protecting the family is a central concern of international human rights law, the relevant treaties say little about the nature of "the family" they protect.[3]

Despite India's State obligations to international conventions, there is a high level of (legal) discrimination and violence towards LGBTI Indians. Therefore, relevant articles (Articles 14, 15, 19 and 21) of the Indian Constitution are emphasized alongside their scope in protecting human rights, illuminating the level of agreement between the Indian Constitution and international human rights conventions in the context of the promotion and protection of LGBTI persons.

According to Talcott Parsons, the development of a universalistic, secular legal order which is highly generalized in terms of principles and standards was "the most important single hallmark of modern society."[4] A focus of research within the Cluster of Excellence "Religion and Politics in Pre-Modern and Modern Cultures" at the University of Muenster, Germany is the secularization of government and law, including the development of secular modes of normative reasoning.[5] This development, which can be called "Normative Modernization" or "Normative Modernity," is characterized by a systematic critique of categorical inequalities and legal discrimination; it has a strict emphasis on the State's task to accord equal concern and respect to all of its citizens.[6] In this perspective, the reduction of discrimination against homosexual/LGBTI citizens and other life forms and the extension of equal respect to different forms of sexual orientation, gender identity and family life has not only to be understood as an integral part of a larger development in law, but as a litmus test for the state of development of a modern legal order. In this regard, this thesis, "Legalizing Homosexuality in the Jurisprudence of the Supreme Court of India," intends to be a case study.

[3]Hodson, L., "Different Families Same Rights?," p. 8; Roagna, I., "Protecting the right to respect for private and family life under the European Convention on Human Rights," pp. 9–12.

[4]Talcott, P., "Evolutionary universals in society," *American Sociological Review* 29/3 (1964), p. 351.

[5]Cf. Gutmann, T., L. Siep, B. Jakl and M. Städtler, Eds., "Von der religiösen zur säkularen Begründung staatlicher Normen. Zum Verhältnis von Religion und Politik in der Philosophie der Neuzeit und in rechtssystematischen Fragen der Gegenwart," Tübingen: Mohr Siebeck 2012.

[6]Cf. Gutmann, T., "Religion und Normative Moderne," in: Ulrich Willems/Detlef Pollack/Thomas Gutmann/Helene Basu/Ulrike Spohn, Eds., *Moderne und Religion. Kontroversen um Modernität und Säkularisierung*. Bielefeld: Transcript 2013, pp. 447–488; Gutmann, T., "Zur Institutionalisierung der Normativen Moderne," in: Aulis Aarnio/Thomas Hoeren/Stanley L. Paulson/Martin Schulte and Dieter Wyduckel, Eds: *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag*. Berlin: Duncker & Humblot 2013, pp. 471–494; Gutmann, T., "Rechtswissenschaft," in: Friedrich Jaeger/Wolfgang Knöbl/Ute Schneider, Eds., *Handbuch der Moderneforschung. Interdisziplinäre und internationale Perspektiven*. Stuttgart/Weimar: B. Metzler'sche Verlagsbuchhandlung 2015, pp. 216–230.

1.2 The Legal Evolution of Homosexuality

To understand the legal evolution of homosexuality, and thus the politics of gay rights, the important role of global and domestic cultural factors concerning same-sex union laws must be examined. Fernández and Lutter have rightly noted that because "the politics of gay rights lies in the intersection of morality politics, group identity, international discourses and personal interests," it "represents an adequate setting to examine the relative importance of supranational cultural rules vis-a-vis domestic factors."[7]

In the following, therefore, it will be shown how traditional religious morality, especially until the end of the twentieth century, influenced the legal evolution of gay rights in the West. But due to the advance of technological progress in general—especially the development of contraception—traditional religious morality began fading into the background. Technological progress led to drastic changes with regard to sexual activity and the purpose of partnership in the twentieth century: sexual activity became less a matter of procreation and more a matter of bodily pleasure. These drastic changes impacted more than sexual activity; the traditional conception of family life was also transforming. The technological advances of reproductive technology alongside the legal protection of same-sex parents to raise children meant gays and lesbians could now "reproduce."

While the West was experiencing a growing awareness of gay rights, this section also brings light to the interesting, antithetical modern day "reversal" of gay rights in Islamic countries—the resistance to their adoption and how such rights were cast as "colonial." Though Islamic countries once displayed tolerant attitudes towards homosexuality, they now proclaim the prohibition of same-sex practices. Finally, and most important to the legal evolution of homosexuality in India, this section will conclude with a depiction of how the Islamic repressive attitudes towards sexuality have largely affected India and its views of same-sex sexual relations.

1.2.1 Traditional Religious Morality and the Condemnation of Homosexuality

A historical perspective of cultural rules concerning same-sex union laws sheds light on the legal evolution of homosexuality. Although there are well-known instances of the ancient Greeks exploring aspects of same-sex relations, for the most part, at least according to Nicola Barker, "Pre-Christian morality considered homosexual practices deviant and inappropriate."[8] And Christianity obviously

[7]Fernández, J. J., and M. Lutter, "Supranational cultural norms, domestic value orientations and the diffusion of same-sex union rights in Europe, 1988–2009," pp. 102–120.

[8]Barker, N., *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage*, pp. 51–53; Fernández, J. J., and M. Lutter, "Supranational cultural norms, domestic value orientations and the diffusion of same-sex union rights in Europe,1988–2009," p. 107.

continued to reinforce this view: the purpose of sexuality was reproduction and any sexual behavior deviating from this purpose was considered "sinful and contrary to God's will."[9] The condemning of homosexuality, which even went so far as persecution, is, thus, due to the fact that "religious values have historically regulated the morality of sexual practices and the benefits and duties of the marriage institution."[10] Even until the nineteenth century, the law continued to favor a traditional stereotype of the middle-class family, thus also reflecting the strong influence of religious morality[11]: Married couples were supposed to stay together until death.

1.2.2 Twentieth and Twenty-First Century Social Changes and Sexuality

But by the twentieth century, at least by the end of the century, the situation began to change. For instance, the couple agreed to separate if they felt they were incompatible. The desire for "companionate marriage" led to "no-fault divorce,"[12] and the weakening of sexual mores led to the abolition of laws criminalizing extra marital sexual activity. These significant social changes, especially concerning sexual activity, continued into the twenty-first century.

According to Grossman and Friedman, "The social changes included technological changes like contraception, fast transportation, advancement in the field of health leading to the fall in death rate. Economic changes included a booming industrial and postindustrial economy and vastly increased individual wealth."[13] Beyond sexuality, these changes even impacted adoption laws, which became more liberal, as adoption was no longer stigmatized.[14] And as family formation became a matter of self-fulfillment rather than duty, choosing to become a parent through adoption or alternative reproductive technologies became a laudable goal, worthy of facilitation through law.[15] These momentous changes transformed the American and European Legal system, marking the inception of same-sex marriage.

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[9]Carmody, D., and J.T. Carmody, *Native American Religions: An Introduction*, pp. 136–139, Fernández, J. J., and M. Lutter, op. cit., p. 107.

[10]Frank, D. J., and E.H. Mceneaney, "Individualization of Society and the Liberalization of State Policies on Same-Sex Sexual Relations, 1984–1995," pp. 103, 108; Crompton R., "Class and Family," p. 658–677.

[11]Abrams, K., "Family History: Inside and Out," p. 1001; Grossman, J.L., and L. M. Friedman, *Inside The Castle: Law And The Family in 20th Century America*, p. 331.

[12]Ibid., p. 1001.

[13]Grossman, J.L., and L.M. Friedman, *Inside The Castle: Law And The Family in 20th Century America*, pp. 7–8.

[14]Abrams, K. op. cit., p. 1005.

[15]Ibid., p. 1002.

As mentioned, it seems the conception of marriage changed dramatically during the twentieth and twenty-first century: not only for heterosexual unions but for same-sex unions as well. At this time, the correct treatment of same-sex couples became a significant question. "The changing desires of people in the aggregate—what we might call 'social change'—slowly moved the law and forced it to change to suit society's needs."[16] With this "social change" in combination with technological change, a new conception of the family also emerged. The ability of gays and lesbians to "reproduce"—a prime "incident" of traditional marriage—became much easier due to advances in reproductive technology. This, in turn, created the possibility for same-sex couples to raise children together with legal protections as parents easier.[17]

Legal change is most visible in the landmark judicial decisions articulating a right to marry, a right to procreate (or not) and a liberty interest in the care, custody and control of one's children.[18] Especially significant in this regard is *Toonen v. Australia*,[19] in which the UN Human Rights Committee held that the reference to "sex" in Article 2, paragraph 1 (non-discrimination), and 26 (equality before the law) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) should be taken to include sexual orientation. This decision encouraged several States to adopt a non-discriminatory approach towards marriage and family life so as to include same-sex couples. Moreover, in *Miron v. Trudel*,[20] the Supreme Court of Canada recognized marital status as an analogous ground of discrimination. The Supreme Court of Canada in this case held that different-sex cohabiting couples were functionally similar to married couples and should not be denied benefits simply because they were not married. This decision motivated same-sex couples to challenge discriminatory laws that treated them differently than married couples.

The liberalization by many nation-states of their policies on homosexual relations coincided with the appearance of gay and lesbian social movements worldwide.[21] As noted by Frank and Mceneaney, "In some countries, liberalization entailed merely the cessation of systematic police harassment and in others, a legal prohibition was struck down and new legislation was passed. Also, lesbian and gay social movements and liberalized state policies facilitated each other."[22] Additionally, Fernández and Lutter write, "Regions in America and Europe passed many laws that decriminalize homosexual activity, banned discrimination in employment based on sexual orientation and provided legal recognition to same-sex unions."[23]

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[16]Ibid., p. 1007.

[17]Grossman, J.L., and L.M. Friedman, op. cit., p. 9.

[18]Ibid., p. 2.

[19]*Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).*

[20]*(1995) 2 S.C.R. 418.*

[21]Frank, D. J., and E.H. Mceneaney, op. cit., pp. 911–944.

[22]Ibid., p. 912–915.

[23]Fernández, J. J., and M. Lutter, op. cit., pp. 102–120; Waaldijk, K., "Civil developments: Patterns of reform in the legal position of same-sex partners in Europe," pp. 62–63.

Through marriage, registered partnership or equivalent contracts, same-sex couples entered into "state-sanctioned," legally recognized, permanent and exclusive unions.[24] Although no European country provided legal recognition to gay and lesbian couples in the mid-1980s, sixteen European democracies had passed laws establishing same-sex marriages or registered partnerships by 2009—only 25 years later.[25] This shows that the supranational policies coupled with the elements of world polity theory—the idea that domestic policy is influenced by supranational norms or values (i.e., the more connected the stronger the influence)—had a significant influence in Europe, leading to the global growth of same-sex union laws.[26]

The other critical actors fostering social change are the international governmental and non-governmental organizations that have cultivated the diffusion of supranational culture, promoting universal and humanitarian values worldwide.[27] For instance, the International Lesbian and Gays Association (ILGA) formulated the notion that banning the legal recognition of same-sex couples constitutes a violation of the right of equality under the law.[28] And these supranational cultural prescriptions have had a particularly strong influence on the principle of human rights, which has become stronger in the arena of same-sex union laws.[29] Fernández and Lutter state:

> It established that all individuals have a set of rights bestowed upon them solely because of their human nature. This transnational principle that humans have a set of inalienable rights has only grown stronger since the end of the Second World War and the 1948 Universal Declaration of Human Rights with clear potential consequences in the struggle for gay rights . . .[D]omestic political debates and policy reforms are decisively influenced by a supranational cultural and discursive order that carries with it normative principles of appropriate political goals and structures.[30]

The passage above precisely states the most influential change: the recognition of different forms of sexual orientation and gender identity simply lies in the logic of human rights.

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[24]Fernández, J. J., and M. Lutter, op. cit., p. 102–120; Frank, D. J., and E.H. Mceneaney, op. cit., p. 7.

[25]Fernández, J. J., and M. Lutter, op. cit., p. 103.

[26]Ibid. See also Meyer J.W., J. Boli, G.M. Thomas and F.O. Ramirez, "World society and the Nation-State," pp. 144–181.

[27]Fernández, J. J., and M. Lutter, op. cit., p. 107; see also Lechner, F.J., and J. Boli, "World Culture: Origin and Consequences," p. 95.

[28]Kollman, K., "Same-sex union: The Globalization of an idea," pp. 338–340.

[29]Fernández, J. J., and M. Lutter, op. cit., p. 106.

[30]Ibid., p. 106; see Hafner-Burton, E.M., and K. Tsutsui, "Human Rights in a Globalizing World," p. 1400.

1.2.3 The Unfolding of Homosexuality in Islamic Countries

But this "transnational principle"—that humans have certain inalienable rights—was not adopted in the Muslim world. Since 1750, Islamic countries have gone from tolerating same-sex practices to repressing them.[31] Previous to this reversal, Islam actually had a rich history of tolerating same-sex practices.[32] Pederasty, for instance, was quite common throughout Islamic history. That such a practice was commonplace is evident in the oppositional stance taken to it by the famous medieval Jurist and eleventh century theologian Abu Hamid al-Ghazali, who asserted, "It is shameful to look at the face of a beardless boy when it may result in evil."[33] And Murray and Roscoe describe how "Muslim mystics generally adopted the vocabulary of boy love to signify love for God."[34] As Martin remarks:

> While issues surrounding homosexuality were being debated in theological circles, homosexual practices were prevalent in several different niches of the classical Islamic society. From the royal courts and the harems to some Sufi orders, evidence of homosexual practices existed during the era of classical Islam. Although these practices were of a common nature, they were of different motives as well as different levels of acceptability.[35]

As the West increasingly adopted LGBTI rights, Islamic countries became intolerant first in the name of Victorian morals, and then in the name of Islamic tradition.[36] Despite the contemporary global diffusion of LGBTI rights, the Islamic world still resists their adoption. This resistance is inconsistent with the world polity theory.[37]

In opposition to the United Nations Declaration on Sexual Orientation and Gender Identity (2008), the Islamic states made the following statements:[38]

1. Rights based on sexual orientation and gender identity are "new rights" that have no legal foundation in any international human rights instrument.
2. The real problems are discrimination on the basis of color, race, gender, religion and other grounds.
3. Matters pertaining to LGBT rights fall essentially within the domestic jurisdiction of member states.

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[31] Menyawi, H.E. "The Great Reversal: How Nations in the Muslim World Went from Tolerating Same Sex Practices to Repressing LGB People," pp. 1–29.

[32] Ibid.

[33] Ghazali, A.H., *Marriage and Sexuality in Islam*, p. 38.

[34] Murray, S., and W. Roscoe, *Islamic Homosexualities: Culture, History, and Literature*, p. 309.

[35] Martin, S.L., "The Role of Homosexuality in Classical Islam," (1997), University of Tennessee Honors Thesis Projects, http://trace.tennessee.edu/utk_chanhonoproj/231 (accessed on March 16, 2015).

[36] See also Bauer, T., *Die Kultur der Ambiguität*, Verlag der Weltreligionen im Insel Verlag, Auflage: 4, 2011.

[37] Menyawi, H.E., "The Great Reversal: How Nations in the Muslim World Went from Tolerating Same Sex Practices to Repressing LGB People," p. 1–3.

[38] http://www.religioustolerance.org/homundec5.htm (accessed on January 31, 2016).

4. Accepting rights on the basis of "sexual orientation" can lead to acceptance of paedophilia, bestiality and incest.
5. LGBT are not "vulnerable groups" in need of special protection (like women, children, the disabled and refugees).
6. The idea of a genetic cause for "particular sexual interests or behaviors" has been repeatedly rejected scientifically.
7. We must protect the family as "the natural and fundamental group unit of society" in accordance with Article 16 of the Universal Declaration of Human Rights.

By casting LGBTI rights as "colonial," Islamic nations have ratified the symbolic boundaries[39] that separate the Islamic world from the West. The sociologist Hassan Menyawi explains,

> From the perspective of Islamic clerics worldwide, media attention is something new in the treatment of LGBT people in the Islamic world. For them, Islamic practices persisted through time. They argue that, as prohibitions against same-sex practices are in the Quran and have been for 1400 years since the founding of Islam, the crackdown on LGBT people are traditional practices and not novelties that are continuous with historical juristic practice.[40]

However, as noted in this passage, it could be that some such practices have persisted through time.

1.2.4 Homosexuality in Ancient and Modern-Day India

India is more or less on the same track as Islamic nations. Homosexuality has existed in ancient Indian society since time immemorial. Although Hinduism has never considered homosexuality as a sin, it was viewed as worthy of punishment. Amara Das Wilhelm observes:

> The Sushruta Samhita, for example, a highly-respected Hindu medical text dating back to at least 600 B.C., mentions two different types of homosexual men (*kumbhika* – men who take the passive role in anal sex; and *asekya* – men who devour the semen of other men) as well as transgenders (*sandha* – men with the qualities, behavior and speech of women). It also states that men who behave like women, or women who behave like men, are determined as such at the time of their conception in the womb.[41]

In the Manu Smriti, an important Hindu law code, certain punishments for specific instances of male and female homosexuality are prescribed, but the forms of punishment are light. If a *stri* (adult woman) was found having sexual relations

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[39]Menyawi, H.E., op. cit.; Lamont, M., *Money, Morals, and Manners: The Culture of the French and American Upper-Middle Class*, 1992.

[40]Ibid., p. 6.

[41]Wilhelm, A.D., *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality*, pp. 50–51.

with a *kanya* (unmarried girl), her "head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey."[42] If two *kanya* have sex, each "must be fined two hundred (*panas*), and receive ten lashes with a rod. For *brahmanas* and twice-born men [all male members of the first three varnas in Brahmanical Hindu Society – the Brahmins, Kshatriyas and Vaishyas] sexual union with a man is traditionally said to cause a loss of caste."[43] This means, the prescriptions were specifically for *brahmanas* and the kanyas, but not for the other classes. Similarly, in ancient Chinese and Japanese cultures, some unnatural offences were regarded as less hurtful to the community than others. And the ancient Arabs did not have a problem with homosexual love.[44]

Despite this rich historical background, India has become homophobic and reluctant towards same-sex love. Ruth Vanita states, "Islamic and colonial influences imported much more repressive attitudes towards sexuality than what had perhaps existed in ancient and pre-colonial India."[45] Today, India has an overt emphasis on reproduction; reproduction is thought of as a duty to carry on the family lineage. It has made same-sex love in particular and "sex" in general a taboo. Section 377 of the Indian Penal Code criminalizes private, consensual sexual acts between adults (male and female) that are "against the order of nature," or any sexual act that is non-vaginal.

Although it is oftentimes true that "societies with stronger links to the global cultural order or with more secularized value orientations are more likely to decriminalize homosexuality or enact same-sex union laws,"[46] this equation fits neither most Islamic countries nor Hindu regions. In other words, Hindu or Muslim regions in spite of having strong links to the global cultural order have to date remained obstinate in their stance regarding decriminalizing homosexuality.

[42]Manu Smriti, Chapter 8, Verse 370 and 369; see also Wilhelm, A.D., *Tritiya-Prakriti: People of the Third Sex*, pp. 267, 334.

[43]Manu Smriti, Chapter 11, Verse 68 and 175; see also Wilhelm, A.D., op. cit., In the case of India, according to the Laws of Manu, "A twice born man (*brahaman*) who commits unnatural offence with a male, or has intercourse with a female in a cart drawn by oxen, in water, or in the day-time shall bathe, dressed in his clothes" was rightly reckoned as a petty offence (Greenberg, D., *Construction of homosexuality*, p. 143).

[44]Greenberg, D., *Construction of homosexuality*, pp. 145, 148, 551.

[45]Vanita, R., *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society*, pp. 15–29.

[46]Inglehart, R., and W.E. Baker, "Modernization, Cultural Change, and the Persistence of Traditional Values," p. 49; Gerhards, J., "Non-discrimination towards Homosexuality," p. 19.

1.3 Liberalism

1.3.1 The Principle of Equal Concern and Respect

As stated in the previous section, the ILGA expressed in the 1980s that banning the legal recognition of same-sex couples constitutes a violation of the right of equality under the law.[47] It is exactly this global development towards human dignity and modernity's normative critique of legal discrimination that is mirrored in Ronald Dworkin's liberalism. More specifically, the LGBTI community's struggle for equal civil rights finds support in his liberal framework, which emphasizes that the primary role of a democratic government is to accord equal concern and respect to all of its citizens (i.e., the principle of equal concern and respect).[48] In Dworkin's liberalism, values like equality, liberty and neutrality are complementary. A liberal government that abides by the principle of equal concern and respect for the human dignity of its citizens will thus be positively obligated to legalize homosexuality and same-sex unions.[49]

In Dworkin's own words, liberal societies that uphold human dignity "must adopt legal and institutional structures that reflect equal concern for everyone in the community, but it must also insist . . . that the fate of each (citizen) must be sensitive to his own choices."[50] Thus, the principle of equal concern and respect as a responsibility of the State has become the slogan of the twenty-first century. It has helped to prohibit governments from criminalizing sexually intimate acts between gays and lesbians. This in turn has led to State recognition of same-sex unions.

In summary, Dworkin's writings on human dignity, or the right to be recognized as a person whose interests are intrinsically important, which is complemented by his fundamental principle of equal concern and respect, are often used as a common starting point for political and legal arguments globally.[51] Both these principles can be seen as the main pillars in most of the global gay rights movements while appealing for the community demands before the state governments.

[47]Kollman, K., "Same-sex Union: The Globalization of an Idea," pp. 338–340.

[48]Dworkin, R., "Three Questions for America," *The New York Review of Books* 53, no. 14 (September 21, 2006), http://www.nybooks.com/articles/19271 (accessed on February 16, 2015); see also Dworkin, R., *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006).

[49]Franke, K.M., "The Politics of Same-Sex Marriage Politics," *Columbia Journal of Gender and Law,* pp. 239–240.

[50]Dworkin, R., *Sovereign Virtue,* p. 324.

[51]Ibid., p. 4.

1.3.2 Distinction Between Ethics and Morality

Another interesting point made by Dworkin worth mentioning in the context of this thesis is found in his assertion in *Sovereign Virtue*, where he writes that ethics "includes convictions about which kinds of lives are good or bad," while morality "includes principles about how a person should treat other people."[52] In other words, Dworkin is suggesting that ethics concerns principles for living well, for setting and fulfilling life plans, whereas morality concerns principles for how to treat others.

Based on the preceding text on the principle of equal concern and respect and this significant distinction between ethics and morality made by Dworkin, it can now be asserted that most, if not all, moral (or non-ethical) considerations of the government concerning the recognition of opposite-sex relations and rights apply equally to same-sex couples as well. When a liberal State values marriage non-ethically, the principle of equal respect and concern politically obligates the government to be unbiased and just in its distribution and application of this good to same-sex couples.[53] A legitimate government must treat all those over whom it claims dominion not just with a measure of concern but of *equal* concern; this means, it must act "as if the impact of its policies on the life of any citizen is equally important."[54] Ultimately, it follows that a government which continues to knowingly or naively violate the abstract egalitarian principle will weaken the legitimacy of its political regime.

1.3.3 Discrimination Persists

While liberal states "have reformed the legal standing of other normatively charged practices such as abortion, pornography, slavery and non-discrimination against women, etc.,"[55] and despite the growth of the International LGBTI discourse on rights over the past 30 years, many are still suffering discrimination and injustices globally. This discrimination is being combatted on an international level, where there have been judicial decisions concerning the right to privacy, marriage and family for gay men and lesbians.

In this context the ICCPR is important. In *Toonen v. Australia*[56] the UN Human Rights Committee found that Tasmanian laws were in breach of the ICCPR; a

[52]Dworkin, R., *Sovereign Virtue,* p. 485, footnote 5. Dworkin emphasizes this distinction much more forcefully in *Is Democracy Possible Here?*

[53]Bui, N., "Dworkinian Liberalism & Gay Rights: A Defense of Same-Sex Relations," p. 54–55.

[54]Dworkin, R., *Sovereign Virtue,* p. 19.

[55]Fernández, J. J., and M. Lutter, op. cit., p. 112.

[56]United Nations Human Rights Committee, Report of the Human Rights Committee, *Communication No.488/1992, U.N. Doc CCPR/C50/D/488 (4 April 1994) ('Toonen').*

precedent was made within the UN human rights system to address discrimination against gays and lesbians. In Europe, LGBTI activists have fared well in addressing rights and sexuality issues before various European institutions. For instance, the European Court of Human Rights and the European Court of Justice have been positive on privacy rights of gay men and lesbians. In the 1980s the European Court of Human Rights was the first international body to hold that laws criminalizing consensual, private sexual activity between adults violated the right to privacy.[57]

1.3.4 Dworkin and Judicial Discretion

In this regard, the world polity theory and Dworkin's principle of judicial obligation have partly contributed to shaping gay right movement and the global legal system. In particular, the principle of judicial obligation can encourage judges to exercise discretion in deciding cases pertaining to homosexuality and rights thereto. Most of such cases can be viewed as what Dworkin calls "hard cases."[58] In hard cases, judges have turned to principles in the absence of rules.[59] Here, principles may be understood as public standards of morality.[60] In hard cases, judges have extended legal decisions beyond the legal rules and legal systems. Their understanding of legal systems as a whole (law as integrity)[61] involves setting aside their personal morals.[62]

While this claim is generally true in the global context, it does not seem to be empirically correct in the context of India and in the Islamic World. In these countries, judges sometimes make important decisions based in part on personal preferences. Even though the ideal judge is supposed to be completely impartial, it is impractical to expect that a judge can really leave aside his personal morals, formative experiences and other such personal aspects that may influence his decision. Not only do judges seem to make decisions based on their personal morals and political persuasions at times, but it is expected that they will do so. In fact, in India the very appointment of a judge is a political decision.[63] It is sometimes based not only on how good a judge he or she is, but also on his or her personal political views. Therefore, it cannot be believed that there is, in fact, a real obligation upon

[57]*Roes v. U.K* (1987) 9 EHRR 56; *Cossey v. U.K* (1991) 13 EHRR 622; *Sheffield and Horsham v. U.K* (1999) 27 EHRR 163.

[58]Schauer, F., and W. Sinnott-Armstrong, Ed., *The Philosophy of Law: Classic and Contemporary Readings with Commentary*, p. 80–81.

[59]Ibid., p. 82.

[60]Ibid., p. 75.

[61]Dworkin, R., *Judicial Discretion,* p. 635.

[62]Murphy, J. G., and J. L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, p. 40.

[63]Tripathi, G.P., *Indian Constitution*, p. 242, 271; see also Article 124 (1–7) and Article 217 of the Indian Constitution.

judges to put aside their personal morals. Nevertheless, Dworkin is right to the extent that he does not dispute the claim that judges have weak discretion. It is quite the contrary; he only disputes the claim that they have strong discretion.

1.4 Ground Reality of the Research Problem: Research Study at a Glance

1.4.1 Human Rights and Gay Rights

Human rights have occupied a significant place in the history of the United Nations (UN). The framers of the UN Charter (1945) were aware of the large-scale violation of human rights during the Second World War, including the Nazi atrocities. This influenced the drafting of the Universal Declaration of Human Rights (1945) and subsequent conventions for the promotion and protection of human rights.[64] Although the specific conventions and declarations speak for human rights in general, it can be concluded from the discussion in the preceding section that the extension of equal concern and respect to different forms of sexual orientation and gender identity lies in the logic of human rights.

In the time following, gay rights *as* human rights have mainly centered on the resolutions of the UN General Assembly and the UN Human Rights Council (UNHRC).[65] Out of concern for the violation of human rights relating to sexual orientation and gender identity, the European Union supported the December 2008 UN General Assembly statement on human rights, sexual orientation and gender identity (which is supported by sixty-eight countries from five continents).[66] In 2011, the UNHRC adopted a resolution on human rights, sexual orientation and gender identity, which documented discriminatory laws against individuals based on their sexual orientation and gender identity; it was unanimously supported by the European Union.[67]

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[64]Robertson, A.H., *The Law of International Institution in Europe*, pp. 52–53; Kapoor, S.K., *International Law and Human Rights*, pp. 806–807.

[65]Report of the United Nations High Commissioner for Human Rights, http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on March 25, 2015).

[66]Report on guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, Foreign Affairs Council meeting, Luxembourg, 24 June 2013. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/137584.pdf (accessed on March 25, 2015).

[67]Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe, *Council of Europe,* Strasbourg, June 2011, p. 52; Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices, European Union Agency for Fundamental Rights, Vienna, 2011, p. 13; Kuhar, R., and A. Svab, "The Unbearable Comfort of Privacy: Everyday Life of Gays and Lesbians," p. 153.

Along similar lines, another leading international human rights organization and advisor of the UN, Out Right Action International, formerly known as the International Gay and Lesbian Human Rights Commission, held a meeting on February 28, 2011 to celebrate the launch of the Yogyakarta Principles, which is a guide to human rights. According to these principles, gay rights are considered both human rights and civil rights. The rights include but are not limited to the following: allowing men who have sex with men to donate blood; recognition of same-sex relationships such as marriage, partnership and union; allowing adoption; recognition of parenting by gay couples, anti-bullying laws and student non-discrimination laws to protect gay children and or students; immigration equality laws; anti-discrimination laws for employment and housing; hate crime laws providing enhanced criminal penalties for prejudice-motivated violence against gay people; equal age of consent laws; equal access to assisted reproductive technology and legal recognition and assignment of preferred gender and laws related to sexual orientation and military service.[68]

Although India has ratified most international conventions, like the UDHR, ICCPR, ICESCR (International Covenant on Economic, Social and Cultural Rights), etc., it has failed to acknowledge and grant LGBTI rights on the national front. On the contrary, in March 2015, India openly supported a Russian-drafted resolution voting against gay rights for UN employees.

1.4.2 The Indian and the International Context

In India gay rights are not subsumed under human rights. Same-sex marriage was never a demand that generally figured into Indian political campaigns. And the small demand for a change in marriage laws to allow same-sex marriage has been put forward most strongly in the context of lesbian women.[69] A few same-sex marriages among lesbians have been reported from some parts of India. However, there is no detailed account as to what types of rituals were performed during these marriage ceremonies.

This could be partly due to the primary focuses of gender studies in India. From the Indian context, most studies of gender variance in India until 2001 were confined to research on men who have sex with men, *hijras* (transgender persons) and other gender identities. The studies focused on a health perspective, emphasizing safe sex practices to prevent the spread of HIV/AIDS infection.[70] A fitting

[68] An Activist's Guide to The Yogyakarta Principles, 2010: www.yogyakartaprinciples.org (accessed on March 25, 2015). For human rights defenders, see also Gross, A.M., "Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law," pp. 235–253.

[69] Vanita, R., *Love's Rite: Same-Sex Marriage in India and the West,* p. 183.

[70] Joseph, S., *Social Work Practice and Men Who Have Sex With Men,* pp. 1–51; Seabrook, J., *Love in a Different Climate,* pp. 4–16.

example of such an influential study comes from the gay rights activist Shivananda Khan.[71] He in fact asserts that there are no gay families in India.

According to Khan, a gay man is one who is cruising for sex in the park, yet is known for many other things outside the park: perhaps he is a good Hindu, a married man with a family.[72] But Khan neglects the existence and relevance of same-sex unions and family life; the men he speaks of are family-oriented in the traditional sense: they honor family and community obligations by marrying women and having children. The same-sex sexual relations he speaks of involve men looking for sex outside the marriage with other men. His primary focus is thus only on the males who are affected by HIV/AIDS and prevention strategies. Therefore, gay marriage and rights are of no interest to him. The representation of a "gay man" as a separate identity, with a different orientation, is missing in his work.

The most recent notable work on law and homosexuality in India, *Law Like Love: Queer Perspectives on Law in India,* is a series of essays from multiple perspectives on the history of queer life and law in India. It was mainly published to honor the second anniversary of the 2009 Delhi High Court ruling to decriminalize homosexual sex in the privacy of one's home, which profoundly helped the gay rights movement in India gain momentum.[73] Although some essays are excellent, the book does not provide a concrete answer for the best strategy to promote and protect human rights or the rights of gay people in India. It only gives an enumeration of cases, incidents and general arguments on homosexuality, marriage, and family in the form of essays without any concrete solutions. This is exactly why this thesis seeks to provide concrete answers for the best strategy to promote and protect gay rights as human rights in India.

1.4.3 Pressing Problem

Gay people worldwide constitute a vulnerable group who continue to be victims of persecution, discrimination, bullying and gross ill-treatment, often involving extreme forms of homophobic violence, including torture and murder.[74] On June 17, 2011 South Africa initiated a resolution in the UNHRC requesting that the UN High Commissioner for Human Rights draft a report detailing the situation of

[71]Khan, S., "Culture, Sexualities, and Identities: Men Who Have Sex with Men in India," pp. 99–115; Nivedita Menon (ed.), *Sexualities,* pp. 3–50.

[72]Ibid.

[73]Narrain, A., and Gupta, A. Eds., *Law Like Love: Queer Perspectives on Law in India*, pp. 25–42.

[74]Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices, European Union Agency for Fundamental Rights, Vienna, 2011, p. 13; Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report for 2009, OSCE Office for Democratic Institutions and Human Rights, Warsaw, November 2010.

LGBTI citizens worldwide. The report was published in December 2011 and documented violations of the rights of LGBTI people, including hate crimes, criminalization of homosexuality and discrimination.[75] Additionally, discriminatory legislation, policies and practices are found in legislations, at the workplace, in the public sphere and in education. Discriminatory practices also include different forms of exclusion, which is why many gay men fear, for instance, coming out of the closet, especially at their work place. Such excessive practices are contrary to the right to equality and are discriminatory as per the UDHR and the ICCPR.[76]

Although it is now absolutely clear that the principle of equality embedded in human rights laws applies to sexual orientation and gender identity,[77] even in Germany two men going hand in hand or kissing in public is still an eye-catcher. Gays are granted formal equality, yet in reality they have remained second-class citizens. The formal equality only shows the tolerance of the people towards gay men, it does not reveal their acceptance.[78] Discrimination is clearly visible in personal laws, especially when it comes to provisions pertaining to marriage, adoption and assisted reproduction. Gay couples are still not a part of the mainstream heteronormative marriage and family laws. They do not have the same marriage or adoption benefits that are enjoyed by hetero-couples.[79] The right is conferred upon gays to legalize their unions in the form of a partnership (*Eingetragene Lebenspartnerschaft*). No doubt, this right is akin to marriage, but it is not the same as marriage.[80] Instead of integration, it seems most countries have segregated gay couples from others by making separate laws for them in contrast to the general laws. Hence, the aim of equality in the family lives of LGBTI people is still in the process of being realized.[81]

The realization of this aim is not only restricted to Europe or America but is global. The West is already working hard towards this goal, to the extent that even

[75]Report of the United Nations High Commissioner for Human Rights, http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on March 25, 2015); Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices, European Union Agency for Fundamental Rights, Vienna, 2011, p. 13.

[76]Ibid.

[77]Ibid., see also *Smith & Grady v UK*, 25 *July 2000, 31 EHRR 24*.

[78]The social situation concerning homophobia and discrimination on grounds of sexual orientation in Germany, Danish Institute for Human Rights, March 2009, pp. 1–15; Frohn, D., and P. Stärke, "The situation concerning homophobia and discrimination on grounds of sexual orientation in Germany," Sociological Country Report, 2008.

[79]LSVD Report, Human Rights Committee,106th session, 15 October to 2 November 2012, pp. 1–4, http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICCPR/iccpr_state_report_germany_6_2010_list_of_issues__replies_2012_en.pdf (accessed on March 25, 2015).

[80]*Quote for the German discussion: Nina Dethloff, Ehe für alle, FamRZ 2016, 351–354; Anne Röthel, Öffnung der Ehe – wenn ja: wie? FamRZ 2015,* 1241–1242.

[81]Hodson, L., "Different Families Same Rights?," p. 8; Roagna, I., "Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights," pp. 9–12.

the Council of the European Union encourages the defenders of human rights from the third countries, including those of the LGBTI persons, to work for the prohibition of every sort of discrimination against gay people. It emphasizes cultivating the development of a political dialogue for the promotion, protection and support of human rights in the third countries.[82] On account of all these efforts, India has already ratified international instruments like the UDHR, ICCPR and ICESC. Though India has in fact recognized several human rights of citizens, the recognition and inclusion of LGBTI rights into the human rights agenda is still awaiting victory.

1.4.4 The Indian Legal Context

Many of the international conventions concerning human rights have been converted into legislative measures by the Indian Parliament. Examples include the Protection of Human Rights Act, Juvenile Justice Act, Domestic Violence Act and Immoral Traffic (Prevention) Act.[83] And tolerance for the promotion and protection of human rights is evident in the Indian Constitution. It is also reflected in the actions of the Judiciary. However, with respect to gender identity and sexual orientation, the State and the Judiciary have remained reluctant.[84] In general, law-makers and the Judiciary seem to lack sufficient knowledge of homosexuality and the issues connected thereto on account of the following *reasons:*

The focus is not the acceptance of same-sex unions and their right to family life, but the legalization of consensual sexual acts among adults in private: In 2009 the Delhi High Court decriminalized gay sex in private between two consenting adults, overturning the colonial-era legislation that outlawed homosexuality.[85] The judgment spoke about inclusivity, non-discriminatory treatment, dignity and a vision of India as an open, tolerant society. However, in December 2013 the Supreme Court set aside the Delhi High Court verdict only to recriminalize gay sex in private between two consenting adults.[86] The petitioners filed a review of the said verdict. This review petition was further dismissed. The Curative Petition was heard by the Supreme Court on February 2, 2016. Without altering its earlier decision, the Court

[82]Report http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/.pdf (accessed on March 25, 2015).

[83]Sabharwal, Y.K., "Human Rights and International Law," Speech on the occasion of Golden Jubilee Celebrations and Law Lecture in memory of late Dr. Rajendra Jain, dt. 11.4.2006, Jabalpur, http://www.supremecourtofindia.nic.in/speeches/speeches_2006/MP.pdf (accessed on March 25, 2015).

[84]*NAZ Foundation v. Union of India*, Civil *Appeal No.10972 of 2013*.

[85]*NAZ Foundation v. Union*, *160 Delhi Law Times 277*.

[86]Ibid.

referred the matter to the Constitutional Bench. According to Tejas RK Motwani and Neeraj Grover,[87]

> [A]n interesting development relevant to the adjudication of the Curative Petition is the enactment of the Criminal Law (Amendment) Act in March 2013. This new amendment would be the thrust of the curative petition. This Act amends provisions of law criminalizing rape (section 375 of IPC) by expanding its scope from non-consensual vaginal penetration to non-consensual penile non-vaginal acts as well (including penile-oral and penile-anal acts; hereinafter, "Penile Non-Vaginal Acts"). This implies that the said section on rape would cover not only vaginal penetration, but also Penile Non-Vaginal Acts between man and woman that are performed without consent. This amendment to Section 375, by de-criminalising all consensual sexual acts between heterosexuals, has taken it completely out of the purview of the IPC. In a nutshell, according to this view, the amendment to Section 375 has a cascading effect over the scope of Section 377 as well.
>
> The scope of Section 377 is now reduced to effectively cover only Penile Non-Vaginal Acts between man and man and transgender persons, be it consensual or non-consensual. This character of Section 377 renders it discriminatory against homosexual men and transgender persons and thus in violation of the principles of equality enshrined in the Constitution. This new amendment in the criminal law though passed in March 2013 was not considered by the Supreme Court while passing its decision in December 2013.
>
> However, it remains to be seen whether this argument will hold any ground in the court. It could be argued that just because one provision in the IPC criminalises only an aspect or part of an activity, it does not mean that the other aspects or parts of such activity are decriminalised, if they are covered under another provision of the IPC. Therefore, by that logic, the mere fact of Section 375 covering only non-consensual activity between heterosexuals may not have the effect of decriminalising consensual activities between them if such activities are covered in another Section, i.e. 377. Thus, the court may hold that amendment of Section 375 has no bearing on the scope of Section 377.[88]

On February 2, 2016 a three-judge bench headed by the Chief Justice of India decided to constitute a five-judge Constitutional Bench to reconsider the constitutionality of Section 377. The Delhi High Court read down the provisions of Section 377 on only three grounds, namely, violation of the right to equality under Article 14, right against non-discrimination under Article 15 and right to life under Article 21. The Delhi High Court was of the opinion that "Section 377 caused an unfair and unreasonable discrimination against homosexuals and hence violated Article 14." The Supreme Court, however, reversed the aspect relating to Article 14 and observed "that a classification based on those who indulge in sexual intercourse in the ordinary course and those who indulge in it 'against the order of nature' constitutes different classes, and that there is no arbitrariness or irrational classification."[89]

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[87]Tejas is an advocate at the High Court of Gujarat and a guest lecturer at the Gujarat National Law University. Neeraj is a practicing lawyer based in Bangalore and a guest lecturer at the Tamil Nadu National Law School.

[88]Tejas RK Motwani & Neeraj Grover; Read more at: http://www.livelaw.in/will-the-curative-be-the-cure/ (accessed on February 8, 2016).

[89]Ramachandran, R., "The Sentinel Who Will Not Protect," *Journal of Indian Law and Society*, Kolkata, Issue December 2013, pp. 1–4, https://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect (accessed on November 14, 2015).

Former Additional Solicitor General and Senior Advocate Raju Ramachandran has criticized the Supreme Court verdict in the following words:

> Even more disappointing was the Supreme Court's treatment of the Article 15 argument. The High Court had, after a careful analysis, held that discrimination on the basis of sexual orientation is not permitted by Article 15. This creative interpretation was not even touched upon by the Supreme Court. It dismissed the Article 15 argument in the same breath as it dismissed the Article 14 argument . . . [T]he Right to Life under Article 21 was viewed by the High Court as including the rights to dignity, autonomy and privacy. This aspect was not dealt by the Supreme Court. It cited passages from several judgments on Article 21, but did not ultimately record a reason about why in its view there is no violation of Article 21. The Court has also devoted a disproportionate amount of space to its critique of the High Court relying on foreign judgments, and has implied that these judgments have been applied 'blindfolded.' . . . Finally, the Court's view that there was insufficient factual foundation to sustain a challenge to the constitutional validity of the law is contradicted by its own recording of the fact that there have been only two hundred prosecutions and that it is the miniscule minority which needs the court's protection.[90]

The Supreme Court Judges also questioned whether courts in foreign countries allow Indian judgments to be cited. Therefore, it appears that the Supreme Court—being the custodian and guardian of fundamental rights of the citizens—has drastically failed in its attempt to safeguard the interests of gay people. Lack of proper knowledge about "gender identity" and "sexual orientation" on the part of law-makers and the Judiciary has caused many misconceptions and prejudices regarding homosexuality and issues connected thereto. It is astounding that archaic law in the form of Section 377 of the Indian Penal Code of 1860 continues to exist even in today.

There are a few recorded case laws wherein homosexual acts (anal and oral sex) have been penalized. There is a scarcity of judgments or judicial statements addressing gay rights and discrimination issues. The "right to marry and found a family" is a component of Article 21.[91] Since marriage laws recognize only heterosexual unions, same-sex couples are deprived of all the State, financial and social benefits that may be availed by heterosexual couples.[92] Such a situation boosts inequalities, instances of discrimination, injustice and restricts their scope for expression.[93] Penalizing such acts is against the identity and dignity of gay persons. It would also amount to violation of the freedom of expression. Further, homosexual acts form the medium through which homosexual men express their love towards each other. In fact, all people including LGBT people have a right to

[90]Ibid.

[91]Right to marry is a part and parcel of right to life under Article 21 of Indian Constitution, see *Lata singh v. State of Uttar Pradesh*, AIR 2006 SC 2522.

[92]Magoo, I.K., *Law relating to sexual offences and Homosexuality in India,* pp. 306–312; John, T., "Liberating Marriage," in eds *Law like Love,* Gupta, A., and A. Narain, pp. 355–365; Malik, N.S., "Legalisation of Homosexual Marriages in India: Challenges and Possibilities," *Periodic Research*, Vol. II Issue-I, pp. 119–125.

[93]Ravichandran, N., "Legal Recognition of Same-Sex Relationships in India," *Journal of Indian Law and Society*, pp. 96–109.

love and therefore a right to marry and form a family. In this thesis it is therefore argued that Article 14,[94] 15[95] and 19(1)a[96] of the Constitution can be more effective if read in light of Article 21, so as to confer the right to marry and found a family on all citizens irrespective of gender identity and sexual orientation.

Hence, the attainment of legal recognition of same-sex relationships is imperative if the constitutional ideals of the aforesaid articles are to be realized. In such matters, the State and the Supreme Court have the final jurisdiction. The Supreme Court on earlier occasions has taken a very liberal stand in its judgments relating to "live-in relationships," etc., even by giving couples the status of marriage.[97] It has also recognized transgender as a "third gender" and conferred upon them all the civil rights.[98] Further, it has given due recognition to the rights listed under three international instruments[99] and has afforded them the status of human rights in various landmark judgments.[100] Additionally the Rajya Sabha (Upper House of the Parliament) has recently passed the Rights of Transgender Persons Bill, 2015, which ensures a family life for transgender persons. The Bill prescribes that "no child, who is born a transgender, shall be separated from his parents. Only a court order can take the child away from the parents, and courts too can intervene only in the interest of the child." The Bill further enjoins "the local governments not to discriminate transgender persons in matters of admissions in educational institutions and to provide them with monetary aid" and "to provide them reservations in matters of employment and education." More significantly, as per the Bill, "transgender persons are free to choose sex of their choice viz, male, female or third gender. The local authorities are required to provide transgender for free "sex reassignment surgery."[101]

In particular the international instruments have been domesticated through the enactment of the Protection of Human Rights Act (1993). However, it must be stated that this Act is a weak effort, suffering from certain defects and shortcomings. Mainly, there are certain ambiguities and impediments concerning the competence and autonomy of the National Human Rights Commission (NHRC)

[94]Equality before law.

[95]Protection from discrimination.

[96]Freedom of speech and expression.

[97]*Lata Singh v. State of Uttar Pradesh, AIR 2006 SC 2522* (live-in relationship case).

[98]*NALSA v. Union, SC 2013*; see also http://supremecourtofindia.nic.in/outtoday/wc40012.pdf (accessed on March 25, 2015).

[99]Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESC).

[100]If any illustration is required of this approach of the Indian Judiciary, reference can be readily made to the cases of *Apparel Export Promotion Council v. A.K. Chopra (1999) 1 SCC 759; Vishaka v. State of Rajasthan (1997) 6 SCC 241 and T.N. Godavarman Thirumalpad v. Union of India & Ors. (2002) 10 SCC 606*.

[101]Subodh Ghildiyal, "Bill ensures family life for transgender children," TNN December 30, 2015, 05.41 A.M IST, http://socialjustice.nic.in/pdf/TGBillFinal.pdf (accessed on February 8, 2016).

established under this Act.[102] The NHRC can only make recommendations to the Supreme Court, which is the final binding authority. This makes the NHRC a paper tiger. It has no power to execute its own decisions. The NHRC requested the Government remove the said impediment, but the Government has been inactive in conferring enforcement powers upon the NHRC.[103] Such an attitude is not conducive for the proper observance and protection of human rights. Hence, the judgment criminalizing homosexuality is in fact a reflection of the situation of the vulnerability of gay people. It limits the protection, respect and observance of their human rights. The aim of this study, therefore, is to provide recommendations for the effective protection of human rights of gay people.

1.4.5 Study Objectives

The study aims to examine the jurisprudence of the Supreme Court of India (henceforth "the Court") on homosexuality and issues concerning same-sex unions and families in order to determine how their need for protection and legal recognition has been met by the Court. It does so using a two-pronged approach: (1) On the one hand, it analyzes the implementation and enforcement of the *principle of equality and non-discrimination* enshrined in human rights laws to matters pertaining to sexual orientation and gender identity. The rights to "gender identity" and "sexual orientation" are the core focus of this study, imbibing inclusiveness and equality. (2) On the other hand, the study examines laws on homosexuality under the aspect of the *protection of the family*. Although protecting the family is a central concern of international human rights law, the relevant treaties say little about the nature of "the family" they protect.[104]

In this direction, the research study presents sociological and socio-anthropological findings from India and then makes normative recommendations to all states, human rights tribunals and other law and policy makers with regard to an adequately broad notion of the meaning of "family." In doing so, the study provides a wide scope for the legal recognition of homosexuality, broadening and extending the definition of marriage and family so as to include all people irrespective of their gender identity and sexual orientation. It especially addresses the issues relating to same-sex unions and families which do not fit into the traditional definition of marriage and family.

[102]Tiwana, M., "Needed: More Effective Human Rights Commissions in India, Access to Justice Program," pp. 1–5; Agarwal, H.O., *International Law and Human Rights,* pp. 485–493.
[103]Kapoor, S.K., *International Law and Human Rights*, pp. 958–962.
[104]Ibid.

1.4.6 Hypothesis and Research Questions

The legal research involved the Court's jurisprudence on the legal recognition of homosexuality, same-sex unions and their right to found a family. The study examines how such recognition has or has not been met by the Court. The present situation and the arguments used by the Court helped to identify the main problems in the Court's current approach, possible reasons for it and to propose some ways or suggestions to move forward. For the purposes of this study, the expression "legal recognition of same-sex unions and family" also includes within its ambit equal access to civil marriage[105] or alternative systems as a substitute for marriage.[106]

The following research questions were formulated:

- How consistent has the Court been in its judgments relating to homosexuality?
- How has the Court perceived homosexuality, same-sex unions and their right to family?
- What is the current level of protection afforded by the Court to sexual minorities?
- Why has the Court refused to apply the international law regime and the judgments of foreign countries in deciding the constitutionality of Indian law?
- Why is the Court's current approach discriminatory?

1.4.7 Methodology

The subject of this study relates to constitutional law and, more precisely, to human rights. In addition, it includes other fields of law like Indian Penal Code, family law and international public law. The primary method applied is legal dogmatics to describe and systematize legal sources and legal arguments.[107] Peczenik elaborates on the key aspects of the legal dogmatic method, arguing that "it is used to analyse the current practice of the law. Opposed to the adoption of a theory as a lens through which data can be analysed, the laws instead serve as the backbone of the research as both the framework and the research object."[108] It is this perception that has influenced my use of this method in the current research study.

The study to some extent goes beyond traditional legal dogmatics, concerning itself with how the laws are practiced, and focuses on the major problems in the Court's current approach and conjectures why the Court has taken this approach in

[105] Also it can include the terms 'registered partnership', 'civil union' and 'civil partnership'.

[106] Soergjerd, C. *Reconstructing Marriage: The Legal Status of Relationships in a Changing Society,* p. 14.

[107] Peczenik, A. "Scienta Juris, Legal Doctrine as Knowledge of Law and as a Source of Law," in Enrico Pattaro *Ed. A Treatise of Legal Philosophy and General Jurisprudence,* pp. 4, 11.

[108] Ibid.

the first place. Through a case law analysis, I attempt to identify and systematize the current approach of the Court towards homosexuality and related issues. I attempt to look beyond traditional legal dogmatics in order to uncover the reasons and principles behind the Court's current approach. Additionally, a *de lege ferenda* (making justified recommendations for the lawgiver)[109] aspect is also a part of this study, which has helped me to formulate suggestions to the Court on how it could better accommodate the needs of gay people. Suggestions include the possibility and necessity of judicial activism. This approach is defensible because the Court's judgments and its methods of interpretation are already systematized, and a purely legal dogmatics approach would not bring many new considerations. The benefit of this method is to define the judicial assessment and approach to inquiries.

The study also involves an extensive survey of literature in jurisprudence, sociology and social anthropology from secondary sources like books, research papers, academic journals, articles, judicial judgments, press clippings, encyclopaedias, published and unpublished dissertations, theses and other relevant sources. Besides primary sources like yearbooks and various government reports, speeches and interviews were used to collect data. Lectures, seminars, conferences and policy workshops were used in addition to the aforesaid.

Finally, the study relies on socio-anthropological findings pertaining to sex, sexuality, contemporary families and intimate relationships among gay men in India. The snowball methodology as well as an empirical research methodology were employed to obtain these findings. The snowball methodology for data collection is an apt method in this case because of the invisibility of the majority gay men in India. The empirical research method has helped me gather data mainly through participant observations, non-participant observations and interviews or conversations. That is to say, the data collection methods included structured interviews and group interviews inside the NGO Centers, as well as semi-structured or unstructured and personal interviews outside the NGO Centers. Other methods used for data collection included social networking websites, telephonic interviews or interviews through the medium of Skype. Additionally, recording of oral life histories was also a part of this study. For the theoretical evaluation of these findings, I make use of legal-sociological theory, namely Eugen Ehrlich's "living law" approach.[110]

[109]Pechzenik, A., op. cit., p. 4.

[110]Mahajan, V.D., *Jurisprudence and Legal Theory*, pp. 625–632; Dias, R.W.M., *Jurisprudence,* pp. 425–427.

1.5 Analysis

The study analyzes the Court's jurisprudence on homosexuality, the Court's current position on homosexuality and the legal recognition of same-sex unions. In addition, the study also considers how much the Court's position has evolved in the past years. Relevant judgments by the Court have been found by referring to the chronological list of all the Court's decisions and judgments relating to homosexuality on the Court's official website. The three landmark judgments[111] were crucial for this study. In these judgments the Court was vigilant about issues concerning same-sex unions, families and human rights. It has referred to or relied upon foreign judgments as well.

1.6 Chapter Scheme

In Chap. 2 I shall explain the most central interpretative methods used by the Court. Some of these interpretative methods have been developed in the Court's case law and have previously not been included in the original draft of the Constitution. As a basic and crucial background to this thesis, a historical account of the Constitution's evolution—including its sources, preamble, features and basic structure—and the powers and scope of the Court as a final binding authority is provided. Other issues relevant to the independence of the Judiciary, interpretative methods, the hierarchy of courts, its composition, qualifications and appointment of judges, powers and jurisdiction of the Court, High court and other subordinate courts are discussed.

Chapter 3 throws light on the international jurisprudence of discrimination against LGBTI people and elaborates the relevant Articles (Articles 14, 15, 19 and 21) of the Constitution and their scope in protecting human rights. Agreement among the rights enshrined in the Constitution and the rights stipulated in the Conventions with special reference to the promotion and protection of human rights of gay people is considered. Despite State obligations to the Conventions, there is a high level of (legal) discrimination and violence towards LGBTI Indians. Concrete instances of discriminatory practices affecting the daily lives of homosexuals in India are addressed.

Chapter 4 scrutinizes the Court's observations in terms of judicial activism and judicial self-restraint. In India, international treaties or conventions are not a part of national law, but must be incorporated into the legal system by a legislation made by Parliament. The Indian Judiciary, "though not empowered to make legislations, is free to interpret India's obligations under international law into the municipal laws of the country in pronouncing its decision in a case concerning issues of international law."[112] In the past, the Judiciary has typically given recognition to

[111] *NAZ Foundation, Del. HC 2009; NAZ Foundation v. Union, SC 2013; and NALSA v. Union, SC 2013.*

[112] Kapoor, S.K., *International Law and Human Rights,* pp. 826–832.

international conventions and treaties, especially when matters were brought before the Court through Public Interest Litigations (PIL).[113] In such litigation, the Court has proven incredibly flexible in enforcing human rights by actively directing remedial action on the part of the State. Therefore, I propose that the Court should adopt an activist approach and should issue directions to the State and concerned authorities for taking positive action in order to secure the effective enforcement of the rights of gay people. Furthermore, the powers and competence of the Government with respect to the ratification and implementation of international treaties and conventions in India are examined.

Chapter 5 comprises an analysis of significant judgments that create a rough sketch of the Court's present day understanding of homosexuality, transsexualism and rights thereto. It is argued here that the Court is the right authority for safeguarding the interests and rights of LGBTI people.

Chapter 6 describes the social reality of contemporary "families" and "relationships" in India. The "living law" approach by Eugen Ehrlich is used here, as it provides all the conceptual principles and tools to the Judiciary necessary for legalizing homosexuality and recognizing same-sex unions in India. Ehrlich's approach—that law should take account of the changing social circumstances—is underpinned here by the ethnographic research I conducted in India in light of the prevailing circumstances, which are undeniably governed by Victorian ideals. Despite such outdated ideals, I found that there is a very strong presence of a subculture in India challenging heteronormativity, patriarchy and hegemonic masculinity.

Chapter 7 focuses on the family and family law with regard to the rights of LGBTI persons. It deals with the strong influence of the traditional nuclear family model on national and international laws. However, it is shown how such an ideal is ever-changing and new notions of "family" are emerging. Abiding by the "traditional" family ideal merely marginalizes, excludes and discriminates against alternative family formations. This chapter considers various international instruments, viz., UDHR, ICCPR, ICESCR, ECHR, EConvHR, etc., in reference to same-sex families and their rights. Though judicial rulings based on these instruments are often contradictory, there seems to be a positive international trend in recognizing the seriousness and depth of gay relationships and family life. Despite this positive direction, the Indian Judiciary has overlooked the provisions enlisted in the International Human Rights Conventions and rulings pertaining to same-sex

[113]Public Interest Litigation has rendered a signal service in the areas of Prisoner's Rights, Development of compensatory jurisprudence for Human Rights violation, Environmental protection, Bonded labour eradication and Prohibition of Child Labour and many others. See also *Chandanmal Chopra v. State of West Bengal AIR 1986 Cal 104; Oddessey Lok Vidyayana Sanghatan v. Union of India (1988) I SCC 168; Common Cause v. union of India (1996) 2 SCC 752; D. Satyanarayana v. N.T. Rama Rao AIR (1988) AP 144; Centre for Public Interest Litigation v. Union of India (1995) (supp) 3 SCC 382; Shiv Sagar Tiwari v. Union of India (1996) 2 SCC 558; Vineet Narayan v. Union of India (1996) 2 SCC 199 18; All India judges association v. Union of India AIR (1992) SC 165*.

relationships and family rights. Ethnographic observations depict the current state of India and its proliferating same-sex unions and alternative forms of family and kinship, which are largely unrecognized by the State.

Chapter 8 presents the findings on the current level of protection extended to gay people in India by the Court. It proposes possible explanations for the Court's current approach and provides suggestions for moving forward.

Chapter 2
Interpretative Methods and Judicial Power

2.1 Introduction

Homosexuality is a crime and punishable under Section 377 of the Indian Penal Code. The Delhi High Court on July 2, 2009 held Section 377 to be unconstitutional with respect to penetrative sex, i.e., penile-anal sex and penile-oral sex, between consenting adults in private. However, the Supreme Court, through its recent judgment[1] has criminalized homosexual acts by reinstating Section 377. In doing so, it has set aside the Delhi High Court verdict (2009), which conferred equality, liberty and dignity to the LGBTI community.[2] On earlier occasions, the Supreme Court has struck down constitutional amendments; thus, by not striking down Section 377 the Supreme Court has exercised judicial restraint. It has denied fundamental human rights to the LGBTI Community by labelling them the "miniscule minority."

The Supreme Court also held that Section 377 is non-discriminatory, being neutral and applicable to all sexualities including heterosexuals. However, the Supreme Court failed to realize the effect of the amendment in the offence of rape in Section 375 of the Indian Penal Code on Section 377. With the coming into force of the Criminal Law (Amendment) Act, 2013, Section 375 prohibits both penile vaginal and penile-non vaginal sexual acts between man and woman without consent. This means consensual sexual acts between man and woman are no longer criminalized. Therefore, consensual penile non-vaginal sexual acts in a heterosexual context would be out of the purview of Section 377, otherwise the amendment in Section 375 would become meaningless. Since the Supreme Court observed that Parliament should amend Section 377, it is crucial to understand the powers of the

[1] *NAZ Foundation v. Govt. of NCT of Delhi* (Judgment dated December 11, 2013).

[2] An introduction to Section 377 of the Indian Penal Code is provided in Chapter 1. Discussions of Section 377 – including its historical background and the Supreme Court's judicial restraint – are found in Chapters 4 and 5.

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Supreme Court to overturn the Section and to place the onus on the Parliament to amend Section 377, when it has upheld fundamental rights on several other occasions in the past. Therefore, there is a need to analyze and correct this attitude or approach of the Supreme Court, which otherwise has a good reputation for expanding fundamental rights jurisprudence. This may be possible by providing suggestions and recommendations to the Supreme Court.

The foundational base of the Supreme Court's judgment and functioning can be better grasped with an understanding of their interpretive methods and powers embodied in the Constitution. This is mainly because the Supreme Court's role in the interpretation rests on the constitutional base. Although the Constitution has been a constant source of inspiration in the decision making process, the Supreme Court over the decades has developed unique and innovative interpretation methods of its own.[3] These interpretive methods are visible in several judgments of the Supreme Court. In most of these judgments, legal principles have proved to be the foundational base rather than the judicial interests of the judges. Through most of these landmark rulings, the Supreme Court has acted as the custodian of the fundamental rights of the citizens. In doing so, the Supreme Court has exercised the judicial powers enshrined to it by the Constitution.

In this chapter, I shall explain the most central methods used by the Supreme Court. Some of these interpretative methods have been developed in the Supreme Court's case law and have previously not been included in the original draft of the Constitution. As a basic and crucial background to this thesis, the chapter also provides a historical account of the Constitution's evolution and the powers and scope of the Supreme Court as a final binding authority. To explain the Supreme Court's central methods, India's constitutional evolution and history is necessarily examined. In particular, focus is placed on its development starting from the Government of India Act, 1935 and the adoption of the new Constitution by the Constituent Assembly on November 26, 1949. An elaborate account of the sources, preamble, features and the basic structure of the Constitution is provided, as well as a brief judicial history of India. Various issues pertaining to the independence of the judiciary, interpretative methods, the hierarchy of courts, its composition, qualifications and appointment of judges, powers and jurisdiction of the Supreme Court, High court and other subordinate courts are discussed.

2.2 Constitutional Evolution

January 26, 1950 was a red letter day in the history of India. It was on this day that the present Constitution of India was brought into force, which declared to the World the birth of a new republic. The Constitution of India is an outcome of

[3]For interpretative methods, see Overy, C., and R.C.A. White, The European Convention on Human Rights, p. 64.

national consensus: on the method of administering the country with a pledge to the enduring values of democracy, human rights, social justice and national unity.[4] It is also a product of the collective consciousness of the people as a whole. And as an intimate choice of autochthony has great importance for the conscious social engineering it has launched.[5] It is the outcome not of the political revolution but of the research and deliberations of a body of eminent representatives of the people who aspired to improve upon the prevailing systems of administration.[6]

Like other constitutions, it seeks to establish the fundamental organs of government and administration. It lays down their structure, composition, powers and principal functions. It also defines the interrelationships between the organs and regulates the relationships between the citizens and the State, more particularly the political relationship.[7] Further, the preamble's invocation of popular power—"We the People of India"—symbolizes persistent collective support to the values and works under the Constitution for the realization of welfare and unity of the nation.[8]

Prior to the Constitution's advent, India was governed under the Government of India Act (1935), which became effective in 1937. During this time, India was a part of the British Empire, where sovereignty of the British Crown prevailed over the country. In the exercise of this sovereignty, the British Parliament enacted the Act of 1935. This Act conferred only a very limited right of self-government to the Indians.[9] The executive authority was vested in the Governor, appointed by the Crown. He acted as a ministerial advisor responsible to the Provincial Legislature, which was elected on a limited franchise. However, the Governor could exercise certain functions in his discretionary capacity or on the basis of individual judgment, in which case he was not bound by the ministerial advice and was subject to the control of the Governor-General.[10] The central executive authority was vested in the Governor-General appointed by the Crown. Although the Governor-General acted on ministerial advice, he was free to discharge certain functions "in his discretion" or "individual judgment." He was thus subjected to the control of the Secretary of State for India, who was a member of the British Cabinet.[11]

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[4]Bhat, I.P., *Law and Social Transformation*, p. 169.

[5]Iyer, V.R.K., "The Constitution: Our Founding Deed and Our Fighting Creed - Some Thoughts on Their Future First S.K. Memorial Lecture, New Delhi," pp. 9–13; see also Bhat, I.P., *Law and Social Transformation,* p. 168.

[6]Courts have referred to conventions on several occasions during the course of their decisions. See, for instance, *Carltona Ltd v. Commissioners of Works, (1943) 2 All E.R. 560; Madzimbamuto v. Lardner-Burke, (1969) 1 A.C.645; A.G. v. Jonathan Cape Ltd., (1976) Q.B. 752; Adegbenro v. Akintola, (1963) A.C. 614.*

[7]Pandey, J.N., *Constitutional Law of India*, p. 1; see also Basu, D.D., *Introduction to the Constitution of India*, p. 3.

[8]Bhat, I.P., op. cit., p. 169.

[9]Jain, M.P., *Indian Constitutional Law*, p. 3.

[10]Ibid., pp. 3–4.

[11]Ibid., p. 4.

The Act of 1935 sought to change the character of the Indian Government from unitary to federal. The Indian Federation was to consist of the Provinces in which British India was divided and the States under the native princes. This scheme, however, never materialized as the princes did not join the Federation. The federal concept was thus implemented partially in so far as the relationship between the Centre and the Provinces was ordered on this basis. Also, the ministerial form of government, as contemplated by the Act of 1935, could not be introduced at the Centre, which continued to function under the Government of India Act, 1919. The Central Government was thus comprised of the Governor-General and a nominated Executive Council. Further, in this setup the Governor-General occupied the key position as he could overrule his Council on any ground if in his opinion the safety and interest of British India were affected.[12]

Thus, before 1947, Indian participation in the government process was minimal. The effective power and control over the administration lay with the Secretary of State, the Governor-General and the Governors. This situation in turn gave rise to a demand for independence. The struggle to live as an independent nation and, at the same time, establish a democracy based on the ideas of justice, liberty, equality and fraternity resulted in the setting up of a Constituent Assembly for drafting a constitution for a free India.[13] The Draft Constitution was published in January 1948. The people of India were given 8 months to discuss the draft and propose amendments. As many as 7635 amendments were proposed and 2473 were actually discussed. The Constituent Assembly held eleven sessions.[14] The Draft Constitution was considered for 114 days. In all, the Constituent Assembly sat for 2 years, 11 months and 18 days. Finally, on November 26, 1949 the new constitution of India was adopted by the Constituent Assembly.[15]

2.3 Sources of the Constitution

The structural part of the Constitution evolved from the Government of India Act (1935). Fundamental Rights under Part III derive its inspiration from the Bill of Rights, which is enshrined in the American Constitution, whereas Part IV on the Directive Principles of State Policy from the Irish Constitution.[16] The political part, that is, the principle of Cabinet Government and the relations between the executive and the legislature, has been largely drawn from British experience.[17] The

[12]Ibid.

[13]Pylee, M.V., *Constitutional History of India*, p. 24; Jain, M.P., *Indian Constitutional Law*, pp. 3–4.

[14]Pandey, J.N., *The Constitutional Law of India*, p. 15.

[15]Basu, D.D., *Introduction to the Constitution of India*, p. 3.

[16]Bakshi, P.M., *The Constitution of India with Selective Comments*, p. 3–4.

[17]Ibid., p. 4.

Union-State relations are similar to the provisions in the Canadian Constitution, though the expanded concurrent list in the Seventh Schedule has a model in the Australian Constitution. Part XIII, dealing with trade, commerce and intercourse, also appears to have derived inspiration from the Australian Constitution. In addition, the privileges of the members of Parliament and of the State Legislature, to some extent, follow the Australian model.[18]

2.4 The Preamble of the Constitution

The Preamble of the Constitution declares "India to be a Sovereign,[19] Socialist, Secular and Democratic[20] Republic[21] and to secure to all its citizens: Justice, Liberty, Equality, Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation. It further declares that the Constitution has been given by the people to themselves, thereby affirming the republican character of the polity and the sovereignty of the people.

In *Berubari Union Case*,[22] the Supreme Court observed that the Preamble to the Constitution is a key to open the minds of the makers and shows the general purpose for which they made the several provisions of the Constitution.[23] But, this does not mean that the Preamble can override the express provisions of the Act or a statute. It is the core of the Constitution and it limits the amending power of the Parliament under Article 368 of the Constitution. In the Berubari case, it was held that the "basic elements" in the Preamble cannot be amended under Article 368.

The Preamble declares the rights and freedoms which the people of India intended to secure to all citizens and the basic type of government and polity which was to be established.[24] "The Preamble forms the basic structure of the constitution, and it cannot be amended in exercise of the power under article 368 of the Constitution."[25] The fundamental concept of an independent judiciary and the concept relating to "separation of powers between the legislature, the executive and

[18]Ibid., p. 5.

[19]The State has power to legislate on any subject in conformity with the constitutional limitations; see *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh (1990) 1 SCC, 109, paragraphs 35–37, 56–64, 106–108*.

[20]The ideals of socialism, secularism and democracy are elaborated by the enacting provisions. See also *Bhim Singh v. Union of India AIR (1981) SC 234, paragraphs 39, 71–72; State of Kerala v. N.M. Thomas (1976) AIR SC 490, 531; Waman Rao v. Union of India (1981) AIR SC 271*.

[21]Inserted by the Constitution (42nd Amendment) Act, 1976 for "Sovereign Democratic Republic."

[22]*AIR 1960 SC 845*.

[23]Ibid.; see also Shelat and Grover, JJ., in *Keshavananda Bharti v. State of Kerala*, *AIR 1973 SC 1461*.

[24]Ibid., see Pandey, J.N., *Constitutional Law of India*, p. 30.

[25]*Keshavananda Bharati v. State of Kerala, AIR 1973 SC 292,437,599,682* and *1164; Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 299, paragraphs 251–252 (Khanna, J.), paragraphs*

judiciary" are elevated to the basic structure of the Constitution and are the very heart of the constitutional scheme.[26] The Preamble may therefore be invoked into service to interpret the provisions as to the fundamental rights under Part III and the directive principles under Part IV of the Constitution.

2.5 Salient Features of the Constitution

2.5.1 Written Constitution

The Indian Constitution is a lengthy document. It consists of 395 Articles arranged under 22 parts and 9 Schedules. But since the Constitution 78th Amendment Act, 1995, the Constitution consists of 443 Articles divided into 26 Parts and 12 Schedules.[27] The Indian Constitution though written is sufficiently flexible. According to Jain,

> First, the Constitution deals with the organization and structure of the Central Government and the States. Secondly, in a federal constitution, Centre-State relationship is of utmost significance. Thirdly, the Constitution has reduced in writing many unwritten conventions of the British Constitution, for instance, the principle of collective responsibility of the Ministers, parliamentary procedure, etc.[28]

Fourthly, the vastness of the country and peculiar problems relating to language have added to the bulk of the Constitution.[29] There exists various communities and groups in India. To safeguard their interests, Fundamental Rights have been included in Part III of the Constitution.[30] Provisions pertaining to safeguards to minorities, scheduled tribes, scheduled castes and backward classes have been specifically written in the Constitution. Lastly, the Constitution also contains the fundamental principles of governance and many administrative details such as the provisions regarding citizenship, official language, government services, electoral machinery, etc. It also clarifies the presence of other detailed provisions about the organization of the judiciary, the services, the Public Service Commissions, Elections and many transitory provisions.[31]

664, 665 and *691 (Chandrachud, J); paragraphs 555 and 575 (Beg, J.); Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789*.

[26] *State of Bihar v. Bal Mukund Sah, AIR 2000 SC 1296*.

[27] Pandey, J.N., op. cit., p. 22.

[28] Jain, M.P., *Indian Constitutional Law*, p. 7.

[29] Pandey, J.N., op. cit., p. 22.

[30] Jain, M.P., op. cit., p. 7.

[31] Constituent Assembly Debates, Vol. XI, Lok Sabha Secretariat, 1949, pp. 839–40.

2.5.2 Parliamentary Form of Government

The Constitution of India establishes a parliamentary form of government both at the Centre and the States. The President is the constitutional head of the State; however, the real executive power is vested in the Council of Ministers, whose head is the Prime Minister. The Council of Ministers is collectively responsible to the Lower House, *Lok Sabha*.[32] The members of the Lower House are elected directly by the people on the basis of adult franchise normally for the period of 5 years. The position is similar in the States.[33] Therefore, the Government is called a responsible Government. The Rajya Sabha or the Council of States is the Upper House of the Parliament. The representatives of States are elected by the members of the State Legislative Assemblies in accordance with the system of proportional representation by means of a single transferable vote.[34]

2.5.3 A Secular State

The belief that all religions are equally good and efficacious pathways to perfection or God-realization[35] compels the Constitution to stand for a secular state of India. Article 25 to 28 of the Constitution guarantee every person the freedom of conscience and the right to profess, practice and propagate religion. In *St. Xavier College v. State of Gujarat*,[36] the Supreme Court observed, "although the words 'secular state' are not expressly mentioned in the Constitution there can be no doubt that Constitution-makers wanted to establish such a 'State' and accordingly Article 25 to 28 have been included in the Constitution." Though the Indian Constitution is secular and does not interfere with religious freedom, it does not allow religion to impinge adversely on the secular rights of the citizens or the power of the State to regulate socio-economic relations.[37]

[32]Pandey, J.N., op.cit., pp. 23–25.

[33]Ibid., p. 24.

[34]Ibid., p. 388.

[35]*Valsamma Paul v. Cochin University, AIR 1996 SC 1011, para 25.*

[36]*AIR 1974 SC 1389.*

[37]Sharma, G.S., *Secularism: Its implications for Law and Life in India*, p. 4–5; see also Luthra, V. P., *The Concept of the Secular State in India* (1964) and Srivastava, D.K. *Religious Freedom of India* (1982).

2.5.4 Federal Structure

The Constitution establishes a dual policy, a system of double Government at the Centre and the State. Powers are divided between the Central and the State Governments. Each level of Government is supreme in its own sphere.[38] However, every power, executive, legislative or judicial whether it belongs to the nation or to the individual State is subordinate to and controlled by the Constitution.[39] The provisions of the Constitution cannot be altered without the consent of the majority of the States. The Supreme Court established by the Constitution is empowered to decide disputes between the Union and the States, or the States inter se interpret finally the provisions of the Constitution.[40] "Some scholars have been reluctant to admit that the Constitution is purely federal. According to them, in certain circumstances the Constitution empowers the Centre to interfere in the State matters and thus places the States in a subordinate position which violates the federal principle."[41] They therefore use the expressions "quasi-federal," "unitary with federal features" or "federal with unitary features." Jennings has characterized the Constitution as "a federation with a strong centralizing tendency."[42] In the viewpoint of Wheare, "The Constitution establishes a system of Government which is quasi-federal . . . a unitary State with subsidiary federal features rather than a federal State with subsidiary unitary features."[43] There is a long Concurrent List containing subjects of common interest to both the Centre and the States. According to Jain, "The emergency provisions under the Constitution transform the normal federal fabric into an almost unitary system so as to meet the national emergencies."[44] Further, in certain situations, Parliament becomes competent to legislate even in the exclusive State sphere. The Governors of the States are appointed by the President under Articles 155 and 156 and answerable to him. However, a Governor is only a constitutional head of the State and normally acts on the advice of his Ministers. There are provisions in the Constitution under which the Governor is required to send certain State laws for the assent of the President.[45] Thus, the Indian Constitution is neither purely federal nor purely unitary but a combination of both.[46]

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[38]Dicey, A.V., *Introduction to the study of the Law of the Constitution*, p. 157.

[39]Ibid., p. 144.

[40]Pandey, J.N., *Constitutional Law of India*, p. 18.

[41]In *State of West Bengal v. Union of India AIR 1963 SC 1241,* the Supreme Court held by a majority that it is not truly federal.

[42]Jennings, I.W., *Some Characteristics of the Indian Constitution*, p. 1.

[43]Wheare, K.C., *India's New Constitution Analyzed*, p. 18.

[44]The Indian Constitution can be both unitary as well as federal as per the requirement of time and circumstances. Normally, it is framed to work as a federal system. But in times of war it is designed to work as a unitary system. See Jain, M.P., *Indian Constitutional Law*, p. 13, footnote 2.

[45]Pandey, J.N., *Constitutional Law of India,* p. 18–19.

[46]Jennings, I.W., op. cit., p. 55.

2.5.5 Welfare State

The Preamble of the Constitution enumerates the great objectives and the socio-economic goals for the achievement of which the Indian Constitution has been established.[47] The Constitution was conceived and drafted in the mid-twentieth century. During this time the concept of social welfare state was the rule of the day. This concept of a welfare state was further strengthened by the Directive Principles of State Policy under Part IV of the Constitution, which sets out the economic, social and political goals to be undertaken by the States.[48] The idea of a welfare state envisaged in the Constitution is very dependent on the accountability of the State.

Furthermore, the Fundamental Rights in Part III of the Constitution is another distinguishing feature of the Constitution. In fact, these rights are prohibitions against the State. The State cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in Part III of the Constitution.[49] Even if the State passes such a law, it can be declared as unconstitutional by the courts. The Supreme Court has been empowered to grant most effective remedies[50] in the event these rights are violated. The fundamental duties serve as a constant reminder to every citizen: the Constitution has conferred on them certain fundamental rights, which requires them to observe the fundamental duties.[51]

2.5.6 Adult Suffrage

The uniform adult suffrage system confers on every man and woman above 18 years of age the right to elect representatives for the Legislature. Having regard to the vast population of the country, the adoption of universal Adult Suffrage under Article 326 of the Constitution has helped boost democracy.[52]

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[47]Pandey, J.N., op. cit., p. 27.

[48]Jain, M.P., *Indian Constitutional Law,* p. 9.

[49]Ibid., p. 10.

[50]Remedies in the nature of writs Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari.

[51]The Constitution (42nd Amendment Act, 1976) has introduced the "Fundamental Duties" for citizens; Part IVA (containing article 51A) ins. by the Constitution (42nd Amendment) Act, 1976, sec.11 (w.e.f. 3-1-1977); Under Article 51A Fundamental duties have been particularly invoked in litigation concerning the environment.

[52]Pandey, J.N., *Constitutional Law of India,* p. 27.

2.5.7 *Independent Judiciary*

India has a unified system of courts. The Constitution provides a special and privileged position to the Judiciary. It acts as the interpreter and guardian of the Constitution and keeps all the authorities—legislative, executive, administrative, judicial and quasi-judicial—within limits.[53] It is empowered to safeguard fundamental rights, and in this regard it serves as the custodian of the rights of citizens. The Constitution contains provisions to safeguard judicial independence. The Supreme Court and the High Courts are expected to discharge their functions impartially.

After having explained the constitutional evolution and the supremacy of the Indian Constitution, I shall now examine the judicial system in India (past and present): the interpretation methods employed by the Supreme Court, its composition, powers, jurisdiction and other related concepts pertaining to the Judiciary.

2.6 Historical Evolution of the Indian Judicial System

2.6.1 *Judicial System in Ancient India*

The Indian judiciary is the oldest judiciary in the world. The judicial system in ancient India was founded on the rule of law.[54] Manu and Brihaspati wrote texts[55] such as *Dharam Shastras,* Naradathe *Smritis* and Kautilya the *Arthshastra*.[56] Justice S.S. Dhavan provides an account of the ancient Indian judicial system. He states that:

> The king himself was subject to the law and the king's right to govern was subject to the fulfillment of duties the breach of which amounted to forfeiture of kingship. The judges during this time were independent and subject only to the law. The ancient system contained the elements of integrity, impartiality and independence of the judiciary. The disputes were decided in accordance with the natural justice principles which govern the

[53] Jain, M.P., op. cit., p. 12.

[54] Justice Dhavan, S.S. High Court Allahabad, "A Historical Survey: The Indian Judicial System," p. 1. http://www.allahabadhighcourt.in/event/TheIndianJudicial System_SSDhavan.pdf (accessed on March 6, 2015).

[55] Manusmriti is considered as superior to the Dharma Shastras. After Manusmriti came Dharma Shastras attributed to Brihaspati, (a Hindu god described as being of yellow or golden colour and holding a stick, a lotus and beads) Narada, (a Vedic sage who spreads the name of God Narayana and who plays a prominent role in a number of Hindu texts) Vishnu, (one of the most significant deities in Hinduism) Yajnavalkya (a sage and philosopher of Vedic India. Dharma Shastras is the 'science of dharma' and refers to the treatises (shastras) of Hinduism on Dharma. Dharma means something more than law. In classical Hindu thought there was no distinction between religion and law. There are many Dharma Shastras (ca. 100) with different and conflicting points of view.

[56] Sharma, S.D., *Administration of Justice in Ancient India*, p. 170.

> judicial process in modern India today. The rules of procedure and evidence were similar to those followed today. In criminal trials the accused was punished only on the proof of his guilt. In civil cases, the trial consisted of four stages like, filing of plaint, reply, hearing stage and decree or order. '*Purva Paksha*' was the expression used for filing of a plaint whereas '*Uttara Paksha*' was the expression in use for a written statement. Judgment was known as '*Nirnaya*.'[57]

Even the doctrine of *res judicata* was quite familiar to the Indian jurisprudence. Such a doctrine was known as *pran nyaya*.[58] Bearing false witness was viewed with great abhorrence.[59] Besides, all trials were heard by a bench comprised of several judges and rarely by a single judge, in contrast to the situation today where a suit is heard by a single judge of the subordinate civil or criminal court. Spellman has rightly stated, "In some respects the judicial system of ancient India was theoretically in advance of our own today."[60]

Further, the decree of all courts except the King were subject to appeal or review. A judge who gave a wrong decision out of corrupt motive was considered as an offender. Perjury by a witness attracted severe penalty. Fine, reprimand, torture, imprisonment, death and banishment were the six types of punishments.[61] It is significant to note that the Indian Judiciary today consists of a hierarchy of courts organized in a manner similar to the village courts: the Munsif, the Civil Judge, the District Judge, the High Court and finally the Supreme Court.

2.6.2 *Judicial System in Medieval India*

Indian judicial history drastically changed with the beginning of Muslim rule. Muslim conquest brought new religion, new civilization and a new social system, which had a profound effect on the judicial system.[62] Religion became the foundational base of the system. The Prophet himself set the standards.[63] According to Briggs,

> The medieval State in India as elsewhere throughout its existence had all the disadvantages of an autocracy. Everything was temporary, personal, and had no basic strength. The personal factor in the administration had become so pronounced that slight deviation of the head from the path of duty, produced concomitant variations in the whole 'trunk'. If the King was drunk his Magistrates were seen drunk in public.[64]

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[57] Justice Dhavan, S.S., op. cit., p. 1.

[58] Ibid., p. 1–3; see also Shilwant, *Legal and Constitutional History of India,* p. 341; Cowell, *History of the Constitution of the Courts and Legislative Authorities in India,* p. 3; Gledhill, A., *The Republic of India,* p. 147.

[59] Bashman, A.L., *The Wonder that was India*, p. 116.

[60] Spellman, J.W., *Political Theory of Ancient India,* p. 128.

[61] Das, S., *Crime and Punishment in Ancient India,* p. 14.

[62] Justice Dhavan, S.S., op. cit., p. 7.

[63] Shah, F.M., *Tarikh-i-Fakhr-ud-din Mubarak Shah*, p. 12.

[64] Briggs, J., *Rise of the Muhammendan Power in India*, Volume 1, p. 272; Ahmad, M.B., *The administration of Justice in Medieval India*, p. 272.

The Sultans of India felt insecure. Thus, the democratic ideal of government preached by Islam was obscure in India.[65] However,

> Under the Mughal Empire there was an efficient system of government and justice. During this period, '*Qazi-an*' office was the unit of administration. Every provincial capital had its *Qazi*[66] and at the head of the judicial administration was the Supreme *Qazi* of the empire, '*Qazi-ul-quzat*'. Moreover, every town and village *(large enough to be classed as a Qasb*a) had its own *Qazi*.[67] . . . The *Qazi* first prayed and craved God's help in the administration of justice. He was assisted by *Katib* (Scholar, Writer or Intellectual person). The *Qazi* was responsible to see that the evidence was recorded correctly.[68] The plaintiff was called the '*Muddai*' and the defendant was called '*Muddaa Allaih*'. The plaint was called '*Daawa*' while the complaint in criminal cases was called '*Istaghasa*'. A party could have an agent as *vakil* or an attorney to represent his case.[69] But at a later stage, the death of Aurangzeb[70] marked the downfall of the Mughal Empire. After the conquest of Bengal by the British, the process of replacement of the Mughal system of justice accelerated. However, it took a long time and the '*Sadre Diwani Adalat*'[71] continued to function till it was later replaced by the High Courts.[72]

2.6.3 Judicial System Today

The current administration of the justice system and laws is the product of the then British governance in India. Its roots can be traced back to 1726 when King George I issued a charter introducing important changes in the judicial administration of the Presidency Towns of Bombay, Calcutta and Madras along with the system of appeals from India to Privy Council in England.[73] The annual report of the Supreme Court provides a historical analysis of the evolution of the present day judicial system in India. As per the report, "The Regulating Act of 1773 promulgated by the King of England subjected East Indian Company to the control of British government paving the way for the establishment of the Supreme Court of Judicature at

[65]Ibid., p. 273.

[66]A Qazi was a Muslim scholar conversant with the prescriptions of the sacred law.

[67]Justice Dhavan, S.S., op. cit., p. 8.

[68]Ibid., Majumdar, R.C., *The History and Culture of the Indian People: The Mughal Empire*, p. 545.

[69]Majumdar, R.C., op. cit., p. 545.

[70]Emperor of Mughal India.

[71]The Supreme Court of Revenue in British India established at Calcutta by Warren Hastings in 1772. It was reformed in 1780 and 1793 by the British Parliament.

[72]Justice Dhavan, S.S., op. cit., p. 8.

[73]Annual Report of the Supreme Court of India, 2007–2008, p. 39, http://supremecourtofindia.nic.in/annaulreport2007-08.pdf (Assessed on May 8, 2015).

Calcutta[74], Madras[75] and Bombay."[76] Later, "the Indian High Courts Act, 1861 re-organized the then prevalent judicial system by abolishing the Supreme Courts at Calcutta, Madras and Bombay and setting up of the High Courts in 1862. These High Courts had the distinction of being the highest Courts for all cases till the creation of Federal Court of India under the Government of India Act, 1935."[77]

> During this time, the Federal Court was the constitutional court. In order to give shape to this system, no less than four law commissions were appointed during the period from 1834 to 1947. With the transfer of power on August 15, 1947 from the British Parliament to the people of India, the need to establish a judicial system free from British Control was in demand. The people of independent India, through Constituent Assembly, enforced on January 26, 1950 their own Constitution providing, *inter alia*, for replacing the Federal Court by establishing the Supreme Court of India as the highest authority in the country.[78]

Although English Common Law had a deep impact on India, detachment from it was made whenever deemed necessary to suit the local needs.[79] According to Majumdar, "in matters of succession, marriage, inheritance, caste, religious institutions and other allied matters, the parties were left to be governed by the personal law. New laws were brought into effect to provide for matters which were either not fully covered by the indigenous law, or where such laws were not clearly defined."[80]

In the light of the above historical facts, not fully, but partially the present Indian judicial setup has its genesis in the British judicial system. Indians have become accustomed to this system and the procedures, and legal terminologies applied by the members from the legal fraternity are agreed upon by the parties to a legal suit.

The essence of a federal constitution is the distribution of powers between the Centre and State. This division is made by the written Constitution. However, the constitutional provisions are not free from ambiguities, and this can at times create differences among the Central or State authorities. Hence, in order to maintain the supremacy of the Constitution, an independent and impartial judicial body like the Supreme Court has been constituted under the Constitution.[81]

The Indian Judicial System comprises the Supreme Court standing at the apex and the High Court below it. The Supreme Court thus enjoys the highest position in the judicial hierarchy of the country. It is the final interpreter and guardian of the Constitution and the highest court of appeal in civil and criminal matters.[82] It is also

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[74]Supreme Court at Calcutta was established by way of issuance of Letters Patent on March 26, 1774.

[75]Supreme Court at Madras was established by way of issuance of Letters Patent on December 26, 1800.

[76]Supreme Court of Bombay was established by way of issuance of Letters Patent on December 8, 1823.

[77]Annual Report of the Supreme Court of India, 2007–2008, op. cit.

[78]Ibid., p. 40.

[79]See Majumdar, R.C., *The History and Culture of the Indian People: The Mughal Empire*, p. 553.

[80]Ibid., p. 553.

[81]Dicey, A.V., *Law of the Constitution*, p. 175.

[82]Austin, G., *The Indian Constitution Cornerstone of Nation*, p. 169.

responsible for the enforcement of fundamental rights conferred by the Constitution. Justice Untawalia compares the Supreme Court to "a watching tower above all the big structures of the other limbs of the state from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme."[83]

The Supreme Court is located at Delhi, or at another place, as the Chief Justice of India may, with the approval of the President, appoint from time to time.[84] Below the Supreme Court are the High Courts at state level, and below these are the subordinate courts. There are several rules and laws which direct the composition, power and jurisdiction of these courts.

2.7 Composition of the Supreme Court

The Supreme Court consists of a Chief Justice of India and no more than seven[85] other judges, unless the Parliament by law prescribes a larger number. Every Supreme Court Judge is appointed by the President of India. The judge's age is determined by such authority and in such manner as Parliament may by law provide.[86] A person is qualified to be appointed as a Judge of the Supreme Court if he is a citizen of India; if he has been for at least 5 years a Judge of a High Court or of two or more such Courts in succession; if he has been for at least 10 years an advocate of a High Court or of two or more such Courts in succession or if he is in the opinion of the President a distinguished jurist.[87]

A Supreme Court Justice holds office up to the age of 65 years, unless he resigns earlier or is removed on the ground of proved misbehavior and incapacity.[88] He can only be removed from his office by an order of the President, which is passed after an address by each House of Parliament and is supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.[89]

The powers and jurisdiction of the Supreme Court are classified as:

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[83] *India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.*

[84] Article 130 of the Indian Constitution.

[85] Now "thirty", vide the Supreme Court (Number of Judges) Amendment Act, 2008 (11 of 2009). Earlier it was "twenty five", vide the Supreme Court (Number of Judges) Amendment Act, 1986 (22 of 1986).

[86] Ins. by the Constitution (Fifteenth Amendment) Act, 1963, Sec. 2 (w.e.f. 5-10-1963).

[87] Pandey, J.N., *Constitutional Law of India*, p. 406–407.

[88] Article 124 (2-A) provides that the age of the Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide (at present it is 65 years).

[89] Article 124 (2) (b) makes provision for removal of a Supreme Court Judge. The manner of removal is in Article 124(4) and (5) of the Constitution. Procedure of removal is known as Impeachment of Judges.

2.7.1 Court of Record

The Supreme Court is the Court of Record and has all the powers of such a court including the power to punish for contempt of court.[90] That is to say, the Supreme Court has the power to punish a person for the contempt of itself as well as of its subordinate courts.[91] The power of contempt of court has come up before the Supreme Court on numerous occasions.[92] The Contempt of Courts Act, 1971 defines the powers of courts for punishing contempt of courts and regulates their procedure. It also provides for judges to be tried for contempt of court.[93] Hence, a judge or other person acting judicially is liable for contempt of his own court or of any other court in the same manner as any other individual is liable.

2.7.2 Original Jurisdiction[94]

The Supreme Court has original jurisdiction in any dispute: a) between the Government of India and one or more States; b) between the Government of India and any State or States on one side and one or more States on the other; c) between two or more States.[95] However, the said jurisdiction does not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of the Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.[96] Further, the said jurisdiction will also not apply to matters where citizens or private bodies are parties either jointly or in alternative with State.[97]

2.7.3 Writ Jurisdiction

Article 32 of the Constitution confers original jurisdiction on the Supreme Court to enforce Fundamental Rights. Under Article 32 every citizen has a right to move to

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[90] Article 129 of the Constitution.

[91] *Delhi Judicial Service Assn. v. State of Gujarat,(1991) 4 SCC 406.*

[92] For instance, *C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; Namboodripad v. Nambiar, AIR 1970 SC 2015; Brahma Prakash v. State of Uttar Pradesh, AIR 1954 SC 10.*

[93] Pandey, J.N., *The Constitutional Law,* p. 417.

[94] Article 131.

[95] Bakshi, P.M., *The Constitution of India*, p. 144.

[96] Ibid., Subs. By the Constitution (Seventh Amendment) Act, 1956, Sec. 5, for the proviso (w.e.f. 1-11-1956).

[97] *Tashi Delek Gaming Solutions Ltd v. State of Karnataka, AIR 2006 SC 661.*

the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights. The Supreme Court is given power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition* and *certiorari,* whichever may be appropriate.[98] Thus, the Supreme Court has been constituted as the protector and guarantor of the Fundamental Rights. An elaboration on the Supreme Court's power to issue orders or writs will be dealt with in a later chapter.

2.7.4 Appellate Jurisdiction[99]

The appellate jurisdiction of the Supreme Court is divided into four main categories: a) constitutional matters, b) civil matters, c) criminal matters and d) special leave to appeal. Under Article 132 (1) of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order or a High Court whether in civil,[100] criminal[101] or other proceedings, if the High Court certifies under Article 134-A that the case involves a substantial question of law of general importance as to the interpretation of the Constitution. And in the opinion of the High Court the said question needs to be decided by the Supreme Court. Further, the Supreme Court can hear appeal against the decision of the High Court even without the certificate of the High Court in which the death sentence has been pronounced after reversing the acquittal order passed by the subordinate court or after withdrawal of the case from any subordinate court.[102]

2.7.5 Appeal by Special Leave[103]

The Supreme Court in its discretion, under Article 136 of the Constitution, is authorized to grant special leave to appeal from any judgment, decree, determination, sentence or order passed by any court or tribunal in the territory of India. However, the only exception to this power is with regard to any judgment or order of any court or tribunal constituted by or under any law relating to the Armed Forces.[104] According to Bakshi, "The jurisdiction of the Supreme Court to entertain

[98]Pandey, J.N., *The Constitutional Law,* p. 423; see also Bakshi, P.M., *The Constitution of India*, p. 97.

[99]Article 132 of the Constitution.

[100]Article 133 of the Constitution deals with appeal in civil cases.

[101]Article 134 of the Constitution deals with appellate jurisdiction of the Supreme Court in regard to criminal matters.

[102]Bakshi, P.M., *The Constitution of India,* pp. 147–148.

[103]Article 136 of the Constitution.

[104]Pandey, J.N., *The Constitutional Law of India,* p. 429.

appeal by special leave is of the widest amplitude as regards: the nature of the decision that may be appealed from; the nature of the proceedings in which appeal may be entertained and the grounds that may be allowed to be raised for seeking such special leave."[105] It is noteworthy that in an appeal under Article 136 of the Constitution the Supreme Court does not normally appreciate the evidence by itself and go into the question of credibility of witnesses.[106] Also, "Where the appellants have not approached the Court with clean hands and have succeeded in polluting the stream of justice by making a patently false statement, they would not be entitled to relief under Article 136 of the Constitution."[107]

2.7.6 Power of Review and Curative Petitions

The Supreme Court under Article 137 has the power to review any of its judgments or orders. This article does not limit the grounds for review. However, these may be limited by parliamentary legislation or rules made by the Supreme Court.[108] Review petitions are disposed of by circulation as per listing procedures.[109] Even after the dismissal of the review petition, the Supreme Court can reconsider the final judgment on limited grounds on a curative petition, under its inherent powers.[110] Article 142 is one such provision in the Constitution which empowers the Supreme Court to pass such "decree or order as may be necessary for doing complete justice between the parties."

Sahai in the S. Nagaraj Case[111] has observed, "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way." Further, the Supreme Court has the power to issue directions under Article 142 where no legislation exists and such directions shall be binding till such time as new rules are enacted by the Legislature on the subject. Thus, ample powers are conferred on the Supreme Court under Article 32 and 142 to issue necessary directions to fill vacuum till the Legislature steps in or the Executive discharges its role.[112]

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[105] Bakshi, P.M., op. cit., p. 145.

[106] *Alamelu v. State, AIR 2011 SC 715, 719.*

[107] *Abhyudaya Sanstha v. Union of India, (2011) 6 SCC 145 (158).*

[108] Bakshi, P.M., *The Constitution of India,* p. 152.

[109] Supreme Court Annual report 2007–2008, p. 51, http://supremecourtofindia.nic.in/annaulreport2007-08.pdf (accessed on May 8, 2015).

[110] *Rupa Ashok Hurra v. Ashok Hurra & Anr. (2002) 2 SCR 1006.*

[111] *S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595, para 18.*

[112] *Vineet Narain v. Union of India, (1998) 1 SCC 226, para 49 and 51; Nilabati Behera v. State of Orissa, (1993) 2 SCC 746.*

2.7.7 *Advisory Jurisdiction*[113]

Under Article 143:

> If at any time it appears to the President of India that, a) a question of law or fact has arisen or is likely to arise, and b) the question is of such a nature and of such public significance, that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question for the Advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon.

However, the Supreme Court on earlier occasions has also refused to give opinion on the question submitted to it.[114]

2.8 High Courts and Subordinate Courts

The Judiciary at State level consists of a High Court and a system of subordinate courts. The High Court is below the Supreme Court in India's judicial hierarchy. The institution of the High Court dates back to 1862, when under the Indian High Courts Act, 1861, High Courts where established at Calcutta, Bombay and Madras. Later, other High Courts also came to be established.[115] Today, each State of India has a High Court. The Parliament may however establish by law a common High Court for two or more States.[116] For instance, the State of Goa and Mumbai have a common High Court bench. "Every High Court consists of a Chief Justice and such other judges as the President may, from time to time, deem it necessary to appoint."[117]

"The Judges of the High Court are appointed by the President after consulting the Chief Justice of India, the Governor of the concerned State and the Chief Justice of the concerned High Court."[118] A Judge may be removed from office by the President in the same manner and on the same grounds as a Supreme Court Judge. The conduct of a High Court Judge in the discharge of his duties cannot be discussed in any legislature, either Central or State, except on a motion for his removal on the ground of proved misbehavior or incapacity by a majority of not less than two-thirds of the members present and voting.[119] Similar to the Supreme Court, "Each High Court is also a Court of Record and has all powers including

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[113] Article 143 of the Constitution.

[114] In *re Kerala Education Bill Case*, *AIR 1958 SC 956*, the Supreme Court refused to submit its advisory opinion, stating that it is not binding on the Court because it is not a law within the meaning of Article 141, interpreting the word "may" under Article 143 as discretionary.

[115] Jain, M.P., *Outlines of Indian Legal History,* pp. 262–89.

[116] Article 231(1).

[117] Article 216 of the Constitution.

[118] Article 217 provides for appointment of a judge of the High Court.

[119] Pandey, J.N., *The Constitutional Law of India,* pp. 477–479.

the power to punish for its contempt."[120] The jurisdiction and powers of the High Courts can be amended both by the Union Parliament and the State Legislatures.[121]

Like the Supreme Court, every High Court has power to issue various writs in the form of *habeas corpus*, *mandamus*, prohibition, quo *warranto* and *certiorari*.[122] In addition, Article 227 empowers "every High Court to have superintendence over all courts, tribunals within its territorial jurisdiction." As compared to the Supreme Court, the High Courts with wider powers occupy a high position of honor, respect and dignity in the Indian Judicial System.

2.8.1 Subordinate Courts

Below the High Court there is a system of subordinate courts in every state. In consultation with the High Court, the Governor appoints the District Judge of the concerned state.[123] "A person not already in the service of the Union or of the State is eligible to be appointed as a District Judge if he has been for not less than 7 years an advocate or a pleader and is recommended by the concerned High Court."[124]

2.9 Supreme Court on the "Basic Structure" of the Constitution

Article 368 empowers the Parliament to amend the Constitution. "This power can be exercised by the Parliament through a two-thirds majority in both the Houses of Parliament and, in some cases, with the additional consent of half the number of State legislatures."[125] However, there is no mention in Article 368 of the exact nature, scope and limitations of the amending power. Article 245, on the contrary, invests Parliament with the power to make laws subject to the provisions of the Constitution.

The argument that the Parliament's amending power is subject to substantive limitations was first heard in *Shankari Prasad Deo v. Union of India*.[126] Whether the word "law" in clause (2) of Article 13[127] also includes a "constitutional amendment" was the main question that arose in this case. The Supreme Court

[120] Article 215 of the Constitution.

[121] Pandey, J.N., op. cit., p. 481.

[122] Article 226 of the Constitution.

[123] Article 233 of the Constitution.

[124] Ibid.

[125] Samanta and Basu, *Test of Basic Structure: An analysis,* p. 499.

[126] *AIR 1951 SC 458.*

[127] Clause (2) of Article 13 prohibits the State to make any law which takes away or abridges rights conferred under Part III of the Constitution. Part III deals with the Fundamental Rights of Citizens.

held that "the word 'law' in clause (2) did not include law made by Parliament under Article 368." The Supreme Court explained, "The word 'law' in Article 13[128] must be taken to mean rules or regulations made in the exercise of ordinary legislative power and not amendments to the Constitution made in the exercise of constitutional power and hence Article 13 (2) did not affect amendments made under Article 368." This decision was upheld by the majority in *Sajjan Singh v. State of Rajasthan*.[129] However, in *Golak Nath v. State of Punjab,*[130] the Supreme Court overruled its decisions in the aforesaid cases, and held that "the word 'law' in Article 13 (2) included every branch of law, statutory, constitutional etc., and hence, if an amendment to the Constitution took away or abridged fundamental right of citizens, the amendment would be declared void." In order to overcome the difficulty created by the Supreme Court's decision in the *Golak Nath case*, the Constitution 24th Amendment Act, 1971 was enacted. By this Amendment a new clause (4) was inserted into Article 13 of the Constitution, which made it clear that the constitutional amendments passed under Article 368 shall not be considered as "law" within the meaning of Article 13 and, hence, cannot be challenged as violating the provisions of Part III of the Constitution.

The validity of the Constitution 24th Amendment Act, 1971 was considered by the Supreme Court in *Kesavanada Bharati v. State of Kerala Case*.[131] The Supreme Court overruled the *Golak Nath case* and upheld the validity of the said amendment. The Supreme Court tried to restrain the amending powers of the legislature and the executive. "With the intention to preserve the original ideals of the Constitution, the Supreme Court pronounced that the Parliament could not damage the basic features of the Constitution."[132] In this landmark case,[133] the Supreme Court with its extreme creativeness propounded the famous "*basic structure and framework of the Indian Constitution*" or "*doctrine of basic structure*" thereby restraining the amending powers of the Legislature. Basic structure thus proved to be a guardian and savior to the constitutional sanctity from the ever-encroaching grabbles of the executive and legislature. The Judicial Bench accepted the following ideals as "basic structure." Sikri explained that the concept of basic structure included supremacy of the Constitution, republican and democratic forms of government, secular character of the Constitution, separation of powers between the legislature, executive and the judiciary and the federal character of the Constitution. Shelat and Grover added two more basic features, namely, the mandate to build a welfare state

[128] Article 13 provides for the judicial review of all legislations in India, past as well as future. This power has been conferred on the High Courts and the Supreme Court of India under Article 226 and Article 32 of the Constitution respectively. Under these articles, the Supreme Court can declare a law unconstitutional if it is inconsistent with any of the provisions of Part III of the Constitution.

[129] *AIR 1965 SC 845*.

[130] *AIR 1967 SC 1643*.

[131] *AIR 1973 SC 1461*.

[132] Ibid., p. 500.

[133] *Kesavananda Bharati Case, AIR 1973 SC 1461: (1973) 4 SCC 225*.

contained in the Directive Principles of State Policy and unity and integrity of the nation. Hegde and Mukherjee identified a separate and shorter list of basic features: sovereignty of India, democratic character of the polity, unity of the country, essential features of the individual freedoms secured to the citizens and the mandate to build a welfare state. Jaganmohan Reddy stated that elements of the basic features were to be found in the Preamble and in the provisions into which they are translated and interpreted, such as the sovereign democratic republic, parliamentary democracy and the three organs of the State viz. legislative, executive and judiciary.

Further, in *Indira Gandhi v. Raj Narain* also known as *Election case,*[134] Justice K.K. Thomas held that "the power of judicial review is an essential feature of the Constitution." Justice Y.V. Chandrachud listed "four unamenable basic features: sovereign democratic republic status, equality of status and opportunity of an individual, secularism and freedom of conscience and religion, government of laws and not of men" i.e., the rule of law. The ambiguity relating to the basic structure doctrine was made clear in later decisions of the Supreme Court. The judiciary in *Minerva Mills v. Union of India*[135] very lightly defined basic structure in a negative manner: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity." This verdict was the result of the Parliament's attempt to overturn the *Kesavananda* ruling by inserting the 42nd Amendment, which expressly stated that "the amending power was unlimited, and not open to judicial review. The Amendment was struck down by the Supreme Court on the ground that the limited amending power of the Parliament was itself part of the basic structure." In *Indira Gandhi v. Raj Narain,*[136] a constitutional amendment dealing with the election of the Prime Minister and Speaker, was struck down for violating the basic features of democracy, the rule of law and equality. Finally, in *Waman Rao v. Union of India*,[137] it was held "that laws placed in the 9th Schedule,[138] and thus beyond the pale of fundamental rights review, would nevertheless have to be tested on the touchstone of the basic structure before they were given immunity."

The basic structure doctrine, first enunciated in *S.R. Bommai v. Union of India*,[139] was further crystallized in the decisions of *Ismail Faruqui v. Union of India*[140] and *Aruna Roy v. Union of India and Others,*[141] in which the Court upheld

[134] *AIR 1975 SC 2299.*

[135] *AIR 1980 SC 1789.*

[136] *AIR 1975 SC 2299.*

[137] *AIR 1981 SC 271.*

[138] The 9th Schedule was added by the Constitution (First Amendment) Act, 1951 primarily to deal with a situation in which the Supreme Court struck down land reform laws. The Supreme Court has held that it can strike down any law which is included in the 9th Schedule if, in its opinion, the law violates the basic structure of the Constitution.

[139] *(1994) 3 SCC 1*, see Pandey, J.N., *Constitutional Law of India,* p. 266–267.

[140] *(1994) 6 SCC 360.*

[141] *(2002) 7 SCC 368.*

secularism as the basic feature of the Constitution. Further, in *I.R.Coelho v. State of Tamil Nadu*[142] the Court added Articles 14 (right to equality), Article 19 (fundamental freedoms) and Article 21 (right to life) to the list of basic features. But, in other significant landmark judgments[143] the basic structure contentions were rejected.

In sum, the basic structure as a concept has evolved over the years since its inception. Rights have been widened. However, the basic structure is still evolving in the light of Supreme Court judgments. It acts as the custodian of natural rights, human rights and fundamental rights of the citizens of India. In addition, the Sovereign, democratic and secular character of the polity, rule of law, independent judiciary, etc., are some of the salient features of the Constitution that have been aptly recognized by the Supreme Court. Thus, in essence, the power of the Parliament to amend the Constitution is not absolute and is regulated by the Supreme Court being the final interpreter.

2.10 Power of Judicial Review

According to Corwin, "Judicial Review is the power of the courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction, to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void."[144] Article 13 of the Indian Constitution provides for the judicial review of all legislations in India, past as well as future. The power has been conferred on the High Courts and the Supreme Court under Article 226 and Article 32 respectively. The Courts can declare a law unconstitutional if it is inconsistent with any provisions of Part III of the Constitution. In other words, the Courts can curtail the State from making any law which takes away or abridges the fundamental rights conferred under Part III of the Indian Constitution.[145] As per Article 13, "All pre-Constitution laws or existing laws (laws which were in force immediately before the commencement of the Constitution) are void if they are inconsistent with the Fundamental Rights." However, it is noteworthy that Article 13 does not apply retrospectively. This means, the inconsistent law cannot be erased so far as the past Acts are concerned.[146]

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[142] *AIR 2007 SC 861.*

[143] *Kuldip Nayar and Ors. V. Union of India, (2006) 7 SCC 1; M. Nagaraj and Ors. V. Union of India, AIR 2007 SC 71.*

[144] Corwin, E.S., *Judicial Review, Encyclopedia of Social Sciences,* p. 457.

[145] Pandey, J.N. op.cit., p. 60.

[146] Ibid., p. 63.

A declaration of invalidity by the courts is required to make the laws invalid. Also, when part of a statute is declared unconstitutional, the question arises whether the entire statute is to be declared void or only that part which is unconstitutional. In order to resolve this puzzle, the Supreme Court devised the "doctrine of severability."[147] According to this doctrine, "If an offending provision can be separated from that which is constitutional, then only that part which is offending needs to be declared as void and not the entire statute."[148] However, the Supreme Court observed in *Romesh Thapper v. State of Madras*[149] that:

> Where a law purports to authorize the imposition of restrictions on a Fundamental Right in language wide enough to cover restrictions, both within and without the limits provided by the Constitution and where it is not possible to separate the two, the whole law is to be struck down. So long as the possibility of it being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

Furthermore, Article 13 (1) of the Constitution provides that:

> any law which was made before the commencement of constitution must be consistent with the part III of the constitution dealing with fundamental rights of the citizens. If any law is inconsistent with the provisions of part III of the constitution such law shall become void. At the same time such law shall not be treated as 'dead' unless it is abolished by the Parliament. It is to be treated as dormant or eclipsed to the extent that it comes under the shadow of the fundamental rights.

This *Doctrine of Eclipse* was enunciated by the Supreme Court in the case of *Bhikaji vs. State of MP*:

> The Doctrine provides for the validation of Pre-Constitution Laws that violate fundamental rights upon the premise that such laws are not null and void ab initio but become unenforceable only to the extent of their inconsistency with the fundamental rights. If any subsequent amendment to the Constitution removes the inconsistency or the conflict of the existing law with the fundamental rights, then the Eclipse vanishes and that particular law becomes active again. Doctrine is applied to already existing laws.[150]

In other words, a law which is in violation of fundamental rights will be dormant until the necessary amendment is made to the law. Such amendments should not violate fundamental rights of the citizens. Thus, the doctrine considers the fundamental rights of citizens as more significant than all other rights.

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[147] *Motor General Traders v. State of A.P., (1984) 1 SCC 222;* see also Pandey, J.N., *Constitutional Law of India,* p. 63.

[148] Ibid.

[149] *AIR 1950 SC 124,* see also *Chintaman Rao v. State of M.P., AIR 1951 SC 118;* see also Pandey, J.N., op. cit., p. 64.

[150] *AIR 1953 SC 781;* see also Jain, M.P., *Indian Constitutional Law,* pp. 465–468.

2.11 Public Interest Litigation

The Supreme Court exercises its powers to do justice in certain matters popularly known as Public Interest Litigation (PIL). The general rule of *locus standi* for moving a court is not strictly followed in matters of public interest where the poor, ignorant or socially and/or economically disadvantaged people seek legal remedy. Even PIL petitions received by post have been entertained by the Supreme Court.[151] Besides, on several occasions, the Supreme Court has also acted *Suo Motu*. An elaborate account of PIL will be given in Chap. 4.

2.12 Other Principles of Judicial Interpretation

The powers of Centre and State are divided and they cannot make laws outside their allotted subjects.[152] Both have to legislate within their respective spheres and they cannot encroach upon the sphere reserved to the other.[153] When a law passed by the Centre encroaches upon the field allotted to the State, the Supreme Court by applying the *doctrine of pith and substance* is entitled to determine whether the concerned legislature was competent enough to encroach upon the field assigned to the other. In India, the principle of "pith and substance" was established in the pre-independence period under the Government of India Act, 1935. The doctrine is in use to ascertain the true character of the legislation. Further, for the application of this doctrine, courts take into consideration the enactment as a whole, its objects, the scope and effect of its provisions.[154]

The *Doctrine of Colorable Legislation* is yet another doctrine of constitutional law devised and applied by the Supreme Court to interpret the Constitutional Provision, placed under Article 246 of the Constitution.[155] The doctrine traces its origin to a Latin Maxim:"*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*," meaning, when anything is prohibited directly, it is also prohibited indirectly. This doctrine was constructed on the founding stones of the *Doctrine of Separation of Power*, which implies striking a balance between the executive, judiciary and the legislature. From an Indian context, the literal meaning of this doctrine is that "under the power conferred for one particular purpose, the

[151] *Veena Sethi v. State of Bihar, AIR 1983 SC 339.*

[152] Subjects are allotted under the Union List, Concurrent List and State List, placed under the 7th Schedule of the Constitution.

[153] Article 246 of the Constitution.

[154] Bakshi, P.M., *The Constitution of India,* p. 247; see also *A.S. Krishna v. State of Madras AIR 1957 SC 297; State of Karnataka v. Ranganathan Reddy, AIR 1978 SC 215.*

[155] Doctrine has been applied in the following cases: *K.C.G.Narayan Dev v. State of Orissa, AIR 1953 SC 375; R. D. Joshi v. Ajit Mills, 1977 SC 2279; Nageshwar v. A.P. S.R.T Corporation, AIR 1959 SC 316; State of Bihar v. Kameshwar Singh, AIR 1952 SC 252.*

legislature cannot seek to achieve some other purpose which it is otherwise not competent to legislate on."[156] Hence, the doctrine would apply only when the Legislature did not possess the power to make law upon a particular subject, but had indirectly exercised such power to make law. It is only then that the Supreme Court will look into the true nature and character of the legislation. In addition, its object, purpose and design will also be taken into consideration.

2.13 Binding Jurisdiction[157] of the Supremecourt

Article 141 provides, "The Law declared by the Supreme Court is binding on all courts within the territory of India." The expression "all courts" means courts other than the Supreme Court. But, the Supreme Court is not bound by its own decisions and may in certain matters reverse its previous decisions.[158] The doctrine of *stare decisis* has been recognized by the Constitution of India. However, the Supreme Court is free to depart from its previous decisions if there are valid reasons to that effect. "The Supreme Court can depart from its previous decision if it is convinced that the error would have a baneful effect on the general interests of the public."[159] Thus, although the Indian judiciary follows the rule of precedent, it seems that the courts, particularly the Supreme Court, have found their own ways to avoid the precedent or doctrine of *stare decisis*.[160]

With regard to foreign decisions, when law in India is clear and settled, foreign case laws are of less importance. Although the Constitution gained its inspiration from some foreign models, foreign court decisions only have persuasive value in India and are not binding authorities on the Indian Courts.[161] However, the legal method to interpret the Constitution seems to be an important facet which influenced the attitude of the Supreme Court towards foreign precedents. It is noteworthy to mention that the Indian legal system derived the doctrine of precedent from the British. In this regard, "Section 212 of the Government of India Act, 1935 confirmed the Privy Council as the supreme judicial authority and stated that laws laid down by the Federal Court and Privy Council would have binding authority overall on the courts of British India."[162]

Over the years, the trend of the Supreme Court has been to refer to the jurisprudence of foreign courts without explicitly quoting a specific precedent.

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[156] Pandey, J.N., *Constitution of India,* p. 535.

[157] Article 141 of the Constitution.

[158] Pandey, J.N., op.cit., p. 437.

[159] *Bengal Immunity Co. Ltd v. State of Bihar, AIR 1955 SC 661.*

[160] Dhavan, R., *The Supreme Court of India, A Socio-Legal Critique of its Juristic Techniques,* p. 56.

[161] *Aruna Ramchandra Shanbaug v. Union of India, AIR 2011 SC 1290.*

[162] Mahajan, V.D., *Jurisprudence and Legal Theory,* p. 238.

However, when reading the decisions of the Supreme Court, it is quite possible to trace references of decisions relating to supranational and national jurisdictions. For instance, in *B.R.Kapoor v. State of Tamil Nadu*,[163] Justice Pattandik quoted no more than two precedents of the U.S. Supreme Court. The Supreme Court engages foreign precedents only in cases where there arises some conflict of law. However, it cannot be denied that since the promulgation of the Constitution, courts in India have relied upon the decisions of common law jurisdictions especially from the United Kingdom, the United States, Canada and Australia.[164] For instance, the court decisions of these countries have been cited in the landmark constitutional cases relating to the right to privacy. In one case, the Supreme Court dealt with unauthorized police surveillance and held it was a violation of the "right to privacy."[165] In another instance, concerning the freedom of press,[166] the Supreme Court relied on the U.S. Supreme Court's decision in *Kovacs v. Cooper*.[167] Furthermore, in the 2009 Delhi High Court verdict pertaining to Section 377, it was declared as unconstitutional since it violated the fundamental rights guaranteed under the Constitution.[168] While delivering this judgment, the High Court relied on a number of U.S. Supreme Court decisions.[169]

2.14 Conclusion

Thus, as a backdrop, this chapter has examined in detail India's constitutional evolution and history. In particular, it has focused on its development starting from the Government of India Act, 1935 and the adoption of the new Constitution by the Constituent Assembly on November 26, 1949. The chapter has provided an elaborate account of the sources, preamble, features and the basic structure of the Constitution. It has also described the judicial history of India. In addition, it has discussed the various issues pertaining to the independence of the judiciary, interpretative methods, the hierarchy of courts, its composition, qualifications and appointment of judges, powers and jurisdiction of the Supreme Court, High court and other subordinate courts.

[163] *2001(7) SCC 231.*

[164] Mahajan, V.D., op. cit., p. 238.

[165] *Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.*

[166] *Bennett & Coleman v. Union of India, AIR 1973 SC 106.*

[167] *Kovacs v. Cooper, 336 U.S. 77 (1949).*

[168] *NAZ Foundation v. NCT of Delhi, WP (C) No. 7455/2001.*

[169] For instance, *Griswold v. State of Connecticut, 381 U.S.479 (1965); Olmstead v. United States, 277 U.S. 438 (1928);* and *Roe v. Wade, 410 U.S. 113 (1973).*

Chapter 3
The Jurisprudence of Discrimination Against LGBTI Persons: Global Issues and Concerns

3.1 Introduction

An account of the disturbingly high prevalence of human rights violations (i.e., discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity) is given in this chapter. Due to the acute and often life-threatening circumstances associated with homophobia, what exactly are the obligations of States to prevent such violence and discrimination? The proceeding section thus considers the various international human rights instruments related to the protection of sexual orientation and gender identity.[1] In particular, the question addressed is: What does international human rights law expect of States?

International conventions require States to make every possible effort to repeal laws criminalizing homosexuality. Anti-discrimination legislation should be enacted to prohibit discrimination on the grounds of sexual orientation and gender identity. It is the responsibility of the State to safeguard the principle of non-discrimination, principle of equality, the individual's guarantee of equal protection before the law, the principle of equal enjoyment of rights and the right to privacy, among others. Briefly stated, discrimination and violence motivated by homophobia are to be prevented by the States themselves.

Despite such State obligations, this chapter reflects on the high level of (legal) discrimination and violence towards LGBTI Indians. It looks into the concrete instances of discriminatory practices affecting the daily lives of homosexuals in India, which include the maltreatment of gay men by police, the prohibition of same-sex marriage and non-recognition of same-sex partnerships and the impact of

[1]Under Article 3 of the Universal Declaration of Human Rights, "everyone has the right to life, liberty and the security of person." Article 6 of the International Covenant on Civil and Political Rights affirms that "every human being has the inherent right to life and this right shall be protected by law."

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negative media images, among others. It is argued that besides legal reform of domestic law in India, the education of LGBTI rights and of sexual orientation in general must be developed and encouraged.

3.2 Urgent Problem: LGBTI Discrimination Around the World

Despite international human rights instruments, homophobic and transphobic violence have been recorded in almost every country. Such violence may be physical (including murder, beatings, street violence, kidnappings, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty).[2] The Organization for Security and Cooperation in Europe (OSCE) describes homophobic hate crimes and incidents as often showing a high degree of cruelty and brutality, including beatings, torture, mutilation, castration and sexual assault.[3] In the proceeding, an account of the disturbingly high prevalence of human rights violations (i.e., discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity) is given.

Human rights violations were noted in the annual report of the United Nations High Commissioner for Human Rights that was submitted to the Human Rights Council.[4] Moreover, the International Gay and Lesbian Association (IGLA) found that more than seventy countries retain laws that are used to criminalize people on the basis of sexual orientation or gender identity: "These laws prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex."[5] The death penalty is the rule for those found guilty of offences relating to consensual, adult homosexual conduct.[6] In a 2010 report to the Human Rights Council, the Special Rapporteur on Human Rights Defenders reported incidents in which individuals were subjected to victimization by police and prison against

[2]Human Rights Council, Nineteenth session, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/19/41, 17 November, 2011. http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on July 28, 2015).

[3]"Hate Crimes in the OSCE Region – Incidents and Responses," Annual Report for 2006, OSCE/ODIHR, Warsaw, 2007, p. 53.

[4]See also Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and Violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, 4 May 2015 http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_3_en.Doc (accessed on February 21, 2017).

[5]"State-sponsored homophobia: a world survey of laws criminalizing same-sex sexual acts between consenting adults," International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), Brussels, May 2011, p. 9.

[6]Homosexuality may be punished by death in Yemen, Iran, Mauritania, Nigeria, Qatar, Somalia, Sudan, Saudi Arabia, United Arab Emirates, and Afghanistan.

detainees perceived as LGBTI.[7] She sent 47 communications regarding human rights defenders working on LGBTI issues during the previous year: killings of LGBTI human rights defenders were alleged in five communications, with rape and sexual violence, including against males, being reported in a further six.[8] The Special Rapporteur also found that in detention facilities "there was usually a strict hierarchy, and that those at the bottom of the hierarchy, such as gays, lesbians, bisexuals and transgender persons, suffered double or triple discrimination."[9] Similarly, the Council of Europe report generally stated, "Hate-motivated violence and hate crimes against LGBTI people take place in all Council of Europe member states."[10] In Great Britain official data on prosecutions for LGBTI-related hate crimes shows 988 criminal cases initiated in 2007, of which 759 resulted in convictions.[11] Correspondingly, the United States government figures also reveal a high number of bias-motivated incidents against gay, lesbian and bisexual people.[12]

Motivated by such incidences, the United Nations High Commissioner for Refugees (UNHCR) has thus referred to those who fear persecution on account of their sexual orientation or gender identity as members of a "particular social group."[13] According to UNHCR estimates, at least 42 States have granted asylum to members of this "particular social group" who have a "well-founded fear of persecution owing to sexual orientation or gender identity."[14]

It should also be stated that such violations of human rights happen not only to adults but also adversely affect the lives of younger adults and children. The Human Rights Council reported that "many school authorities discriminate against young people on the grounds of sexual orientation or gender expression, sometimes leading to their being refused admission or being expelled. Also, LGBT youth frequently experience violence and harassment, including bullying, in school from classmates and teachers."[15] According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), "It is often in the primary school

[7]Ibid.

[8]See Report of the United Nations High Commissioner for Human Rights, 17 November, 2011. http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (accessed on July 28, 2015).

[9]Ibid.

[10]"Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe," Council of Europe, Strasbourg, June 2011, p. 52.

[11]European Union Agency for Fundamental Rights, "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Part II – the Social Situation," 2009, Vienna, p. 38.

[12]See Uniform Crime Report: Hate Crime Statistics 2009, U.S. Department of Justice, Federal Bureau of Investigation, Washington, D.C., November 2010.

[13]UNHCR, Guidance Note on Refugee Claims, http://www.refworld.org/pdfid/48abd5660.pdf (accessed on January 31, 2016); see also *UNHCR in relation to Secretary of State for the Home Department v. Patrick Kwame Otchere, 1988.*

[14]Human Rights Council, Nineteenth session, op. cit.

[15]Ibid.

playground that boys deemed by others to be too effeminate or young girls seen as tomboys endure teasing and sometimes the first blows linked to their appearance and behaviour, perceived as failing to fit in with the heteronormative gender identity."[16] Additionally, a survey in the United Kingdom found that almost 65% of lesbian, gay and bisexual youth had been bullied in schools and more than a quarter had been physically abused.[17] These findings are also mirrored by results of studies carried out in other countries.[18] The Special Rapporteur noted on the right to education that "in order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality."[19]

Given the acute and often life-threatening circumstances associated with homophobia, what exactly are the obligations of the States to prevent such violence and discrimination? The proceeding section thus considers the various international human rights instruments related to the protection of sexual orientation and gender identity.[20] In particular, the question addressed is: What does international human rights law expect of States?

3.3 Overview of State Obligations

International conventions require States to make every possible effort to repeal laws criminalizing homosexuality. Additionally, anti-discrimination legislation should be enacted to prohibit discrimination on the grounds of sexual orientation and gender identity, as such legislation would undoubtedly strengthen the principle of equal concern and respect to every person. In international human rights law it is extremely important for individuals to be guaranteed non-discriminatory practices, equality before the law and equal protection of the law, among others.

The principle of non-discrimination is the guiding principle embodied in the United Nations Charter, the United Nations Universal Declaration of Human Rights

[16]Ibid.

[17]Hunt, R. and Jensen, J., "The experiences of young gay people in Britain's schools: the school report," p. 3.

[18]Takacs, J., "Social Exclusion of Young Lesbian, Gay, Bisexual and Transgender People in Europe," 2006.

[19]See also "Comprehensive sexuality education: giving young people the information, skills and knowledge they need," http://web.unfpa.org/public/cache/offonce/home/adolescents/pid/6483 (accessed on January 31, 2015); see also "Standards for Sexuality Education in Europe," WHO Regional Office for Europe and the Federal Centre for Health Education, http://www.bzga-whocc.de/?uid=20c71afcb419f260c6afd10b684768f5&id=home (accessed on January 31, 2015).

[20]Article 3 of the Universal Declaration of Human Rights states, "Everyone has the right to life, liberty and the security of person." Article 6 of the International Covenant on Civil and Political Rights affirms that "every human being has the inherent right to life and this right shall be protected by law."

(UDHR) and the United Nations human rights treaties. Besides non-discrimination, the principle of equality plays a particularly important role, especially in Article 1 of the UDHR, which states, "All human beings are born free and equal in dignity and rights." And the principles of non-discrimination and equality are equally prominent in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees "equality before the law, requiring States to prohibit discrimination."

Closely related to the principles of non-discrimination and equality is the individual's guarantee of equal protection before the law, which is reflected in the UDHR and ICCPR. According to Article 3 of the UDHR, "Everyone has the right to life, liberty and the security of person." And Article 6 of the ICCPR provides, "Every human being has the inherent right to life to be protected by law. No one shall be arbitrarily deprived of his life." Article 5 of the UDHR and Article 7 of the ICCPR provide that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." And Article 9 of the UDHR and the ICCPR protects individuals from "arbitrary arrest and detention." In other words, it is the duty of the States to provide individuals equal protection before the law, which includes preventing torture and other cruel inhuman or degrading treatment on grounds of sexual orientation or gender identity, as well as protecting the individual against arbitrary arrest.[21]

Another important addition to the principles of non-discrimination, equality before the law and equal protection of the law in international human rights law is the principle of equal enjoyment of rights. As succinctly stated in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), "States parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." States may limit enjoyment of these rights only insofar as restrictions are provided for by law and necessary to protect rights of others and national security or public safety, order, health or morals. But, the responsibility of the States still stands intact.[22] Enjoying the "highest attainable standard of physical and mental health" includes in particular States ensuring that there is no discrimination in the field of healthcare, which is discussed in more detail below.

Also declared in the UDHR and the ICCPR is the right to privacy, which is enshrined in Article 12 of the UDHR and Article 17 of the ICCPR: "No one should be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." Therefore, it is the responsibility of the State to safeguard the right to privacy.[23] Of direct relevance to the link between this thesis and the right to privacy is the assertion by the Human Rights Committee that held that laws

[21] Article 2 (1) of the Convention against Torture states that "each State party shall take effective measures to prevent acts of torture in any territory under its jurisdiction," and Article 2 (2) states that "no exceptional circumstances whatsoever . . . may invoke as a justification of torture."

[22] Ibid.

[23] Ibid. The right to privacy is enshrined in Article 12 of the UDHR and Article 17 of the ICCPR.

criminalizing private, adult, consensual same-sex sexual relations "violate rights to privacy and to non-discrimination."[24]

Other rights for all citizens enshrined in the UDHR (Articles 19–20) and the ICCPR (Articles 19, 21–22) worthy of mention in this context are the freedom of expression, association and peaceful assembly. More specifically, under Article 19 of the UDHR, "Everyone has the right to freedom of thought and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas." Hence States have a duty to protect the right to freedom of expression, association and assembly in a non-discriminatory manner.[25] In light of this thesis, by protecting such rights, homosexuals will not feel the need to withhold or silence the expression of their sexual identities; in turn, such an atmosphere fosters positive information about alternative forms of sexuality in the public sphere.

In conclusion, the acts of discrimination and violence motivated by homophobia, particularly those expressed in the preceding, are to be prevented by the States themselves. States are obligated or responsible for "prevent[ing] torture and other cruel, inhuman or degrading treatment on grounds of sexual orientation or gender identity,"[26] protecting individuals from discrimination and arbitrary detention on grounds of sexual orientation and gender identity[27] and safeguarding their right to privacy and the right to freedom of expression, association and assembly.[28]

To elaborate, it can also be claimed that States are expected to protect individuals from any discrimination in matters of employment. If such laws are absent, employers may refuse to hire LGBTI people, or the benefits normally received by heterosexual employees may be denied their LGBTI counterparts (e.g., parental or family leave, pension and health-care insurance, etc.). Awareness of such employment discrimination and the withholding of benefits is reflected in *X v Colombia* and *Young v Australia,* in which the Human Rights Committee found that "the refusal to provide pension benefits to an unmarried same-sex partner, when such benefits were granted to unmarried heterosexual couples, amounts to violation of rights guaranteed by the Covenant."[29] On December 10, 2013, the Austrian Constitutional Court turned down the ban on donor insemination for lesbian couples. It observed that "the traditional family is not affected by realizing a lesbian couple's

[24]*Toonen v. Australia*, *Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).*

[25]Article 2 (1) of the Convention against Torture, op. cit.

[26]Article 5 of the UDHR and Article 7 of the ICCPR provide that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[27]The right to be free from discrimination is included in the UDHR (Article 2) and core international human rights treaties, including the ICESCR (Article 2) and the Convention on the Rights of the Child (Article 2). Article 26 of the ICCPR guarantees equality before the law, requiring States to prohibit discrimination.

[28]Freedom of expression, association and peaceful assembly are enshrined in the UDHR (Articles 19–20) and the ICCPR (Articles 19, 21–22).

[29]*X v. Colombia, (CCPR/C/89/D/1361/2005), paras. 7.2–7.3; Young v. Australia, (CCPR/C/78/D/941/2000), paras. 10–12.*

wish for a child."[30] Along similar lines, the Human Rights Committee has held, "State obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that also unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples."[31] Whilst many States provide benefits[32] for unmarried heterosexual couples, also commonly referred to as domestic partnership benefits, these benefits are often denied to unmarried homosexual couples: if there is no official recognition of same-sex relationships, health-care providers and insurance companies can discriminate against partners.[33]

Along similar lines, if laws protecting individuals are absent, it is highly likely that there will be discrimination in other healthcare-related matters. According to Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), States parties to the Covenant should recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Hence if homosexuality is criminalized, many individuals will not enjoy the highest attainable standard of physical and mental health, as they will eschew healthcare services out of fear that they may be seen as engaging in "criminal conduct." This is precisely why the UN Human Rights Committee in *Toonen v Australia* rejected the claim that laws criminalizing consensual same-sex conduct were a necessary public health measure; instead, it seems that such laws actually drive many of those at risk underground, thus exacerbating the situation.[34]

The landmark decision in *Toonen v Australia* in which the UN Human Rights Committee held that States are "accountable to protect individuals from discrimination on the basis of their sexual orientation"[35] means, in other terms, that all people—including lesbian, gay, bisexual, transgender and intersex (LGBTI) persons—are entitled to enjoy the protections provided for by international human rights law, including respect for right to life, security of person and privacy, the right to be free from torture and arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.[36] States have an obligation to exercise due diligence to prevent,

[30] http://www.sexualorientationlaw.eu/11-constitutional-court-turns-down-insemination-ban-for-lesbian-couples (accessed on May 16, 2016).

[31] *Young v. Australia, (CCPR/C/78/D/941/2000), para. 10.4.*

[32] Includes pension entitlements, the ability to leave property to a surviving partner, the opportunity to remain in public housing following a partner's death or the chance to secure residency for a foreign partner.

[33] Human Rights Council, Ninetieth Session, op. cit.

[34] Ibid.

[35] See also *Young v. Australia, communication No. 941/2000 (CCPR/C/78/D/941/2000), para. 10.4.*

[36] U.N. General Assembly, Annual Report of the United Nations High Commissioner for the Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human Rights Council, 19th Session, 17th November 2011, p. 4. The report summarizes the information gathered by United Nations treaty bodies and special procedures, regional and

punish and redress deprivations of life and to investigate and prosecute all acts of targeted violence.[37] States should prevent violence and discrimination on the ground of sexual orientation and gender identity. States are also obliged to protect the right to life, liberty and security of persons irrespective of sexual orientation or gender identity.[38] Despite such State obligations, there is still a high level of discrimination and violence towards LGBTI Indians.

3.4 Legal Discrimination

Section 377 of the Indian Penal Code punishes carnal intercourse between two adults. This Section does not refer to homosexuality explicitly, but is implicitly directed to homosexual acts. It does not differentiate between consensual and coercive sex, and it violates the right to privacy enshrined under Article 21 of the Indian Constitution.[39] Other forms of legal discrimination include Section 292 and Section 294 of the Indian Penal Code relating to obscenity and Section 46 of the Army Act. These Sections can be deployed to dismiss gay men from service since they represent the code of conduct for all employees.[40] Homosexual acts are considered as unnatural under these Sections, which does cause a loss of employment. Even though the Indian Constitution prohibits discrimination based on race, creed, caste, sex, etc., it makes no mention of discrimination in relation to sexual orientation.

With the decriminalization of homosexuality by the Delhi High Court in 2009, there was hope that there would be a decrease in discrimination and harassment. Unfortunately, during this time police still laughed and teased gay men and a large majority of families remained unsupportive. The subsequent recriminalization of homosexuality by the Supreme Court in December 2013 simply "added more fuel to the fire,"[41] which is exhibited in the proceeding in concrete instances. Although the international human rights regime prohibits discriminatory practices, there are countless concrete instances of discriminatory practices affecting the daily lives of homosexuals in India. This section considers in particular the maltreatment of gay men by police, especially in the form of bribery and blackmailing. It touches on the prohibition of same-sex marriage and non-recognition of same-sex partnerships,

non-governmental organizations on violence and discrimination based on actual or perceived sexual orientation or gender identity.

[37]Ibid., pp. 4–5.

[38]Ibid., p. 5.

[39]See also the landmark decision on the right to privacy, *Kharak Singh v. State of Uttar Pradesh., AIR 1963 SC 1295.*

[40]Similar provisions can be read in the Navy and State Police Act, where the concept of moral turpitude is viewed as a ground for dismissal from service.

[41]Boesch, D., "Creating Dignity Out of Despair: The Impact of the 2009 Decriminalization of Homosexuality in Delhi," pp. 24–25.

oftentimes resulting in the withholding of the benefits that normally are bestowed on partners or dependents after marriage. Discrimination in the medical field is also problematic, as different branches of medicine are still attempting to "cure" homosexuality. Another highly personal, discriminatory issue affecting LGBTI persons is being disowned by family and friends when coming out or after being outed, which sometimes also leads to the loss of employment. LGBTI persons are also impacted by a negative societal image regularly fostered in the media in which homosexuality is viewed as a perversion. The importance of legal reform and education are therefore placed in the foreground as primary means towards stopping discrimination.

3.4.1 Maltreatment by Police

The police as law enforcement agents of the State occasionally take advantage of Section 377 to catch men having sex with other men in the private sphere, booking them for a criminal offence. Such incidents of verbal and sexual abuse by police have been reported in Delhi, Mumbai and Bangalore. Police have even outed gay men to their families. Merely on suspicion gay men are arrested in public parks or on quiet corners while socializing with friends, especially if they are showing some degree of same-sex affection in public. Oftentimes, the police, aware of the difficulties in prosecution, bribe them for sexual favors or money. In the past, they have even gone to the extent of fabricating false cases and setting up illegal detentions and entrapments to incarcerate men whom they believed were homosexual, either due to their appearances or actions. First Information Reports (FIRs) are almost never recorded. Also, due to lack of evidence, cases never come to light.[42] There have even been reported instances in which gay rights organizations were harassed by the police when distributing condoms, because it was presumed that they were encouraging sexual deviance.[43] In summary, gay men are easy bait for extortion, assault, wrongful restraint and wrongful confinement by policemen.[44]

[42]PUCL-K, "Human Rights Violation Against Sexual Minorities in India," 2001, http://sangama.org/files/sexual-minorities.pdf (accessed on July 28, 2015).

[43]Boesch, D., op. cit., pp. 24–25.

[44]Gupta, A., "Section 377 and the Dignity of Indian Homosexuals," pp. 4819–4821; see also Goodman, R., "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics," *California Law Review*, 2001.

3.4.2 Same-Sex Marriages Not Legal

The institution of marriage in modern Indian society is generally regarded as extending only to male-female relationships, although most marriage statutes use gender-neutral language. As a result, gay men are deprived of their right to marry, to have a family or to choose the partner of their own choice. This in turn denies them the many legal and economic privileges automatically bestowed by marital status, such as employment benefits, tax benefits, intestate inheritance or other privileges in the event of illness or death of partner, such as custody maintenance, adoption rights, etc. Also, gay couples are not recognized as family for the purpose of insurance claims, compensation under the Workman's Compensation Act, gratuity benefits or for the purpose of nomination.[45]

3.4.3 Discrimination in the Medical Field, Family and Employment

Doctors from the field of allopathy influenced by societal biases and prejudices recommend treatments to gay people in the form of drugs, behavioral and aversion therapy followed by mild electric shocks.[46] Such treatments are given to change "sissy" or "feminine" behaviors of patients. Many doctors also draw a linkage between drug use and gays or HIV/AIDS and gays, claiming that both are common among gay men. Medicines to cure homosexuality are also recommended by doctors from the field of homeopathy and Ayurveda.[47] Some have been forced to undergo psychiatric treatment in a vain attempt to convert them to heterosexuality.

The non-acceptance and fear of non-acceptance of homosexuality has other dangers as well. Many gay men are disowned by their families when their sexual orientation is exposed, which is why police often succeed in blackmailing them with information—threatening to tell to their families and friends about their sexual orientation.[48] They are thrown out of their houses without even getting their rightful share of the family property. This abandonment by family members leaves gay people without any money or assets, thereby making their subsistence all the more difficult. Many are forced to work as escorts or male prostitutes. Gay men have also

[45]"Recognition of Same-Sex Marriage – Time for Change," *Murdoch University Electronic Journal of Law*, https://www.murdoch.edu.au/elaw/issues/vln3/lauw131.html (accessed on July 28, 2015). See also PUCL-K, Human Rights Violation Against Sexual Minorities in India, 2001, http://sangama.org/files/sexual-minorities.pdf (accessed on July 28, 2015).

[46]PUCL-K, op. cit.

[47]Ibid.

[48]See Jain, D., "Impact of the Decriminalization of Homosexuality in Delhi: An Empirical Study," 2013.

lost their jobs due to disclosure of their sexuality, causing many to stay closeted at their work place.[49]

3.4.4 Negative Societal Images

Indian society views homosexuality as a perversion, something not to be talked about. This has constructed a negative image of homosexuality. One crucial ground or reason for society to discriminate against homosexuals is that their unions do not show the possibility of child-bearing. There is also the belief that encouraging homosexual unions could discourage people from entering into heterosexual relationships, which could also lead to the decline of family growth and stability. But this cannot be a legitimate reason, as procreation is not the essential element of marriage in India. Rather, the primary reasons for marriage, in most cases, are love and companionship.[50] If procreation were the sole reason for marriage, then why has there never been any attempt to prohibit unions between a sterile woman and a fertile man or vice versa?[51]

3.4.5 Media Discrimination

Cinema has a huge influence on Indian society. It has contributed in reforming the nation as a whole. Since cinema is the replication of society and society also watches and starts accepting the changes introduced by cinema, both mutually influence the other. The last decade saw an increase of films on issues relating to homosexuality. However, when it comes to issues pertaining to homosexuals, the films in India have mostly attempted to display homosexuality in a nonchalant fashion, denying any attempt to deal with the serious issues that exist in and outside same-sex desires. Homosexual image is always projected in an effeminate manner to squeeze out laughter from the public. For instance, in 2010, a film titled *Dunno Ye Na Jaane Kyun* was the first big release to tackle the issue of homosexuality seriously. However, on account of its homosexual content, the film faced censorship problems and unfortunately was never released in its true sense. Right on the date of its premiere show, the theaters in Mumbai and in other parts of India were stoned and set on fire. *The Bombay Times* reported that one of the actors from this film was disowned by his family and thrown out of the family home in Delhi

[49]PUCL-K, op. cit.

[50]Myers, M.F., "Common psychiatric problems in homosexual men and women consulting family physicians," pp. 359–363.

[51]Friedman, A., "The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family," p. 161.

because of his role in the film. His parents were of the opinion that what he did was against the Indian culture and tradition and it challenged the purity of the relationship between a man and a woman.[52] They also revealed that their son kept them in the dark right from the start by telling them that he was acting with a girl. However, when they saw the poster and the kissing scenes, they were shocked, hurt and humiliated. They further added that people in the neighborhood were making fun of them and that they would never be able to live peacefully again. They didn't wish to see their son ever again and also claimed that no woman would consider marrying him after playing a gay man on-screen. For just a film role, an artist has severed his blood ties.[53]

Likewise, although the portrayal of homosexuality in the English language press is largely positive, the regional presses are still homophobic and consider homosexuality a perversion, disorder or disease. The impact of all these forms of discrimination on gay persons makes them feel sick, abnormal and ashamed of themselves, giving rise to feelings of guilt, depression, low self-esteem, rejection and hatred and leading to attempting or actually committing suicide.[54]

3.5 Conclusion

Human rights laws have been employed to challenge discrimination against gay people. Although the principle of non-discrimination, principle of equality, the individual's guarantee of equal protection before the law, the principle of equal enjoyment of rights (especially no discrimination in the field of healthcare) and the right to privacy are enshrined in international human rights law, which is applicable to matters of sexual orientation and gender identity, these safeguards are clearly not effectively implemented by the Indian State.

Of course, there has been some progress in some parts of the world regarding decriminalizing homosexual acts. The UN Human Rights Council has rightfully noted that many States have indeed taken positive steps to curb violence and discrimination on grounds of sexual orientation and gender identity. For instance, States like Brazil, Ecuador, Germany, the Netherlands and Uruguay use the Yogyakarta Principles as guidelines to prevent incidents of violence and discrimination. Also, the Asia Pacific Forum of National Human Rights Institutions has facilitated interactions among member institutions, with positive contributions from national institutions in Australia, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Philippines, the Republic of Korea and Thailand.[55]

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[52]See http://www.pinknews.co.uk/2010/09/27/indian-gay-film-faces-censors-as-stars-family-disowns-him/ (accessed on March 12, 2015).

[53]Ibid.

[54]PUCL-K, op. cit.

[55]Human Rights Council, Ninetieth Session, op. cit.

Yet there are still significant areas, especially India, in which LGBTI persons must deal on a daily basis with discrimination and inequality. However, if Indian society continues living in a shell, embracing misconceptions and prejudices pertaining to homosexuality, it will never put itself on the global map. It must be generally agreed upon that neither heterosexuality nor homosexuality are mere "choices"; and the popular opinion of homosexuals as promiscuous and HIV-infected must also be dispelled: some may be promiscuous, but there are just as many who are already living in long-term monogamous relationships or who desperately desire to do so.

The law is merely one aspect of discrimination that homosexuals are subjected to. Besides legal reform of domestic law in India, the education of LGBTI rights and of sexual orientation in general must be developed and encouraged. Without proper education, it is still highly likely that homosexuals will be treated as second-class citizens even with legal acceptance. For instance, Indian women have been guaranteed formal legal equality, but in reality they remain second-class citizens. A non-judgmental attitude with proper knowledge and education on the subject would certainly be a crucial step towards diminishing anti-homosexual prejudice and discrimination towards gay people.

Chapter 4
Addressing Judicial Activism and Judicial Restraint

4.1 Role of the Judiciary: From Retroactive to Proactive

The end of British Raj saw the oppression of masses beyond imagination at the hands of the unconstrained actions of money power, muscle power, media power and ministerial power.[1] With the framing of the Constitution of India, the three wings of effective governance—the Legislature, the Executive and the Judiciary—came into being. This constitutional framework of the separation of powers demarcates the powers and areas of all these three organs. However, sometimes with the failure of the Legislature and the Executive, the separation of power is only on paper. "After independence the executive has always looked upon the judiciary as a hostile branch of the State since executive started to rot into a system for personal and not public gains."[2] Another reason that can be attributed to this change is the theory of social wants.[3] Under such circumstances, the Judiciary could not wait for the Parliament to take action, as it took far too long to procure justice. Hence the Judiciary was compelled to provide relief.[4]

The Supreme Court (henceforth "the Court") has also assumed unprecedented powers under the name and guise of judicial review.[5] Justice Dr. A.S. Anand, former Chief Justice of India and former Chairperson of the Human Rights Commission of India, while addressing "Judicial review – judicial activism – need for caution," opined:[6]

[1]Jayasurya, G., "Indian Judiciary: From Activism to Restraint," p. 4, http://ssrn.com/abstract=1601843 (accessed on July 1, 2015).

[2]Ibid., p. 4.

[3]Tyagi, B.S., *Judicial Activism in India*, p. 80.

[4]Jayasurya, G., op. cit.

[5]Pandey, J.N., *Constitution of India*, pp. 17, 28 and 60.

[6]Shunmugasundaram, R., "Judicial activism and overreach in India," *Amicus Curiae*, pp. 22–23.

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Y. Naik, *Homosexuality in the Jurisprudence of the Supreme Court of India*,
DOI 10.1007/978-3-319-55435-8_4

> The legislature, the executive and the judiciary are three coordinate organs of the state. All the three are bound by the Constitution. The ministers representing the executive, the elected candidates as Members of Parliament representing the legislature and the judges of the Supreme Court and the High Courts representing the judiciary have all to take oaths prescribed by the Constitution. All of them swear to bear true faith and allegiance to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony. A judicial decision either 'stigmatises or legitimises' a decision of the legislature or of the executive. In either case, the court neither approves nor condemns any legislative policy, nor is it concerned with its wisdom or expediency. Its concern is merely to determine whether the legislation is in conformity with or contrary of the provision of the Constitution. It often includes consideration of the rationality of the statute. Similarly, where the court strikes down an executive order, it does so not in a spirit of confrontation or to assert its superiority but in discharge of its constitutional duties and the majesty of the law. In all those cases, the court discharges its duty as a judicial sentinel.

The Court has over the period of time changed from a mere spectator to a pro-active player. It has undertaken the task of ensuring maximum freedom to the masses and, in the process, has motivated the Legislature and Executive to work for the public welfare and social justice.[7] Nevertheless, this changing attitude of the Court from moderate to active role has invited some criticisms. According to Gautam, "Some political scholars are of the opinion that the judiciary is usurping powers in the name of public welfare while others are of the opinion, that judicial activism and interference is actually preventing the executive from going awry."[8] However, the Court itself has appealed to the judges to actively strive to achieve the constitutional goals of socio-economic justice.

In *S. P. Gutpa v. Union of India*,[9] referring to the orthodox British view of judging, the Court opined:

> Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities' justice, Dalit justice and equal justice between chronic un-equals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach. What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of Indians who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every

[7] Bairagi, A., "The Notion of Judicial Activism and Judicial Restraint in Indian Milieu," p. 2.
[8] Jayasurya G., op. cit., p. 2.
[9] *AIR 1982 SC 149*.

> tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.[10]

Over the years, the Court has attracted criticism for both exceeding its powers or role as well as for not fulfilling it. It has also been criticized for being too active, introducing new rights and principles that were originally not a part of fundamental rights under the Indian Constitution[11] and for being too conservative in dealing with sensitive or controversial issues of public interest.[12]

Since the issue of sex between consenting adults in private still remains sensitive and controversial in India, it is relevant to examine, in this thesis, the reasons and limits of the Court's observations or supervision through the medium of judicial activism and restraint. This chapter therefore examines the terms "judicial activism" and "judicial restraint," and it presents the Indian understanding of judicial activism. The Court's historical role—which usually went beyond the intentions of the original Framers of the Constitution, thus effecting positive social transformation—is reviewed, as well as previous instances in which the Court consistently applied international law, thus progressively promoting the fundamental objectives of international law. In view of these findings, the question naturally arises: Why did the Court practice judicial restraint in the case of Section 377 of the Indian Penal Code? What are some probable causes or motivations for such a decision? In conclusion, it is argued that it is crucial for the Court to strike a proper balance between judicial activism and judicial restraint.

4.2 Indian Understanding of Judicial Activism and Judicial Restraint

The Judiciary has been assigned an active role by the Constitution. As Pandey writes, "Judicial activism and judicial restraint are facets of that uncourageous creativity and pragmatic wisdom."[13] Judicial activism refers to the power of the Court and the High Court but not the subordinate courts to declare the law as unconstitutional and void if it infringes on or is inconsistent with one or more provisions of the Constitution.[14] In contrast, judicial restraint means that "judges should not transgress beyond their

[10]Bairagi, A., "The Notion of Judicial Activism and Judicial Restraint in Indian Milieu," p. 2.

[11]For instance, the right to free legal aid under Article 21 and right to education under Article 21A of the Constitution.

[12]See *NAZ Foundation v. Union of India* (Judgment pertaining to recriminalizing homosexuality), 2013.

[13]Pandey, J.N., *Constitutional Law of India,* pp. 4–8.

[14]Kumar, V., "The Role of Judicial Activism in the Implementation and Promotion of Constitutional Laws and Influence of Judicial Over activism," p. 20.

traditional roles as interpreters of the law."[15] According to *Black's Law Dictionary*, judicial activism is a "judicial philosophy which motivates judges to depart from the traditional precedents in favour of progressive and new social policies."[16] Paul Mahoney offers his own definition, which states that "judicial activism exists where the judges modify the law from what was previously stated to be the existing law which often leads to substituting their own decisions from that of the elected representatives of the people."[17] Thus, judicial activism becomes the most valuable instrument when there is a halt in the legislative machinery.[18]

Derived from the American judicial discourse, the concepts of judicial activism and judicial restraint have been implanted in India. From an Indian context, the doctrine of judicial restraint means that the broad separation of powers under the Constitution and the three organs of the State (the legislature, the executive and the judiciary) must not ordinarily encroach upon each other's spheres. The Court in *Asif Hameed v. The State of J & K* has observed:

> Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity, the Constitution makers have meticulously defined the functions of various organs of the State. The legislature, executive, and judiciary have to function within their own spheres demarcated in the Constitution. No organ can usurp the function of another.[19]

However, considering the nature of the constitutional provisions, the Court requires a certain amount of novelty or creativity when interpreting them. Mostly, the Court has been judicially active in giving positive effect to the constitutional goals.[20] On several occasions it has interpreted the Constitution in a way that has certainly gone beyond the intentions of its Framers. In fact, it has significantly raised the level of human rights protection in India. In doing so, the Court has delivered numerous remarkable judgments pertaining to the eradication of untouchability, bonded labor, child labor, child abuse, immoral traffic in women, domestic violence, dowry, sexual abuse or crimes, for protection of environment, etc., which has indeed helped to uphold the social transformation objectives.[21] Thus, judicial activism has become a crucial element of judicial tasks, because its main concern is to protect public interest as opposed to private interest.[22]

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[15]Dragoljub, P., "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights," p. 365.

[16]Paranjapee, N.V., *Jurisprudence and Legal Theory*, p. 438.

[17]Mahoney, P., "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin," pp. 57–58.

[18]Koopmans, T., "The Roots of Judicial Activism in Protecting Human Rights: The European Dimension," p. 326.

[19]AIR 1989 SC 1899 (para 17 to 19).

[20]Bhat, I.P., *Law and Social Transformation*, p. 208.

[21]The Parliament and State Legislatures have contributed by creating supportive legislation and legislative policies for these social evils; it is difficult to make an exhaustive list of them.

[22]Ahmadi, A.M., "Judicial Process: Social Legitimacy and Institutional Viability," pp. 1–10.

The historical background of judicial activism in India can be traced back to the late 1960s or early 1970s. Shunmugasundaram has provided an historical account of this topic:

> During this time late Mrs. Indira Gandhi (then Prime Minister of India) had attempted to introduce progressive socialistic measures, for the purpose of implementing her favourite slogan "garibi hatao" (poverty eradication) by abolishing Privy Purses and privileges giving to the erstwhile rajas and princes of the princely states of pre-independent India, and nationalising the 14 major banks so as to serve the cause of the poorer sections of the society in a more meaningful manner. However, the conservative judiciary did not take it openly and struck down the relevant legislation as unconstitutional. The judgement of the Supreme Court of India in the Privy Purse abolition and bank nationalisation cases was considered by Mrs. Gandhi to be judicial overreach. On the advice of Mr. Kumaramangalam, the most senior judges of the Supreme Court who participated in the majority judgement in the above cases were passed over for appointment to the post of Chief Justice of India. The dissenting judge, Mr. A N Ray, who was fourth in the line of seniority, was appointed. Aggrieved by this appointment, the three senior judges (Justice Hegde, Shelat and Grover) resigned and this marked the starting point of the theory of judicial activism in India."[23]

Hence it is clear that judicial activism in India was an outcome of the conflict that occurred between the Executive and Judiciary.

Over the years, judicial activism has become a controversial subject in India.[24] "The attempts which include indirect methods of disciplining the Judiciary by supersession of the judges[25] and transfers of inconvenient judges"[26] have literally hindered the powers of the courts.[27] Apart from this, the Judiciary is not a substitute for the Legislature and Executive and hence it has laid down its own limitations. The first instance where judicial activism was denied by the Court was the case of *A. K. Gopalan v. State of Madras*,[28] wherein the issue was about the meaning of the word "law" in the phrase "due process of law" as used in Article 21[29] of the Indian Constitution. The Court held that "law" meant law declared by the Legislature, and it held that the Judiciary cannot intervene.

In *State of Rajasthan v. Union of India*,[30] "[T]he court rejected the petition on the ground that it involved a political question and therefore the court would not proceed into the matter." Justice Bhagwati and Justice Gupta observed that "if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds the court would have jurisdiction to examine it. But it is not for the Courts to formulate

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[23] Shunmugasundaram, R., op. cit., p. 25.

[24] Sathe, S. P., "Curbs on the PIL: Evil Designs of the UF Government," p. 441.

[25] *A Judiciary made to Measure* (N.A. Palkhivala ed., M.R. Pai, 1973) cited in Sathe, S.P., "Judicial Activism: The Indian Experience," *Washington University Journal of Law and Policy*, Vol. 6, 2001, p. 31.

[26] *India v. Sankalchand, AIR 1977 SC 2328.*

[27] Sathe, S.P., "Judicial Activism: The Indian Experience," p. 30.

[28] *AIR 1950 SC 27.*

[29] Right to life and personal liberty.

[30] *AIR 1977 SC 1361.*

and much less to enforce a convention to regulate the exercise of such an executive power. This is a matter which entirely rests with the Executive."[31]

Further, in *S.R. Bommai v. Union of India*,[32] the Court also held that judicial review is not possible in every case since there are certain situations where there is a dominance of political will. The Court in the case of *State of Kerala v. A Lakshmi Kutty*[33] stated: "Special responsibility devolves upon the judges to avoid an over activist approach and to ensure that they do not trespass within the spheres earmarked for the other two branches of the State." Contrary to this, the Court expressed a wider amplitude to the constitutional provisions in the case of *Kesavanda Bharati v. State of Kerala*,[34] in which it held that the basic structure of the Constitution cannot be amended in any case, not even by enactment of the Legislature. This landmark judgement was followed by *Maneka Gandhi v. Union of India,*[35] which protected human rights and liberties of the citizens in practice and continues to do so to this day. In a most recent case of judicial activism, the Court has allowed passive euthanasia, i.e., withdrawal of life support to a person in a permanently vegetative state.[36]

The issue of judicial activism and judicial restraint was well addressed in the case of *State of U.P. and anothers v. Jeet Bisht & Anr.*[37] The Court in this case observed that:

> [B]y exercising judicial restraint [the] judiciary will enhance its own respect and prestige. If a law clearly violates a provision of the Constitution, it can be struck down, but otherwise, it is not for the judiciary to exceed over the wisdom of the legislature. Nor can it amend the law. In other words, it means that the Court cannot amend the law or over take the functions of the legislature and executive. But in the same verdict, the Court also acknowledged that a judge made law is recognised throughout the world.

The Court further observed that "if one is to put the doctrine of separation of power into absolute rigidity, it would not be possible to have any superior court both in developed as well as developing countries. Also, the interpretative process of creating new rights would be hindered." It can be submitted here, that "too much judiciary restraint on the basis of separation of powers cannot provide justice to the poor. Just as too much intervention by the judiciary impairs smooth governance, the exercise of restraint can affect the system adversely."[38] Therefore, a wise judicial

[31] Pandey, J.N. *Constitutional Law of India*, p. 626.

[32] *(1994) 3 SCC 1.*

[33] *(1986) 4 SCC 632.*

[34] *AIR 1973 SC 1461.*

[35] *AIR 1978 SC 597.*

[36] *Aruna Ramchandra Shanbaug v. Union of India, AIR 2011 SC 1290.*

[37] *2007 6 SCC 586.*

[38] Jayakumar, N.K., "Judicial Process Limitations and Leeways," 1997, p. 7, see http://www.legalservicesindia.com/article/judicial-activism-v-judicial-restraint-96-1.html (accessed on July 5, 2015).

policy should contain the blend of activism and restraint.[39] In this regard, Sathe observes:

> True sometimes the courts have gone beyond the scope of their powers. They have entertained matters they ought not to have entertained, and they have been guilty of populism as well as adventurism in violation of the doctrine of separation of powers. Such excesses ought to be prevented or minimized through judicial self-restraint. But in the present Indian Scenario, excessive restraint and doctrinaire regard for separation of powers could also be disastrous. Ultimately what a court should entertain and what it should not must be governed by proper exercise of judicial discretion.[40]

4.3 Judicial Activism and the Application of International Law and Human Rights

The Constitution empowers the Government of India with executive power to enter into and implement international treaties.[41] This executive power extends to matters of which Parliament can legislate. As per Article 73 (1) (b) of the Indian Constitution, "The executive power of the government extends also to the exercise of such rights, authority by virtue of which the Government of India can enter into international agreement. However, this does not mean that international law, ipso facto, is enforceable upon ratification."[42] Thus, a treaty may be implemented by the Executive. However, implementation of a treaty requires legislation, and it is only the Parliament who has exclusive powers to enact a statute or legislation under Article 253 of the Indian Constitution.[43]

Article 51 of the Indian Constitution serves only as a directive of State Policy "to endeavour a) to promote international peace and security; b) to maintain just and honourable relations between nations; c) to foster respect for International law and treaty obligations in the dealing of organised people with one another; and d) to encourage settlement of international disputes by arbitration." Although the Directive Principles of State Policy in this regard may not be justiciable under the Constitution, its principle is fundamental in the making of laws.[44]

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[39]Ibid., p. 8.

[40]V. R. Krishna Iyer, "Judicial Review in a democracy," Book Review Article, *The Hindu*, June 11th 2002, see http://www.thehindu.com/thehindu/br/2002/06/11/stories/2002061100090300.html/ (accessed on July 2, 2015).

[41]In accordance with Articles 246 and 253 read with Entry 14 of List I of the Seventh Schedule of the Constitution of India.

[42]Agarwal, S.K., "Implementation of International law in India: Role of Judiciary," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864489 (accessed on July 5, 2015).

[43]Article 253 empowers the Parliament to make any law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

[44]Tandon, M.P., *Public International Law*, p. 57.

The Indian Constitution ensures that in the entire Indian administration, high regard shall be given to international law and to international morality.[45] Alexandrowicz says that the expression "international law" in Article 51 (c) connotes customary international law and the expression "treaty obligations" stands for treaties. "This explanation seems reasonable in the context of the article as well as the attitude of the Indian Courts to questions of international law."[46] However, Article 51 is only a directive under Part IV of the Constitution and Article 37 expressly provides that the provisions contained in this Part shall not be enforceable by any court. But, the non-enforceability of Article 51 does not hinder the government from implementing or executing the provisions of the international treaty. It can do so in good faith. Further, the Judiciary through it judgments can interpret the provisions of the international treaties or conventions into the municipal laws of the country.

The incorporation of international law into national law has exhaustively been discussed by the Court in *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Ors*.[47] Justice Chinnappa Reddy observed that "if in respect of any principle of international law the Parliament says 'no', the national court cannot say 'yes'. National Court shall approve international law only when it does not conflict with national law. In case however the conflict is inevitable, the national law shall prevail."[48] However, it would be wrong to contend that simply because the principles contained in Part IV are non-justiciable the State is immune from its responsibility. It cannot be agreed upon that the principles are of no significance or even less significance than the justiciable fundamental rights contained in Part III.[49] Long before the Constitution of India, the British practice that customary rules of international law are part of the law of the land was applicable in India. The practice however continued even after the adoption of the Constitution until it was altered or repealed or amended by a competent legislature.[50]

Further, it does not mean that the Indian courts are entirely closed to the wide inclusion of international customary law into municipal law. Under the British rule in India, the English Common Law doctrines are widely applicable in many fields. The Constitution did not alter that position for it provided for the continued operation of the "law in force" immediately preceding the commencement of the Constitution. Therefore, in analogy to English Common Law, the municipal courts of India have applied the provisions of the treaties entered into by India only if they

[45]Ibid., p. 58.

[46]Nawaz, M.K., "International Law on the Contemporary Practice of India: Some Perspective," Proc. ASIL, April 25–27 (1963), p. 275, p. 278; see also Alexanderowicz, C.H., *International Law in India,* ICLQ (1952), p. 292, cited in Kapoor, S.K., *Human Rights under International Law and Indian Law*, 2005, p. 271.

[47]*AIR 1984 SC 667.*

[48]Ibid, at p. 671.

[49]Kapoor, S.K., *International Law and Human Rights*, p. 111.

[50]See *T.K. Varred v. State of Travancore-Cochin, AIR 1956 SC 142* on p. 145.

have been incorporated into municipal law through legislation, and the well-recognized principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the "dualist view of international law which has been commenced by the British and Indian Courts, viz. that international law can become a part of municipal law only by specific incorporation."[51]

Hence, Article 51 of the Constitution requires that the various organs of the State respect the international law and treaties, which would seem to strengthen rather than weaken the principle that international law is a part of the law of the land. "Constitutional declarations in India are not mere embroiders on paper but they do reflect the law in action."[52] The customary rules of international law are part of the municipal law provided that they are consistent with any municipal law or the provisions of the Constitution of India.[53] Hence, when there is no conflict between municipal law and international law or where two constructions of municipal law are possible, Indian courts can give effect to international law by giving harmonious construction. In *A.D. M Jabalpur v. Shukla*,[54] Justice H.R. Khanna held that "if there was a conflict between the provisions of an international treaty and the municipal law, it is the latter that will prevail. But if two constructions of the municipal law were possible the court should give that construction which might bring harmony between municipal law and international law or treaty."

For instance, the Court in its landmark judgment pertaining to sexual harassment of working women at all work places[55] held that:

> In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards of sexual harassment implicit therein. Any International Convention not in harmony with the fundamental rights must be read into these provisions to enlarge the meaning of constitutional guarantee.[56]

Delivering the judgment J.S. Verma, CJI, observed as follows:

> Independence of judiciary forms a part of our constitutional scheme. The International Conventions (more specifically the Convention on the Elimination of All Forms of Discrimination Against Women) and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to International Conventions

[51] Agarwal, S.K., "India's Contribution to the Development of International Law – the Role of Indian Courts in Asian States and the Development of International Law," p. 73. See also Kapoor, S.K., op. cit., p. 112.

[52] Nawaz, M.K., "International Law in the Contemporary Practice in India: Some Perspectives," p. 275.

[53] Kapoor, S.K., op. cit., p. 112.

[54] *AIR 1976 SC 1207.*

[55] *Vishaka v. State of Rajasthan, AIR 1997 SC 3011.*

[56] Ibid., n. 17, para. 7.

> and norms for construing domestic law when there is no inconsistency between them and when the domestic law is void.[57]

In *Vineet Narain v. Union of India*,[58] Justice J.S. Verma referring to *Vishaka v State of Rajasthan* held:

> It is the duty of the executive to fill the vacuum by executive orders because its field is conterminous with that of the legislature and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions, to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

Further, in *Apparel Export Promotion Council v. A.K. Chopra*,[59] Chief Justice Dr. Anand observed: "In cases involving violation of human rights the courts must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law occupying the field."

Also, in *Chairman, Railway Board and Others v. Mrs. Chandrima Das and others*,[60] the Court aptly observed that:

> the International Conventions and Declarations as adopted by the United Nations have to be respected by all signatory states and the meaning given to the words in such declarations and covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and Principles thereof may have to be read, if need be, into the domestic jurisprudence.[61]

Thus, constitutional interpretation in India has been strongly influenced by the Declaration.[62] The Court has even amplified the scope of Article 21 (right to life) of the Constitution by referring to the Universal Declaration of Human Rights (UDHR).[63] In a recent case, *Ram Jethmalani & Ors v. Union of India & Ors.*,[64]

> where the Petitioners sought the disclosure of various documents/information, including names and bank particulars, relating to various bank accounts, of Indian citizens, in the Principality of Liechtenstein (Liechtenstein), the Respondent claimed that it was unable to reveal the documents and other information sought by the Petitioners, inter alia, on the ground that such disclosure was prohibited under Article 26 of the tax treaty. The Supreme Court observed that though India is not a party to the Vienna Convention,[65] the principles of customary international law and principle of interpretation contained therein provides a

[57] Kapoor, S.K., op. cit., p. 116; see also *Vishaka v. State of Rajasthan* op. cit.

[58] *AIR 1998 SC 889* at p. 916.

[59] *(1999) 1 SCC 759.*

[60] *AIR 2000 SC 988.*

[61] Ibid., pp. 996–997.

[62] *Kishore Chand v. State of Himachal Pradesh, (1991) 1 SCJ 68* at p. 76.

[63] *Additional District Magistrate, Jabalpur v. Shukla, AIR 176 SC 470.*

[64] See *Writ Petition (Civil) No. 176 of 2009* http://judis.nic.in/supremecourt/imgs1.aspx?filename=38154 (accessed on July 11, 2015).

[65] The Vienna Convention (entered into force on 27 January 1980) is a code on the law of treaties. The Vienna Convention applies to treaties concluded by States who are signatories to the said Convention.

> broad guideline for the appropriate manner of interpreting a treaty in the Indian context also. Accordingly, the Supreme Court directed the Respondent to disclose to the petitioners the information secured from Germany, except in cases where investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available. Though India is not a signatory to the said Convention, the Supreme Court has drawn reference to the principles of interpretation contained in the Convention, thereby emphasising the relevance of such principles in the Indian context.

From the above cited cases, it is clear that the Court has persistently applied the provisions of international conventions and instruments on human rights when interpreting the constitutional provisions pertaining to human rights. In fact, the Court can be construed to be most generous in the application of international law. The Court in *Aban Loyd Chiles Offshore v. UOI*[66] has held that in the absence of municipal law, treaties can be looked into, if they are not in conflict with municipal law. The Court has also applied international law in the absence of municipal law in a specific area.[67] In *T.N. Godavarman Thirumulpad v. Union of India*,[68] the Court put forth directives that treaties not contrary to municipal law should be incorporated in the municipal law. In *Jolly George v. Bank of Cochin*,[69] the Court first attempted to deal with the emerging linkages between domestic law and human rights by reconciling Article 11 of the International Covenant on Civil and Political Rights (ICCPR) and contractual provisions under municipal law to protect the human rights of a civil debtor whose personal liberty was at stake due to judicial process under Section 51, order 21, rule 37, Civil Procedure Code.[70]

Further, the Court in *Vellore Citizens Welfare Forum v. Union of India and Others*[71] referred to the "precautionary principle" and the "polluter pays principle" as part of the environmental law of the country; it held:

> Even otherwise, once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.

The Court has thus acknowledged that even international treaties may help provide for judicial and legislative action.

Influenced by the Court's verdicts, the Delhi High Court in *AWAS Ireland v. Directorate General of Civil Aviation*[72] recently sanctioned deregistration of aircrafts by applying the Cape Town Convention on International Interest in Mobile Equipment, 2001, as well as the Aircraft Protocol to the Cape Town Convention, to

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[66] *(2008) 11 SCC 439*.

[67] For instance, in *Vishaka v. State of Rajasthan (1997) 6 SCC 241* and *National Legal Services Authority v. Union of India, (2014) 5 SCC 438*.

[68] *(2012) 4 SCC 362*.

[69] *AIR 1980 SC 470*.

[70] Provision pertaining to scope of debtor, if he could be imprisoned for failure to pay his debts.

[71] *AIR 1996 SC 2715*.

[72] *W.P. (C) 671/2005*.

which India is a party.[73] However, what is more significant about this judgment is how the High Court referred to the provisions of the Vienna Convention of Law of Treaties, 1969, although India neither ratified it nor was it a signatory to the Convention. It did not question whether or not the principles of the Vienna Convention constituted customary international law, since this issue was already recognized by the Court in its earlier decision.[74] Even the Delhi High Court relied upon the provisions enlisted in the international conventions while decriminalizing consensual sex between adults in private by declaring Section 377 of the Indian Penal Code unconstitutional.[75]

It is clear that the Indian Judiciary has somehow been sensitive in promoting the fundamental objectives of international law. The above mentioned cases portray the dynamic role played by the Judiciary in the implementation of India's international obligations. Nevertheless, in India, international law reflects the will of the ruling classes. Each implements their own approach and has their own motives; their interest lies in supporting and preserving a certain portion of generally binding legal norms in international relations.[76] A further elaboration of this dynamic approach adopted by the Judiciary can be understood with the help of PIL.

4.4 Public Interest Litigation[77]: A Dynamic Approach

The original right to move to the Court for the enforcement of fundamental rights of citizens is derived from Article 32 of the Constitution. Under Article 32, citizens can move to the Court to seek remedies for the violation of fundamental rights.[78] This entitlement to constitutional remedies itself serves as a fundamental right and can be enforced in the form of writs such as habeas corpus (to direct the release of a person detained unlawfully), mandamus (to direct a public authority to do its duty), quo warranto (to direct a person to vacate an office assumed wrongfully),

[73]AWAS, which had leased aircrafts to Spice Jet, an Indian low cost carrier, initiated writ proceedings in the Delhi High Court seeking de-registration of the leased aircrafts, upon termination of the lease agreements with Spice Jet for default in payment of lease rents. Further, the Cape Town Convention and Aircraft Protocol, by legislation, have not been adopted as a part of the Indian municipal law.

[74]See *Ram Jethmalani v. Union of India (2011) 8 SCC 1.*

[75]See *NAZ Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court 2009).*

[76]Tandon, M.P., *Public International Law*, p. 59.

[77]A litigation for the protection of the public interest. Under Article 32 of the Indian Constitution it is not necessary for the victim to personally approach the court. Also, the court suo motu can introduce a PIL, rather than the aggrieved party or another third party.

[78]Balakrishnan, K.G., Hon'ble Chief Justice of India, "Judicial Activism Under the Indian Constitution." Lecture delivered at the Trinity College Dublin, Ireland-October 14, 2009. p. 3, see http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf (accessed on July 6, 2015).

prohibition (to prohibit a lower court from proceeding on a case) and certiorari (power of the higher court to remove a proceeding from a lower court and bring before itself).[79] The Court not only issues writs, but any direction or order or writ which is appropriate to enforce the fundamental rights. Also, it is not bound to follow any procedural technicalities.[80] The High Courts located in the various States also function as constitutional courts. Under Article 226 of the Constitution citizens can file writs before the High Courts. The jurisdiction of a High Court is not limited to the protection of the fundamental rights but includes other legal rights.[81] This makes the jurisdiction of the High Court larger than that of the Court.

Balakrishnan observes: "In the recent decades, with the emergence of the Public Interest Litigation (PIL), Article 32 has been interpreted to formulate creative remedies such as a 'continuing mandamus' for compelling the executive agencies to abide by the judicial decisions."[82] Also, new legislations like the Consumer Protection Act, 1986, the Environment (Protection) Act, 1986 and the Protection of Human Rights Act, 1993 are the outcomes of judicial efforts and directions. In addition, judicial activism has uncovered many scams and scandals pertaining to corruption, e.g., Hawala Scam, Fodder Scam, Uria Scam, St. Kit's Scam, etc.[83] Thus, judicial activism has broadened with the emergence and evolution of PIL. Explaining the liberalization of the concept of locus standi, the Court in *S.P. Gupta v. Union of India*[84] opined:

> It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.

PIL emerged with this noble objective of uplifting and empowering the poor by waiving the requirement of locus standi.[85] In *Hussainara Khatoon v. State of Bihar*,[86] the Court first took up a PIL action on behalf of prisoners awaiting trial who had been languishing in jails for periods longer than the maximum punishment prescribed for the offences concerned. The Court issued directions ensuring appropriate relief to the prisoners. In *Sunil Batra v. Delhi Administration*,[87] the Court held that the writ of habeas corpus can be issued not only for releasing a person

[79] Pandey, J.N., *Constitutional Law of India*, p. 490–496.

[80] *Rashid Ahmad v. Municipal Board, Kairana, AIR 1950 SC 163.*

[81] Pandey, J.N., op. cit., p. 483.

[82] Balakrishnan, K.G., op. cit., p. 4.

[83] Jayasurya, G., "Indian Judiciary: From Activism to Restraint," p. 12.

[84] *(1981) Supp. SCC 87.*

[85] Shunmugasundsaram, R., "Judicial activism and overreach in India," p. 26.

[86] *AIR 1976 SC 1360.*

[87] *(1978) 4 SCC 49.*

from illegal detention but also for protecting the prisoners from inhuman and barbarous treatment. In *Veena Sethi v. State of Bihar*,[88] the Court was informed through a letter that some prisoners were not released due to inaction of State authorities and had to remain in jail from 20 to 30 years. The Court directed their immediate release. The Court was also of the opinion that the scope of Article 32 is wide enough to include the power to grant compensation for violation of fundamental rights. It has provided compensation to the victims of custodial violence mainly because of the irresponsible conduct of the State authorities.[89]

Further, in the case challenging the arbitrary seizure of the passport[90] of Indira Gandhi's niece, the Court broadened the interpretation of protection of life and personal liberty in Article 21. Right to travel abroad was made a component of liberty and arbitrary and unreasonable limitations on the enjoyment of the right were subject to judicial invalidation.[91] The landmark judgment (*Maneka Gandhi v. Union*) was soon extended to a gambit of other weak or powerless persons, such as prisoners, bonded laborers, pre-trial detainees, children, migrant labourers, pavement dwellers, rape victims, workers facing plant closures, women, victims of environmental degradation, inmates of mental institutions, victims of water and air pollution.[92] All of the above instances displayed governmental inaction in safeguarding the legal rights of the people. It was only the Court's departure from the doctrine of separation of powers that proved to be the unique feature of PIL. Also, the Court exempted all of the formal pleading requirements in PIL cases. The Court in addition came to call "epistolary jurisdiction," in which it treated letters and newspaper articles as Article 32 petitions for the protection of fundamental rights.[93]

The Court also abandoned fact finding in PIL cases. Instead, it deputed inquiry commissions to inquire into the matter and report. These commissions are comprised of legal experts. In cases involving complex legal issues, the Court also seeks the services of senior counsels by appointing them as amicus curiae on a case-by-case basis.[94] The Court as a protector and guarantor of fundamental rights held that once a citizen has shown that there is an infringement on his fundamental right, it cannot refuse to entertain petitions seeking enforcement of fundamental rights.[95]

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[88] *AIR 1983 SC 339.*

[89] See also *Peoples Union for Democratic Rights v. Police Commissioner, Delhi, (1989) 4 SCC 730; Saheli v. Commissioner of Police, AIR 1990 SC 513; Chiranjit Kaur v. Union of India, (1994) 2 SCC 1; Kewal Pati v. State of Uttar Pradesh, (1995) 3 SCC 600; Nilabati Behera v. State of Orissa, (1993) 2 SCC 746; Arvinder Singh Bagga v. State of U. P., (1994) 4 SCC 602.*

[90] *Maneka Gandhi v. Union of India, AIR 1978 SC 597.*

[91] Pandey, J.N., op. cit., p. 193–194.

[92] Neuborne, B., "The Supreme Court of India," p. 500–501.

[93] Ibid., p. 502.

[94] Desai, A.H. & Muralidhar, S., "Public Interest Litigation: Potential and Problems," p. 164–167.

[95] *Romesh Thapper v. State of Madras, AIR 1950 SC*, pp. 124–126.

Moreover, the Court considered it as its solemn duty to protect the citizen's fundamental rights vigilantly.[96]

The Court has been judicially active and has provided several landmark judgments in terms of the protection from inhuman treatment, child welfare, protection of the environment and the protection of women, which are elaborated in the proceeding.

4.4.1 Protection from Inhuman Treatment

In *Bandhu Mukti Morcha v. Union of India*,[97]

> an organisation dedicated to the cause of release of bonded labours informed the Supreme Court through a letter that they conducted a survey of the stone-quarries situated in Haryana and found large numbers of labourers working under inhuman and intolerable conditions and many were bonded labourers. The Court treated the letter as a writ petition, and appointed a Commission consisting of two advocates to visit these stone-quarries and make an inquiry and report to the Court about the existence of bonded labourers.

In another case,[98] the Court "ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. It has also directed the manufacturing units producing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in neighbourhood, to take all necessary safety measures before reopening the plant."[99] In another noteworthy judgment, *M.C. Mehta v. Union of India,*[100] the Court widened the scope of public interest litigation under Article 32 and held that the poor in India can seek enforcement of their fundamental rights from the Court by writing a letter to any judge. Such a letter need not be accompanied by an affidavit.

The Court has also granted remedial relief, which included the power to grant compensation in appropriate cases where the fundamental rights of the poor and disadvantaged person are violated. This principle was employed by the Court while awarding compensation to *Rudal Shah*[101] and *Bhim Singh,*[102] whose fundamental right to personal liberty were grossly violated by the State. The Court in these cases also held that the poor and disadvantaged person cannot be asked to seek remedy for compensation by filing a suit in the civil court. Justice Bhagwati opined: "No State had the right to tell its citizens that because a large number of cases of the rich are

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[96] *Daryao v. State of U.P., AIR 1961 SC 1457*, p. 1461.

[97] *AIR 1984 SC 803*.

[98] *Rural Litigation and Entitlement Kendra v. State of U.P., (1985) 2 SCC 431*.

[99] *M.C. Mehta v. Union of India, (1986) 2 SCC 176*.

[100] *AIR 1987 SC 1087*.

[101] *Rudal Shah v. State of Bihar, AIR 1983 SC 1086*.

[102] *Bhim Singh v. State of J. K (1985) 4 SCC 677*.

pending in our courts we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford rich lawyers is disposed off."[103] Even when a large number of old, infirm pensioners were unable to approach the Court individually, the Court accepted their writ petition, which was filed by a registered voluntary society working for the cause of old and infirm people.[104]

4.4.2 Child Welfare

In *Lakshmi Kant Pandey v. Union of India*,[105] "The Court entertained a writ petition filed on the basis of a letter complaining the mal practices indulged in by social organisation and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The Court also gave guidelines to the Government and various agencies concerning the welfare of children." Further, in *M.C. Mehta v. State of Tamil Nadu*,[106] the Court has held that "children cannot be employed in hazardous employment like match factories. With regard to children below the age of 18 years detained in jails in different States of India, the Court directed that the Children's Act enacted by various States must be strictly implemented. The Court also opined that the Parliament should pass a Central legislation on the subject."[107] In *Gaurav Jainv. Union of India*[108] "the Court has taken a non-discriminatory stand by rejecting the demand for providing separate schools and hostels for children of prostitutes as it was not in the interest of such children."

4.4.3 Environmental Protection

The water pollution of the Ganga was brought to the notice of the Court by a petitioner, a social worker through a PIL; the Court ordered the closure of the tanneries polluting the Ganga.[109] And concerning the air pollution discoloring the Taj Mahal, the Court "entertained the PIL filed before it and directed the industries operating in the area to change over within a fixed time schedule to natural gas as

[103] See also *Veena Sethi v. State of Bihar, AIR 1983 SC 339.*
[104] *D.S. Nakara v, Union of India, 1983 1 SCC 304.*
[105] *(1987) 1 SCC 667.*
[106] *AIR 1991 SC 417.*
[107] *Sheela Barse v. Union of India, (1986) 3 SCC 596.*
[108] *AIR 1990 SC 292.*
[109] *M.C. Mehta v. Union of India, (1987) 4 SCC 463.*

industrial fuel and if they could not do so they must stop functioning within the area or relocate to some alternative plots outside the Taj Trapezium."[110]

4.4.4 Protection of Women

In *Delhi Domestic Working Women's Forum v. Union of India*,[111] a PIL was filed under Article 32 to expose the pathetic state of four domestic servants who were subjected to indecent sexual violence and assault by seven army personnel. The Court issued extensive guidelines against sexual assault. And in a significant judgment in *Vishaka v. State of Rajasthan*,[112] the Court "laid down extensive guidelines for preventing sexual harassment of working women in the place of their work." Further, for the protection of women from prostitution and the rehabilitation of their children, the Court entertaining a PIL in *Gaurav Jain v. Union of India*[113] "issued a number of directions to the government and all social organisations to take upon appropriate measures for safeguarding women from various forms of prostitution and to rehabilitate them along with their children by providing welfare measures."

4.4.5 Judicial Activism on the Right to Life

A plethora of rights have emanated from Article 21 of the Constitution (right to life and personal liberty) mainly because of the judicial activism shown by the Court. In *A.K Gopalan v. State of Madras*,[114] the Court held that "to deprive a person of his life or liberty without following the procedure established by law would amount to violation of Article 21 of the Constitution. The Court held that the word 'life' in Article 21 means not mere survival but a life to live with dignity as a human being. And that the right to die is not a fundamental right."[115]

In *Francis Coralie v. Union Territory of Delhi*,[116] the Court held that "the right to live is not restricted to mere animal existence but something more than just physical survival." It stated that "the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing

[110] *M.C. Mehta v. Union, AIR 1997 SC 735.*
[111] *(1995) 1 SCC 14.*
[112] *AIR 1997 SC 3011.*
[113] *AIR 1990 SC 292: AIR 1997 SC 3021.*
[114] *AIR 1950 SC 27.*
[115] *Gian Kaur v. State of Punjab, (1996) 2 SCC 648.*
[116] *AIR 1978 SC 597.*

and expressing one-self in diverse forms, freely moving about and mixing and socialising with fellow human beings."

In the popularly known "pavement dwellers case," the Court held that the right to livelihood is an integral facet of the right to life, guaranteed as a fundamental right under the Constitution.[117] The right to food as a part of the right to life was also recognized in *Kapila Hingorani v. State of Bihar,*[118] wherein the Court held that "it is the duty of the State to provide adequate means of livelihood in the situations where people are unable to afford food."

The Court further recognized the "right to privacy" as a new right to be read into Article 21.[119] It held that a citizen has a right to safeguard his own privacy, his family, marriage, procreation, motherhood, child bearing and education, among other matters. The right to health and medical care, to environmental protection, to family pension, to free legal aid, to fair and speedy trial, against sexual harassment, to medical assistance in case of accidents, against handcuffing and solitary confinement, against police atrocities, torture and custodial violence, to minimum wages, etc., have been held to be a part and parcel to the expression of "right to life" in Article 21.[120] Also, the principle of equal pay for equal work, though not a fundamental right, is certainly a constitutional goal and, therefore, capable of enforcement through constitutional remedies under Article 32 of the Constitution.[121] During recent years, the Court has directed to provide a second home in *Asiatic Lions vide Centre for Environmental Law v. Union of India*[122] on the pretext of protecting and safeguarding the environment, as it is a part of Article 21. In *Ajay Bansal v. Union of India*,[123] the Court also directed that helicopters be provided for stranded persons in Uttarakhand.

Hence rights which are not included under Part III of the Constitution as "fundamental rights" have been given the status of fundamental right and are made available to the citizens by the Court judgments. In addition, the rights enlisted in the international conventions have also been duly recognized by the Court through its landmark verdicts. Nevertheless, there are certain rights in the Covenant which are still not recognized as fundamental rights in Part III of the Constitution nor have they been regarded by the Judiciary as fundamental: there is the right against torture or cruel, inhuman or degrading treatment or punishment;[124]

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[117] *Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180.*

[118] *(2003) 6 SCC 1*; Also, the Court has recognized the right to sleep as part of Article 21 vide in *re Ramlila Maidan (2012) S.C.I.1.*

[119] *R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.*

[120] Tripathi, G.P. *Indian Constitution*, pp. 165–177; See also Pandey, J.N., op. cit. pp. 192–237.

[121] *Randhir Singh v. Union of India, AIR 1982 SC 879.*

[122] *Writ Petition 377/1995 decided on 15.04.2013.*

[123] *Writ Petition 18351/2013 vide order dated 20.06.2013.*

[124] Covenant on Civil and Political Rights, Article 7.

the prohibition of the death sentence for children and pregnant women;[125] the right not to be subjected to medical and scientific experimentation;[126] the special treatment of juvenile offenders[127] and the right to marry and found a family.[128] It is therefore reasonable to expect that laws need to be enacted or amended to suit the changing social circumstances so that they are in conformity with the international covenants. But, this is possible only when India incorporates such rules as part of its own municipal legal system. In fact, the existing constitutional framework motivated the Court to deliver its regressive judgment, recriminalizing homosexuality.

4.5 Section 377 of the Indian Penal Code Verdict: Unfairly Judged

It is very clear that judicial activism in India has mostly represented the progressive interpretation of the constitutional provisions over the last decades. It has strived to achieve the tasks of upholding the basic features of the Constitution, applying innovate, new public law remedies and abandoning the obstructive procedural rules.[129] The Court has generally entertained letters written to judges as petitions; has taken suo moto cognizance; has relaxed the rules of locus standi; has allowed anyone to move to the Court on behalf of victims and has expanded the ambit of fundamental rights through the medium of PIL.[130] However, with respect to decriminalizing homosexuality and safeguarding the rights of gay people, the Court has taken a regressive approach, thus departing from its judicial activism: on December 11, 2013, the Court, by striking down the Delhi High Court verdict, upheld the constitutional validity of Section 377 Indian Penal Code (IPC).[131] In doing so, the Court exercised self-restraint, stating that the decision of the legislature to maintain Section 377 is a "manifestation of the will of the public through the Parliament and must be favored with the presumption of constitutionality."[132] The Court held that "the legislative decision to retain Section 377 has guided its understanding of the 'character, scope, ambit and import of the legislation'. It stated that there is no constitutional violation and hence refused to strike down legislation on the pretext that it has fallen into disuse or because of the society having changed

[125]Covenant on Civil and Political Rights, Article 6 Para 5. However, under Section 16 of the Code of Criminal Procedure, 1973 the execution of death sentence is postponed.

[126]Covenant on Civil and Political Rights, Article 7.

[127]Covenant on Civil and Political Rights, Article 10 and 14.

[128]Covenant on Civil and Political Rights, Article 23, Para 2.

[129]Bhat, P.I., *Law and Social Transformation*, p. 860.

[130]Subramanian, S. "Indian Supreme Court's Departure from Judicial Activism," http://jurist.org/forum/2013/12/sujitha-subramanian-india-departure.php (accessed on July 12, 2015).

[131]*NAZ Foundation v. Union of India,* Supreme Court Judgement dated December 11, 2013.

[132]Subramanian, S., op. cit.

as regards the legitimacy of its purpose and its need."[133] The Court further declared that "those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter class cannot demand that Section 377 suffers from the vice of arbitrariness and irrational classification."[134] It provided neither an explanation on what would constitute "ordinary course" nor an "order of nature." It simply declared Section 377 as gender neutral and non-discriminatory, criminalizing the sexual activity of both homosexual and heterosexual people, regardless of age and consent. The Court's judgment thus represents a mirror image of the pre-colonial mindset rampant with a rude form of discrimination on the grounds of sexual preference, orientation and identity. The Court is not a law-maker, but it had the responsibility to determine whether the legislation is in conformity with or contrary to the constitutional provision. The Court failed to consider the rationality of the statute.[135] Although the Court in the past has held that the judges should avoid an over-activist approach and should not trespass within the spheres earmarked for the other two branches of the State, namely, legislature and executive,[136] in *Vishaka v. State of Rajasthan*[137] the Court noted that the legislature had not brought any comprehensive legislation to deal with the sexual harassment of women in the work place and hence declared the law as follows:

> In view of the above, and in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms are hereby laid down for strict observance. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141[138] of the Constitution of India.[139]

In many other cases, such as the *Azad Riksha Pullers Union v. State of Punjab*,[140] the Court asked the Punjab National Bank to advance loans to the rickshaw pullers and provided a whole scheme for the repayment of such loans. In *Common Cause v. Union of India*[141] the Court provided for how blood should be collected, stored, given for transfusion and how blood transfusions could be made safe. It also gave directions as to how children of prostitutes should be educated[142] and prepared

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[133] *NAZ Foundation v. Union of India, op. cit.*

[134] Ibid.

[135] Shunmugasundaram, R., "Judicial activism and overreach in India," pp. 22–23.

[136] See *State of Kerala v. A. Lakshmi Kutty, (1986) 4SCC 632.*

[137] *(1997) 6SCC 241.*

[138] Article 141 provides law declared by the Court to be binding on all courts.

[139] *Vishaka's case,* p. 6, http://judis.nic.in/supremecourt/imgs1.aspx?filename=13856 (accessed on July 12, 2015).

[140] *AIR 1981 SC 14.*

[141] *AIR 1996 SC 929.*

[142] *Gaurav Jain v. India, AIR 1990 SC 292.*

a scheme for how the CBI[143] should be insulated from extraneous influences while conducting investigations against persons holding high offices.[144] The Court was also asked to conduct an inquiry into police officers of red light areas, and to remove all victims from the flesh trade and provide them with remedies. The Court then gave directions to the Government.[145] Apart from this, the Court has given decisions in cases pertaining to different kinds of other entitlements and protections, such as the availability of food, access to clean air, safe working conditions, political representation, affirmative action, anti-discrimination measures and the directives for prison reforms.[146] Even recently, the Court's personal opinions were implemented to demolish and seal off all the commercial entities run in residential areas of Delhi, even though the Delhi Government passed a Bill regularizing all the constructions which were illegal. The Delhi Municipal Corporation was unwilling to continue with the sealing drive since it was against the popular will of the people. The Court remained firm in its decision in spite of demonstrations and violence.[147]

However, with regard to the Section 377 verdict, the activist approach of the judiciary suffered a setback. Had the Judiciary declared Section 377 as unconstitutional, its decision could possibly conflict with the other organs of the State. Further, "while interpreting the constitutional provisions, very often personal opinions of the judges do crystalize into legal principles and constitutional values."[148] Hence, the judicial biases and phobias underlying the Section 377 verdict cannot be discarded. Lack of knowledge or proper awareness on the subject can be attributed as the foremost reason among others. Besides, a judge cannot be "apolitical" because, like any other citizen, he is bound to hold political preferences and ideologies.[149] However, it is highly likely that the Judiciary in the case of Section 377 tried to adjust its decision to the considerations of acquiring power, that is to say, the political party in power. Ultimately, it was also a judgment wherein the Government had its say. The Court did not explain how the recognition of fundamental rights of gay people could have impacted their own power.

Besides, the Judiciary's accountability to the public differs from its accountability to the Legislature and Executive. Hence, the adoption of a regressive attitude by the Judiciary towards gay people does not argue well for a healthy democratic set up.[150] For the common man in India, the Legislature and the Executive are inefficient in their duties towards the general public. Hence, citizens can approach the Judiciary to redress their grievances.[151] But when the Judiciary passes a

[143]Central Bureau of Investigation.

[144]*Vineet Narain v. Union of India, AIR 1998 SC 889.*

[145]*Vishal Jeet v. Union of India, AIR 1990 SC 1412.*

[146]Balakrishnan, K.G., "Judicial Activism under the Indian Constitution," p. 20.

[147]Shunmugasundaram, R., "Judicial activism and overreach in India," p. 24.

[148]Shunmugasundaram, R., op. cit., p. 23.

[149]Sathe, S.P., op. cit., p. 99.

[150]Ibid., p. 27.

[151]Ibid., p. 23.

regressive judgment, only a larger bench or a constitutional amendment can intervene. This has jeopardized temporarily the interest of vulnerable groups (gay people). However, on February 2, 2016, the Court have passed an order to constitute a five-judge constitutional bench to review afresh the law criminalizing homosexuality.

I have attempted to highlight some of the circumstances that might have contributed to the Court's change of stance. It must be admitted that judges are human beings, not saints. Hence, decisions of courts are reasoned and are often subject to appeal or review.

Although a judge is always expected to be unbiased and impartial, the external factors embodied in a constitution can affect the judge's integrity. For instance, a Supreme Court judge is appointed by the President after consultation with the Chief Justice and such other judges.[152] Similarly a High Court judge is appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and in case of a judge other than the Chief Justice, the Chief Justice of the High Court.[153] A judge may resign or may be removed by order of the President for his misbehavior or incapacity. A presidential order for the removal of a judge can be passed only after an address by Parliament, supported by a majority of the total membership of that House and by a majority of no less than two thirds of the members of that House present and voting.[154] The question of whether a judge has misbehaved is to be assessed by a committee consisting of a judge of the Supreme Court of India, a Chief Justice of a High Court and a jurist nominated by the Speaker.[155] If the Committee does not find any substance, the matter is dropped, and if the Committee reports against the judge, the matter is put before Parliament and removal ultimately depends on a majority of votes in each House of Parliament. It is clear that the impeachment or removal procedure is entirely a political process.[156] In addition, according to Sathe, "[T]he independence of judiciary has been threatened when it has arisen to the changing needs of the society." In this regard, the Executive's policy of arbitrarily transferring High Court judges serves as a good example.[157]

[152] Article 124 (2).

[153] Article 217 (1). On October 16, 2015, the Court struck down the constitutional amendment and National Judicial Appointments Commission Act restoring the old collegium system of judges appointing judges in higher judiciary. However, a review petition has been filed before the Court.

[154] Article 124 (4) and Article. 217 (1b).

[155] Pandey, J.N., op. cit., pp. 412–416.

[156] Ibid.

[157] *S.P. Gupta v. Union of India, (1981) Supp. SCC 87.*

4.6 Concluding Remarks

The composition of the Court is not entirely a matter of law but a matter of politics. The traditional myth, that judges do not make law but merely find it or interpret it, sought to immunize the Court from its responsibility to safeguard the interests of vulnerable minorities like gay people. In fact, this myth itself has served as a judicial self-restraint in the recent case, i.e., the Section 377 verdict. The Court, in the aforesaid case, imposed restraint on its own power.[158] It is exactly for this reason that criticizing the Court's decision can now help correct future fallible judgments.

[158]Sathe, S.P.; "Judicial Activism: The Indian Experience," p. 107.

Chapter 5
Analyzing the Supreme Court's Verdict on Section 377 of the Indian Penal Code

5.1 Introduction

On December 11, 2013 the Court overturned a High Court verdict that struck down the 1860 law and decriminalized consensual carnal sex among adults.[1] The Supreme Court (henceforth "the Court") passed the responsibility to the Legislature, arguing that the law can be annulled only through appropriate legislation. In doing so, the Court observed that section 377 of the Indian Penal Code does not violate any of the constitutional provisions. The Court's order finally stated:

> In its anxiety to protect the so-called rights of LGBT persons ... the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right (concerning gay people) and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.[2]

It further stated, "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."[3] The petition in appeal was brought before the Court not by the State but by individuals and various religious groups: the Apostolic Churches Alliance, the Utkal Christian Council and the All India Muslim Personal Law Board.[4]

In justifying the ruling, the Court discussed the value of judicial restraint in a constitutional democracy, only to hold the Legislature responsible for amending

[1] *NAZ Foundation v. NCT of Delhi, WP (C) No. 7455/2001*. In 2009, the Delhi High Court held that Section 377 of the Indian Penal Code, which criminalizes sex between adult homosexual men, was unconstitutional.

[2] Ibid., p. 52.

[3] Ibid., pp. 97–98.

[4] *Suresh Kumar Koushal v. NAZ Foundation, Civil Appeal No. 10972 of 2013*. http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070 (accessed on August 4, 2015).

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Y. Naik, *Homosexuality in the Jurisprudence of the Supreme Court of India*,
DOI 10.1007/978-3-319-55435-8_5

Section 377 in case of misuse by police.[5] It opined that, there is a presumption of constitutionality in favor of all laws, including pre-constitutional laws, and there is an option to read down a law to prevent it from being rendered unconstitutional. But, with regard to Section 377, the Court was of the opinion that there is no clear proof of constitutional violation to invalidate the law and believed that the discrimination alleged by the LGBTI community was exaggerated or somehow inadequate to justify reading down parts of Section 377.[6] Further, it added that the LGBTI community comprised only a "miniscule fraction" of India's population and that over the past 150 years, less than 200 individuals have been penalized under Section 377.[7] Hence, it held that Section 377 is not only procedurally sound, but also "just, fair and reasonable."[8]

The Court also highlighted the large number of amendments to the Indian Penal Code since its adoption in 1860, totaling around 30. In explaining the development of Section 377, the Court referred to several cases related to Section 377 dating back as far as the nineteenth century.[9] The Court further noted all previous cases related to non-consensual acts and observed that no uniform test exists to classify which acts would fall under Section 377. On the other hand, the Court held that the acts can only be determined with reference to the act and the circumstances in which it is executed.[10] In support of these statements the Court stated, "Section 377 does not criminalize a particular person or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation."[11] Where the Delhi High Court extensively referred to international and foreign legal materials, the Court ignored the principles embodied in the European and American judgments relating to privacy and decriminalizing homosexuality.[12] As discussed at length in Chap. 4, the Court has certainly relied upon international and foreign laws while deciding domestic matters in the past.[13]

In contrast to the Court's opinion that Section 377 did not violate the fundamental rights of the LGBTI Community as a class or of its individual members, the Delhi High Court held "that Section 377 in its application to private acts between

[5]Abeyratne, R., and N. Sinha, "Insular and Inconsistent: India's Naz Foundation Judgment in Comparative Perspective," pp. 76–77; see *Suresh Kumar Koushal v. Naz Foundation,* pp. 26–28 and p. 51.

[6]*Suresh Kumar Koushal v. NAZ Foundation*, op. cit., p. 52.

[7]Ibid, p. 43.

[8]Ibid, p. 45.

[9]See on 4 August, 2015). http://www.equalrightstrust.org/ertdocumentbank/Case%20Summary.pdf (accessed on August 4, 2015).

[10]Ibid.

[11]*Suresh Kumar Koushal v. NAZ Foundation*, op. cit.

[12]Gardner, C., "The Supreme Court of India and 'unnatural offences': a bad judicial reaction," HEADOFLEGAL, http://www.headoflegal.com/2013/12/13/the-supreme-court-of-india-and-unnatural-offences-a-abad-judicial-reaction/ (accessed on August 8, 2015):

[13]See also *Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011.*

consenting adults, violated fundamental rights embodied in the Constitution, including the right to privacy implicit within the right to life under Article 21, the right to equality under Article 14 and the right against discrimination under Article 15."[14] The Delhi High Court significantly remarked[15]:

> If there is one constitutional tenant that can be said to be an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. This inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized. Where Society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately.

More importantly, the Delhi High Court verdict recognized that discrimination includes not only direct discrimination but indirect discrimination as well.[16] It rightly observed that on the face Section 377 penalized all sexual acts (anal and oral) between men and women, yet in reality it only targeted the gay people who are presumed to perform oral and anal sex.[17]

On the contrary, the Court diverted from its activist approach. It set aside all the foreign sources of law, and it also overlooked the gay rights jurisprudence of other major constitutional democracies,[18] and in doing so, it delivered a bizarre and regressive verdict. In other words, the verdict only reflects the mindset and ignorance of those who passed it. Moreover, the Court's judgment is the decision of a two-judge bench. The Indian Constitution requires that a minimum of five judges hear cases involving a "substantial question" of law.[19] The Court later rejected a review petition to rehear the NAZ Foundation case.[20] But in April 2014 a four-judge bench considered the plea for the curative petition, which is pending before the Court and challenges the order criminalizing same-sex intercourse.[21] On February 2, 2016 a three-judge bench headed by the Chief Justice of India decided

[14] *NAZ Foundation v. Govt of NCT of Delhi,* p. 50; see also Abeyratne, R., and Sinha, N., op. cit., p. 75; see also *Suresh Kumar Koushal v. NAZ Foundation,* p. 126.

[15] *NAZ Foundation v. Govt of NCT of Delhi*, para. 130 and 131, p. 104.

[16] Khaitan, T., "Reading Swaraj into Article 15," in *Law Like Love: Queer Perspectives On The Law,* Arvind Narrain and Alok Gupta eds., pp. 287–288.

[17] Ibid.

[18] For instance, South Africa and America have a comparable constitutional framework like India, i.e., courts strike down laws incompatible with constitutional rights; see also Abeyratne, R., and Sinha, N., "Insular and Inconsistent: India's NAZ Foundation Judgment in Comparative Perspective," pp. 80–85.

[19] Article 145 (3) of the Indian Constitution.

[20] In January 2014 the review petition was rejected by the Supreme Court.

[21] A four-judge bench comprising Chief Justice P. Sathasivam and Justices R.M. Lodha, H.L. Dattu and S.J. Mukhopadhaya considered the plea for an open hearing of the curative petition.

to constitute a five-judge constitutional bench to reconsider the constitutionality of Section 377.

5.2 Judicial Discrimination: How the Verdict Erased Basic Rights

The weak judicial approach of the Court reflects the poor application of the theories of separation of powers, democracy and judicial self-restraint. The Court failed to take note of the fact that Section 377, although presumed to be constitutional, still needed to withstand constitutional scrutiny.[22] The Court's reasoning—that just because a law is capable of being misused, it should not be struck down—is easy to comprehend. However, this does not justify the unconstitutionally of Section 377. The provision can still be deemed as violative, mainly because misuse itself provides a sufficient ground to repeal it.

In the past, in applying the doctrine of strict scrutiny in *Anuj Garg v. Hotel Association of India*,[23] the Court struck down a protective discrimination provision in the Punjab Excise Act, 1914, which restricted women's rights to employment and equal treatment, thereby challenging the validity of the provision on the touchstone of Article 14, 15 and 19 of the Constitution. With respect to "personal autonomy" the Court in the said case held:

> Personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression. It falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.[24]

The Delhi High Court had given a positive effect to Article 15 of the Constitution by establishing a strict standard of scrutiny in discrimination cases, and held that discrimination causes harm and restricts individual autonomy.[25] The High Court even went a step forward to interpret the expression, "discrimination on the basis of sex" to include "sexual orientation" within the meaning to Article 15.[26] However, the Court, handling the same issue, certainly should have practiced deeper judicial scrutiny. Here, it is important to highlight the *Anuj Garg* case: "It is for the court to review that the majoritarian impulses rooted in moralistic tradition

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[22] Atrey, S., "Of Koushal v. Naz Foundation's Several Travesties: Discrimination and Democracy," Oxford Human Rights Hub, http://ohrh.law.ox.ac.uk/?p=3702 (accessed on August 5, 2015).

[23] *A.I.R. 2008 S.C. 663.*

[24] *Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1 (para 43–35);* see also *NALSA v. Union of India, (Civil) No. 604 of 2013, para. 69.*

[25] Atrey, S., op. cit.

[26] *NAZ Foundation v. Govt of NCT of Delhi,* op. cit.

do not impinge upon individual autonomy. This is indeed the backdrop of deeper judicial scrutiny world over."[27] Had the Court adopted such an approach, it would have earned a feather in cap especially with reference to its role in fundamental rights or human rights jurisprudence. Unfortunately, the Court left gay people to their own fate and destiny. Atrey rightly points out:

> By leaving it to the democratic procedures of the Parliament, the Court bypasses its own constitutional mandate of reinforcing democratic processes through judicial review. Instead it abdicates the essential role of adjudicating upon a breach of fundamental rights, especially in relation to a 'miniscule fraction of the country's population',[28] who have a right not be discriminated against on the basis of their sexual orientation.[29]

In other words, the judgment directed the minority to place their case before the majority, i.e., the Government or Parliament. This attitude of the Judiciary in itself is discriminatory. It seems the decision pertaining to "the rights of minority" cannot be decided by the majority. The majority deciding the fate of the minority appears to be barbaric and inhumane rather than democratic. Also, a legislative forum cannot be the appropriate sphere to decide a sensitive issue like this.[30] Logically, the Court's argument had no valid constitutional base.[31] In fact, the core of illogical reasoning of the Court can be found in paragraph 42 of the judgment, which states:

> Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 IPC suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

In the above paragraph, the Court speaks about an "ordinary course," which is in other words heterosexuality and penal-vaginal sex. It rejects every other kind of sexual act as "against the order of nature." But by showing these two classes of persons, the Court has somehow admitted that there is a class involved and it is for the Government to safeguard the rights, if any, of this class. It does not provide any justification for criminalizing this class of persons indulging in sexual intercourse "against the ordinary course."[32] Nor does it explain why Indian society is not ready

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[27] *Anuj Garg v. Hotel Association of India, A.I.R. 2008 S.C. 663, para. 39.*

[28] *Suresh Kumar Koushal v. NAZ Foundation,* op. cit., *para 43.*

[29] Atrey, S., op. cit.

[30] Bhatia, G. "The Unbearable Wrongness Of Koushal vs Naz," Indian Const. L. & Phil Blog, http://www.outlookindia.com/article/the-unbearable-wrongness-of-koushal-vs-naz/28823 (accessed on August 8, 2015).

[31] As Article 13 (2) of the Constitution specifically provides, "the state shall not make any law which takes away or abridges the rights conferred by Part III (fundamental rights) and any law made to that effect, to the extent of the contravention, be void.

[32] Bhatia, G., op. cit.

to withstand the Delhi High Court verdict.[33] In doing so, the Court has discriminated against gay people not only on the grounds of their sexual orientation but also in matters of their right to privacy, life, liberty, freedom of speech and expression. It has drastically failed to uphold the principle of equal respect and concern to all its citizens. In fact, all of these elements are crucial for the healthy personality development of an individual.

In addition, the Court has relied on the *Black's Law Dictionary* meanings. Showing distrust in academic research material, it relied on the dictionary meanings of words or expressions like "carnal," "carnal knowledge" and "nature."[34] The Court's approach thus appears to be homophobic and discriminatory. Its justifications only convey a strong message especially to the homosexual community that one can be homosexual but one cannot have a sexual preference or wish to love the person of his or her own choice. Through its judgment, the Court has exposed its extremely conservative view that heterosexuality is a norm and homosexuality is only an abnormality or disorder. Also, the Court's presumption of "unnatural sexual acts" is more attributed to homosexuals than to heterosexuals. In this way, the Court is caught up in its own understanding, misconception and prejudice pertaining to homosexuality.

In this regard, v Bondyopadhyay's[35] comments can help provide better education to the Judiciary pertaining to the term "natural" in the context of law.[36] He states that, historically, both law and society have considered some things "natural" based on the following premises:

- Customary law is derived from the premise, that what is historical in human society is natural. In other words, if it has happened for a long period of time, it must be the natural way things are. From Plato to Tom Daley, history is replete with homosexuals. Victorian England believed that there is no historical evidence of homosexuality and hence considered it as a modern vice.
- That what is found in nature is natural. Biological research shows that homosexuality is prevalent in animals ranging from tapeworms to elephants and blue whales.
- That what is expressly prohibited by religion is unnatural because in a secular country, law is based on the principles of equality, freedom and right. Religious principles cannot supersede the fundamental rights of citizens.
- The misconception that "the sexual act is only for procreation and not for recreation" does not hold good. For that matter, any sexual act that does not

[33]Gardner, C., op. cit.

[34]*Suresh Kumar Koushal v. NAZ Foundation*, op. cit.

[35]Aditya Bondyopadhyay is a lawyer and Director of Adhikaar, an LGBT organization based in Delhi, India.

[36]Bondyopadhyay's comments on Carl Gardner's article, "The Supreme Court of India and 'unnatural offences': a bad judicial reaction," HEADOFLEGAL, http://www.headoflegal.com/2013/12/13/the-supreme-court-of-india-and-unnatural- offences-a-bad-judicial-reaction/ (accessed on August 8, 2015).

lead to procreation is unnatural. Further, historical references to recreational sex are well documented. Even natural fauna is replete with recreational sex.

- And finally, if the principle of equality is to be applied, contraception cannot be allowed even for heterosexuals.

Furthermore, the foundational base of the law relating to unnatural offences is easier to understand in light of a reading of the colonial history of India. In 1825 Lord Thomas Babington Macaulay was entrusted the task of drafting law for the Indian colony.[37] He proposed two clauses relating to "Unnatural Offences":[38]

> Clause 361: Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a terms which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> And
>
> Clause 362: Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a terms which may extend to life and must not be less than seven years, and shall also be liable to fine.

The final draft of the Indian Penal Code came into effect in 1860 with a modified definition of "Unnatural Offences" (Section 377).[39]

The Court's Section 377 reasoning can be challenged not only on the above grounds but also in the light of its contradictory and landmark judgment of *NALSA v. Union of India* (also known as the third gender judgment). In this case, the Court, on a PIL, passed an order legally recognizing transgenders or *hijras* as a "third gender." According to this judgment, transgenders are free to choose either male or female gender. They are to be treated as a separate socially and economically backward class. They are now entitled to reservations in matters of education and employment. Through this judgment, transgenders have the right to form a family, adopt children, divorce, inherit property, etc.[40] The Court also directed the Centre and State Governments to take proper health measures to provide social welfare schemes and to create public awareness so that transgender persons can become a part of social life. It also directed that no person shall be forced to undergo a

[37]Gupta, A., "The Presumption of Sodomy," in *Law Like Love: Queer Perspectives On The Law* Arvind Narrain and Alok Gupta's eds., 2011, pp. 119–121.

[38]As per the report of the Indian Law Commission on the Penal Code, dated 14 October, 1837, pp. 3990–91. Also cited as fn. 28 in Gutpa, A., "The Presumption of Sodomy," p. 151.

[39]The definition was founded on the Latin principle contra natura ordirum habiut venereamet et carnaliter cognovit (carnal intercourse against the order of nature) as cited in Gupta, A. op. cit. fn. 31, p. 151.

[40]*NALSA v. Union of India, WP (Civil) No. 604 of 2013*. The Judgment was delivered in the Month of April 2014.

sex-change surgery to fit in the male or female gender and directed the Governments to implement its order within 6 months.[41] In this judgment[42]:

> [The Court] recognized that the principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms; . . . and that discrimination on the grounds of sexual orientation and gender identity violates fundamental rights. It held that the right to choose gender leads to public good . . . and stated to prevent the direct and indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.

The Court showed an understanding and knowledge of gender identity and sexual orientation. Although it acknowledged "other identified categories," it did not recognize them. The Court stated:[43]

> At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor 'transgender'. Etymologically, the term 'transgender' is derived from two words, namely 'trans' and 'gender'. Former is a Latin word which means 'across' or 'beyond'. The grammatical meaning of 'transgender', therefore, is across or beyond gender. This has come to be known as an umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender . . . Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category . . . Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures.

However, at this time, the Court restricted its understanding and reasoning only to the transgender community and further expressed:

> A Division Bench of this Court in *Suresh Kumar Koushal and another v. Naz Foundation* and others [(2014 1 SCC 10] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.[44]

The Court admitted that Section 377 has been used as a weapon to harass and abuse certain identities including transgendered persons/*hijras*. The expression "certain identities" would also include gays, lesbians, etc. The Court agreed that harassment and abuse is meted out to all the "certain identities," yet it did not admit that Section 377 violates fundamental rights of all these identities[45] and stated:

> Section 377 of the IPC found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between

[41] Ibid.

[42] Ibid., para. 59, 88 and 101.

[43] Ibid., para. 19, 20 and 107.

[44] Ibid., para. 18.

[45] Ibid., para. 110.

> persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices.[46]

In the judgment pertaining to Section 377, the Court treated gay people as a "miniscule minority," yet it expressed contradictory statements in its transgender judgment: "These Transgenders, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights."[47]

All of these rulings merely reveal the Court's contradictory and discriminatory reasoning. The Court has separated gender identity from sexual orientation, because in one judgment it criminalizes carnal intercourse, thus outlawing homosexuality, and in the other judgment it confers the right to choose gender identity. It could be stated that the Court has drastically failed to understand that the "gender identity" and "sexual orientation" of a person are closely linked, although both are diverse in their own way.

In my anthropological findings, I obtained sufficient evidence of how many transgender men in the past were either homosexuals or had identified themselves as homosexuals. In the aftermath of the transgender judgment, some gay men changed their gender to "third gender." Many gay men wish to have relationships with transgender persons and vice versa. Many transgenders do not want to undergo sex-change surgery. Even transgenders can have physical relationships with each other. In short, gender, identity and sexual orientation are diverse categories, changing with the pace of time. Therefore, the Court's understanding of gender and sexuality falls short of the lived realities of people, which I have elaborately put forth in the next chapter. The Court commented on "the limits of public knowledge and understanding of same-sex sexual orientation and people whose gender identity and expression are incongruent with their biological sex."[48] In fact, this very comment seems to apply more to the Court than to others. Hence, it is very important for the Court to look beyond the law in order to become informed of gender and sexuality.

With respect to the International Conventions, the Court has shown broader understanding,[49] especially of the Yogyakarta principles, and has maintained that international conventions consistent with fundamental rights must be read in accordance with the Constitution.[50] In addition, it has provided a detailed account of the Court's judicial activism on Article 21 of the Constitution.[51] Not to forget, in

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[46]Ibid., para. 51.

[47]Ibid., para. 123.

[48]Ibid., para. 111.

[49]It referred to various articles contained in the Universal Declaration of Human Rights, 1948; the International Covenant on Economic, Social and Cultural Rights, 1966 and the International Covenant on Civil and Political Rights, 1966; see *NALSA v. Union of India, para. 49.*

[50]The Court noted that India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization, see *NALSA v. Union of India, para. 51.*

[51]*NALSA v. Union of India, para. 94–96.*

Koushal's judgment, i.e., Section 377 verdict, the Court discarded the application of international conventions, foreign judgments and foreign legislations,[52] yet it has embraced all of the aforesaid in its transgender judgment.[53] The Court even went to the extent of referring to judgments of its neighboring countries like Nepal and Pakistan.[54] Choudhry has rightly addressed this approach of the Court as more particularistic rather than universalistic.[55] On the basis of the above analysis, it can be concluded that both the Koushal and transgender judgment are in conflict, which portrays the disagreement and uncertainty of the Judiciary on the subject of homosexuality and transsexuality. The Court should therefore begin practicing its art of judging with dynamism.

5.3 The Art of Judging

The new paradigm of judicial interpretation can provide a range of future positive potential to the Court. The Court needs to interpret the Constitution or law in the light of the needs and knowledge of lived experiences if it is to meet the changing social circumstances. In other words, the Constitution and law must be evaluated on the basis of rationality at the time of decision making. It is incorrect to assume that the framers of the Constitution or lawmakers wanted to impose their age-old interpretations upon the future generations,[56] as social conditions are fluid and prone to uncertainties.[57] The Judiciary should balance laws like Section 377 with reasonable adjustment and reconciliation, since there is always a possibility for adjudication and interpretation. In this regard, Justice Cardozo rightly declared:

> In situations where a material and substantial change of conditions have occurred, no injustice is done to the founding fathers of the Constitution, if the courts of a later day, instead of ascertaining the intent which these men voiced with respect to the meaning of a

[52]In NALSA Judgment the Court has referred legislations enacted by other Countries, viz., United Kingdom, Netherlands, Germany, Australia, Canada, Argentina, etc.

[53]Court referred to the following judgments: *Corbett v. Corbett(1970) 2 All ER 33, Attorney-General v. Otahuhu Family Court(1995) 1 NZLR 603, Re Kevin (Validity of Marriage of Transsexual) (2001) Fam CA 1074, Secretary, Department of Social Security v. "SRA", (1993) 43 FCR 299, McGuiness (1988) 17 NSWLR 158, A.B. v. Western Australia (2011) HCA 42, Christine Goodwin v. United Kingdom (Application No. 28957/95 – Judgment dated 11 th July, 2002), Van Kuck v. Germany (Application No. 35968/97 – Judgment dated 12.9.2003.*

[54]Nepal: Sunil Babu Pant & Ors. v. Nepal Government (Writ Petition No. 917 of 2007 decided on 21st December, 2007) and Pakistan: Dr. Mohammad Aslam Khaki & Anr. V. Senior Superintendent of Police (Operation) Rawalpindi & Ors. (Constitution Petition No. 43 of 2009) decided on 22nd March, 2011.

[55]Choudhry, S., "How to Do Comparative Constitutional Law in India: NAZ Foundation, Same-Sex Rights, and Dialogical Interpretation," pp. 11–14; see also Abeyratne, R., and Sinha, N., op. cit.

[56]Bodenheimer, E., *Jurisprudence: The Philosophy and Method of the Law*, p. 348.

[57]Ibid., p. 352.

> constitutional clause in their own day, attempt to determine the intent which these men would presumably have had if they had foreseen what our present conditions would be.[58]

Seen historically, the position of the common law towards the interpretation of statutes during the English medieval period is similar to the current legal system in India.[59] Laws were extended to situations which were not covered by the statutes. A judge was not bound to follow the words of the statute. According to Thorne, during this time statutes were viewed as "suggestions of policy" to be treated with an easy unconcern as to their precise content.[60] However, this force of statute by equity was later destroyed in England in the nineteenth century; the function of judges was determined by what Parliament stated in its enactment and to apply the statutory provisions to the case at hand. Free interpretation was thus curtailed.[61]

However, a rational lawmaker should be aware of the changing social conditions and attitudes and realize that the legislation should undergo changes to reflect modern times. He should also be aware of the fact that laws cannot be drafted with perfection such as to include all future unforeseen cases.[62] In addition, law-makers need to realize that they cannot acquire or claim an exclusive right to amend or to correct errors or inadequacies by fully abandoning the judiciary. Even if amendments or corrections are eventually made by the law-makers, the injustices done in the meantime by judges tied down to a literal interpretation of statutes will remain without redress. Hence, conferring limited powers to small correction upon the courts does not amount to the destruction of the normative system.[63]

In the new theory initiated by Bentham and concluded by Gray, "Judges produce law just as much as legislators do." Also, for Gray, judges make laws more decisively than legislators, mainly because statutes are interpreted by courts and judicial interpretations determine the true meaning of enactment more than the original text.[64] Gray states, "A fortiori, whoever hath an absolute authority not only to interpret the law, but to say what the law is, it is truly the law-giver."[65] Gray also supported the following propositions of Hoadly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes and not the person who first wrote or spoke them."[66]

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[58]Cardozo, B.N., *The Nature of the Judicial Process*, p. 83; see also Bodenheimer, E., *Jurisprudence: The Philosophy and Method of the Law,* p. 352.

[59]Bodenheimer, E., *Jurisprudence,* p. 358.

[60]Ibid.; see also Thorne, S.E., *A Discourse upon the Exposicion and Understanding of Statutes* (San Marino, CA, 1942).

[61]Bodenheimer, E., p. 359.

[62]Ibid., pp. 366–367.

[63]Ibid., p. 367.

[64]Ibid., p. 382.

[65]Mahajan, V.D., *Jurisprudence and Legal Theory*, p. 228; see also Prof. Gray, J.C., *Nature and Sources of the Law,* p. 122.

[66]Mahajan, V.D., p. 228.

It would not be incorrect to state that judges recognize exceptions to the applicability and operation of statutes. In such cases, they make new laws or make laws in accordance with the old laws; they may discover the exception in the true intent of the legislator in order to meet the demands of equity and justice.[67] What it means is that judging generally and essentially does not involve the judicial will, but a conscientious attempt to base a decision on formal and non-formal sources.[68] Law cannot see the social changes but courts can certainly look beyond the formal law. Habermas has rightly pointed out that modern society is marked by two processes: the everyday reality of the members of society and the economy and the state as subsystems with their own laws of functioning.[69] Although it is known that law reform should be the task of legislators, it would be too limited to not confer or extend such a power to the judiciary. There may be situations in which decisions of the court can be the only beneficial medium through which justice can be meted out to the neglected members of society, like gay people. "Even in countries where law is codified, judges not only declare but also make law."[70] Although the words "make" and "declare" seem to be synonymous, they are still different. The difference is only that of degree.[71] "Declaring involves a creative and intelligent process by which the rules are applied to particular cases; and, making does not mean that judges make law in the sense in which legislators make it but it only means that they develop, interpret and give life to the skeleton of law."[72] In other words, a judge should adapt the law to the changed circumstances, which in turn can boost the development of society as well as that of the law. In doing so, judges should remove or clarify ambiguities and wherever possible offer harmonious construction.

Although critics have pointed out the shortcomings of the legislative powers of the judges, it cannot be rejected outright that judges discover law on a particular point and declare it. In the words of Dicey, "The best part of the law of England is judge-made-law which consists of rules to be collected from the judgments of the courts. This portion of the law has not been created by Act of Parliament and is not recorded in the statute book. It is the work of the courts; it is recorded in the reports; it is, in short, the fruit of legislation."[73] Also Pollock, the distinguished English jurist, wrote: "No intelligent lawyer would at this day pretend that the decisions of the courts do not add to and alter law. The courts themselves, in the course of the reasons given for those decisions constantly and freely use language admitting that they do."[74]

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[67]Bodenheimer, E., op. cit, p. 383.

[68]Ibid., p. 386.

[69]Kaarlo, T., "On the Limits of Law," in eds. S. Panou, G. Bozonis, D. Georgas, P. Trappe, *Theory and Systems of Legal Philosophy*, p. 169.

[70]Mahajan, V.D., op. cit, p. 230.

[71]Ibid.

[72]Ibid., p. 231.

[73]Ibid., p. 227; see also Dicey, "Law and Public Opinion in England," 1905.

[74]Mahajan, V.D., p. 228.

As Willes stated, "When the nature of things changes, the rules of law must change too."[75] The courts should therefore change rules to keep the law in line with change. Further, when there is no rule of precedent, statute or custom, knowing the law means knowing how to create or discover a rule. A judge may simply create a rule out of broad principles or doctrines or out of his own sense of justice.[76] For instance, in *Corbett v. Corbett*[77] the Court in England was concerned with the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod observed that the law should adopt the chromosomal, gonadal and genital tests and if all three are congruent, that should determine a person's sex for the purpose of marriage.[78] In the absence of any law pertaining to transsexual people, the verdict served as the only authority until the coming into force of the Gender Recognition Act, 2004.

The liberal interpretation offered by the Supreme Court of Canada held that sexual orientation, though not explicitly specified in the Canadian Charter of Rights and Freedoms, was analogous to the prohibited unlawful grounds for discrimination.[79] Furthermore, mandating decriminalization in *Lawrence v. Texas,*[80] the U.S. Supreme Court overruled its own earlier decision in *Bowers v. Hardwick*[81] by ruling that adults of the same sex have a right to engage in intimate and consensual sexual acts.

Accommodating the non-conventional family forms, Justice L'Heureux-Dube observed, "It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and nontraditional family forms may equally advance true family values."[82] The Judiciary should realize that the acceptance of homosexuality and same-sex relationships creates per se no danger to social well-being. On the contrary, non-acceptance is dangerous to social well-being, as it leads to discrimination on the grounds of sex and race.[83] Therefore decriminalization is the first step towards legal recognition of same-sex relationships. In the words of Norrie:

> Decriminalization removes the primary justification for treating same-sex couples less favourably than opposite-sex couples. The criminal law creates a status of criminal and it is rational and indeed expected that the law will regard those with that status as less valued

[75] Dias, *Jurisprudence*, f.n. 17, p. 147.

[76] Ibid., p. 157.

[77] *(1970) 2 All ER 33.*

[78] See *NALSA Judgment*, para 25.

[79] *Egan v. Canada, (1995) 2 S.C.R. 513.*

[80] *539 U.S. 558 (2003).*

[81] *478 U.S. 186 (1986) [Bowers].*

[82] *Canada (Attorney General) v. Mossop, (1993) 1 SCR 554.*

[83] Norrie, "K.M. Marriage and Civil Partnership for Same-Sex Couples: The International Imperative," p. 259, http://www.jilir.org/docs/issues/volume_1/1_15_NORRIE_FINAL.pdf (accessed on August 25, 2015).

> members of society than those who are entirely innocent. Criminalizing behaviour that is characteristic of same-sex relationships therefore provides a firewall against claims for equal treatment, for the simple (if simplistic) reason that all legal systems, rightly, treat criminals less favourably than non-criminals.[84]

Each different step paves the way for the next. Hence, decriminalization follows anti-discrimination, which is sequentially followed by partnership or marriage legislation.[85] The Court can motivate or boost the social and political will towards the next level of development of LGBTI rights. For instance, by treating gay men engaging in homosexual activity as equal citizens and not criminals, they can hardly be denied civil rights. Thus, prohibition of discrimination on the ground of sexual orientation can be a step forward towards decriminalizing homosexuality.[86]

The creative or innovative judicial interpretation of statutes should correspond with the contemporary changing conditions, social as well as scientific. If the Court fails to do so, it will hinder legal development by making the law more static. The Judiciary should not leave the decisions concerning gay rights exclusively in the hands of national authorities like, for instance, the legislators or law-makers,[87] since minority or vulnerable groups are incapable of representing or placing their demands before the parliamentary channels where the majority prevails. In addition, most parliamentary debates abound with misconceptions and stereotypes about homosexuality and sexual orientation.[88] Hence it would be unfair or unjust to make gay couples wait longer for any substantive rights including marriage rights. In fact, marriage should be made more liberal and secular and less gendered and sexual.[89]

It is therefore correct to suggest that the Court should: give effect to the full equality concept; decriminalize homosexuality; direct the Legislature to include same-sex cohabitation in the existing rules on cohabitation; propose for partnership for same-sex couples; prohibit discrimination on the grounds of civil status and propose for making both marriage and partnership or civil union gender-neutral. This can help lessen future instances of discrimination among married and registered partners, married and unmarried/unregistered partners and registered and unregistered/unmarried partners.[90]

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[84]Ibid., p. 255.

[85]Waaldijk, K., "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe," p. 86.

[86]Ibid., pp. 86–87.

[87]Benvenisti, E., *Margin of Appreciation, Consensus and Universal Standards*, pp. 843–854.

[88]Bribosia, E., Rorive, I., & Eynde, Van de, "Same-Sex Marriage – Building an Argument before the European Court of Human Rights in the Light of the U.S. Experience," p. 20.

[89]Waaldijk, K., "Taking same-sex partnerships seriously: European experiences as British perspectives?," pp. 84–95.

[90]Ibid.

5.4 Conclusion

In conclusion, the Court being the final interpreter and guardian not only of the Constitution but also of the fundamental rights of the people, is known for its active role in safeguarding minority rights. Law declared by the Court is binding on all courts. However, the Court may in the proper case reverse its own previous decisions.[91] In other words, it is not bound by its past decisions. Hence, the Court forms the right authority for safeguarding the interests and rights of LGBTI people. Gradually it can play a vital role in bringing about pro-LGBTI reforms in India. Adopting a pro-LGBTI stance can also increase the likelihood that even countries violating LGBTI rights will eventually become pro-LGBTI.[92] Lastly, India has no specific law to protect the interests of LGBTI people. It is therefore the responsibility of the Court to prohibit discrimination by safeguarding the fundamental rights of the LGBTI people. The Court can indeed accomplish this task by having an open mind and open eye towards the problems and lived realities of LGBTI people in India.

[91]Pandey, J.N., *Constitutional Law of India*, pp. 406 and 437.

[92]Helfer, L., and E. Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT reforms in Europe, International organization," p. 105.

Chapter 6
Law Beyond the Law

6.1 Introduction

As discussed in previous chapters, in its December 2013 verdict on consensual sex in private between two adults the Supreme Court of India (henceforth "the Court") recriminalized homosexuality. Overturning the Delhi High Court's decision on the constitutionality of Section 377 of the Indian Penal Code, the Court found that the said section does not suffer from any constitutional infirmity. Nevertheless, the Court in its verdict opined that the competent legislature shall be free to consider the desirability and propriety of amending or deleting Section 377 from the statute book.[1] But this decision, as I have argued and continue to argue, is unconstitutional: There is a diversity of sexual preferences and homosexual sexual relations should be decriminalized and accepted based on the constitutional rights of gay men to privacy, to sexual identity, to personal freedom and to equal treatment, among others.

In this chapter I turn my attention to the "living law" approach put forth by Eugen Ehrlich and contend that it provides all the conceptual principles and tools to the judiciary necessary for legalizing homosexuality and recognizing same-sex unions in India. For Ehrlich, the law should take account of the changing social circumstances. It cannot remain static, but needs to progress and adapt itself to new circumstances. In making the law, the requirements of the present day society should be taken into consideration. Ehrlich's approach is underpinned here by the ethnographic research I conducted in India in light of the prevailing circumstances. Instead of beginning with an explication of Ehrlich's living law approach, I begin with the findings from my fieldwork and connect these to Ehrlich, as such an application illustrates the urgency or need for such a legal approach in India especially at the present time. A brief description of the historical, cross-cultural

[1] *NAZ foundation v. Govt. of NCT of Delhi*, 160 *Delhi Law Times 277,* see http://lobis.nic.in/dhc/APS/jugement/02-07-2009/APS02072009CW74552001.pdf (accessed on March 25, 2015).

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Y. Naik, *Homosexuality in the Jurisprudence of the Supreme Court of India*,
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background of same-sex sexual relations is provided to further reinforce fieldwork observations.

The ethnographic research I conducted in India—the bedrock and reference point of this entire chapter—supplies numerous descriptions of gay relationships and extra-familial kin ties challenging heteronormativity, patriarchy and hegemonic masculinity. It also tells about the power of the gay subculture to localize the commercialization of gay sex. It shows the undeniable presence of this subculture in India within the context of stark heterosexual moralities governed by Victorian ideals.

I attempt to demonstrate throughout this entire chapter, based on the results of my fieldwork, how gay culture, though marginalized, challenges patriarchy[2] and hegemonic masculinity by means of gay masculinity. One way patriarchy is challenged in particular is by the diverse, innovative forms of sexual relations in gay culture, which, I argue in light of Foucault, represent creative potential for new relationship possibilities among homosexuals and heterosexuals alike. Despite discrimination, stigma, suppression and oppression from heteronormative society, gay masculinity in India has not only survived, but is gaining momentum. The guise of gay masculinity has persistently enabled gay men to foster secret intimate relationships among themselves, thus challenging hegemonic masculinity. The presence of gay masculinity is largely unacknowledged in Indian society, including by the State and the Judiciary.

6.2 Ethnographic Research

The fieldwork presented here is the result of observation in India (from December 2012 to March 2013, December 2013 to September 2014 and November 2015 to December 2015) in which I accompanied activists across the country and conducted short research trips on my own in the major cities of India, e.g., Pondicherry, Goa, Mumbai, Delhi and Pune. My place of everyday engagement was Pondicherry, where I worked in collaboration with the Sahodaran Community-oriented Health Development Society (SCHOD), Pondicherry. SCHOD was founded in 1998 in Pondicherry, Tamil Nadu, India. The organization's objective is to work towards the improvement of health, social and legal situations pertaining to LGBTI and men having sex with men (MSM) in India.

[2]In this dissertation, patriarchy is understood as a social and ideological system which considers men to be superior to women and where men have more control over resources and decision making. It is historically constructed and appears differently in different contexts and at different times. See Bhasin, K., *Exploring Masculinity*, 2009, p. 8. The Khasis of Shillong and the Nayars on the Malabar Coast of southern India are known for their matrilineal family and kinship system.

6.2.1 Methodology

The methodology involved the use of various empirical research methods for the process of data collection: observation, interview and conversation.[3] In other terms, I applied descriptive methods to collect and analyze the data. Most of my target population was invisible, hence I had to rely upon a snowball sampling technique since systematic sampling was not possible.[4] The snowballing strategy worked quite well to make acquaintances: once I contacted SCHOD, I could easily get in touch with other organizations in India, since everyone I worked with in India was somehow linked to these organizations. My circle of acquaintances grew by simply conducting regular visits to SCHOD. I made many friendships and attended their meetings, awareness programs and support group meetings; I was also invited to join them in the evening at local clubs or restaurants. This regular connection with them helped me to pursue my fieldwork without much stress. To understand the dynamics of the gay cruising areas, I had to rely on mass observation for the purpose of data collection.

As a participant observer, I used a video recorder on a few special occasions. However, I refrained from using an audio recorder in casual conversations or in regular meetings. Most people, including myself, preferred to remain casual. Moreover, I wanted to respect their privacy and freedom. Instead, I kept a diary in my bag at all times, writing quickly in it everywhere I went. The diary formed the base from which I would formulate my field notes almost every day. It was only through the writing and reading of my field notes that this ethnographic narrative arose.[5]

6.2.2 Formal and Informal Interviews

I conducted formal and informal interviews with gay men, activists, support group members and public figures. These interviews were fully structured interviews inside the NGO centers, whereas outside the NGO Centers they were semi-structured or unstructured.[6] My interlocutors were more comfortable outside the NGO centers during personal interviews. Their tales were rich with incidents about their friends, families or first love stories. My structured interviews were personalized for each interviewee and usually focused on their comfort and compatibility.[7] The interviews and recording of life stories usually took place in my interlocutors'

[3]Chynoweth, P., "Advanced research methods in the built environment," pp. 111–120.

[4]Blommaert, J., and Jie, D., "Ethnographic Fieldwork: Beginner's Guide," pp. 62–65.

[5]Dave, N.N., *Queer Activism in India: A Story of Anthropology of Ethics*, pp. 21–26.

[6]Fife, W., "Doing Fieldwork Ethnographic Methods for Research in Developing Countries and Beyond," pp. 93–99.

[7]Ibid., pp. 25–26.

homes, in my home, on the beach side or in a pizzeria, as they suggested. This helped me to gather extensive data in the form of informal conversations. Most interlocutors at the NGO centers were natives of different parts of India.

I avoided the distribution of questionnaires during my interviews, because most of my target population in the beginning appeared to be reserved and non-cooperative. An audio recorder was used only in cases of structured interviews, especially with respect to the activists. I preferred to refrain from using an audio recorder with my interlocutors in day to day conversations. I attempted using audio equipment in the beginning only to realize that it was becoming too formal with no elaborate answers to my questions. I used a video recorder only on special occasions.

The ease of informal conversations produced a setting in which I could ask questions pertaining to private intimate relationships; they shared their lives with me only with the assurance of utmost confidentiality of the information they provided to me. Most preferred not to share their true identity due to fear of being discovered by their families, wives, friends and other known acquaintances from their locality. I respected their privacy. Some agreed to be photographed.

6.2.3 Targeted Groups

The information provided by the interlocutors, primarily gay men, helped to shed light on the mysteries of gay life in India. The identities of gay men are quite varied and hence cannot be compartmentalized. Research samples included gay men from lower, middle and upper middle classes; the men were bilingual or trilingual English speakers and had varying levels of education.[8] However, my fieldwork lacks attention to gay men in rural areas, because these areas have been marginalized by the activists, i.e., gay activism in India is limited to cities. Additionally, because of the dynamics of queer activism in India followed by the Court's judgment legalizing the "third gender" during the month of April 2014, my fieldwork to a lesser extent also involved *hijras* and transgendered persons.

6.3 Homosexual Social Practices Worldwide

Before analyzing the results of my fieldwork and placing them in the context of Ehrlich's living law approach, it is helpful to first establish a background of the diverse nature of sexual preferences on a global scale. To begin with, it must be stated that same-sex relations are not new to humankind. Such relationships have existed since the beginning of human civilization. An overview of same-sex

[8] Also, Hindi, Marathi and Tamil Speakers.

relations and social practices worldwide provides ample evidence regarding the age-old existence of homosexual love.[9] It is a common misconception that the only cause of homosexual practice is the absence of opposite sex. Homosexuality as a sporadic reality occurring among every race of humankind will be considered in the following.[10]

Such an understanding of same-sex preferences is essential, since I will ultimately, with the support of my ethnographic study, make the normative claim that in India homosexualsexual relations should be decriminalized and accepted based on the constitutional rights of gay men to privacy, to sexual identity, to personal freedom and to equal treatment, among others.

6.3.1 Examples of Homosexuality Across Time and Space

In North America homosexual customs have been observed among a great number of native tribes.[11] The American Indians, for instance, had *berdaches*—younger partners in male homosexual relationships. They were known for adopting female identities, clothing and occupations; they occasionally took men as sexual partners, who were described as husbands.[12] In Kodiak, Alaska, a girl-like son was dressed and reared as a girl by his parents, teaching him only domestic work and letting him associate only with women and girls. Additionally, homosexual love is also reported as common in Hawaii.[13]

In Eurasia a similar practice was prevalent among the Chukchi, who live on the Chukotka Peninsula located on the northeastern border of Russia. A Chukchi adopts a woman's attire, lets his hair grow and devotes himself altogether to female occupation. The *shaman*, or priest, at the age of ten to fifteen years, was married to rich men and was then called *achunuchik* or *shoopan*.[14] Further, he takes a husband and does all the work which is usually performed by the wife. Thus, a husband becomes a wife, while the wife becomes a husband. This practice of changing gender roles was strongly encouraged by the shamans, who interpreted such cases as an incarnation of their deity.[15] Similarly, sex and gender changing

[9]Main Source: Westermarck, E., "Homosexual love," in ed. Calverton, V.F., *The Making of Man – An Outline of Anthropology*, pp. 529–564.

[10]Ibid.; see Fn. 2, p. 555 (The statement that it is unknown among certain people cannot reasonably mean that it may not be practiced in secret).

[11]Ibid., p. 529.

[12]Reddy, G., *With Respect to Sex: Negotiating Hijra Identity of South India*, p. 310; see also Nanda, S., *Neither Man nor Woman: The Hijra of Indi*a, p. 186; see also Weston, K., *Families We Choose*, pp. 351–352.

[13]Westermarck, E., op. cit.

[14]Ibid., p. 530; see also footnote 6, p. 556 – (Davydow, quoted by Holmberg, "*Ethnographische Skizzen ueber die voelker der russichen Amerika,*" in *Acta Soc. Scientiarum Fennica*, iv, p. 400).

[15]Westermarck, E., p. 530.

roles between man and woman are found among many other Siberian tribes.[16] Among the Koriaks (related to the Chukchi) male concubines had even occupied positions as magicians and interpreters of dreams. They wore women's dresses and did women's work.[17]

In Oceania among the natives of the Kimberley District in West Australia, if a young man on reaching a marriageable age could find no wife, he was presented with a boy-wife, known as a *chookadoo*. And in this case, the husband must also avoid his mother-in-law, just as if he was married to a woman. In New Guinea and parts of the island Melanesia, there are fully institutionalized boys' initiation rites. After leaving his mother's hut at age twelve to thirteen to take up residence in the men's house, a boy enters into a homosexual relationship with his mother's brother, who belongs to a different lineage from his own. The relationship endures roughly seven years, until the boy marries.[18] All males are compelled to participate in these practices provided partners are chosen in conformity with exogamy rules (extended incest taboos); participation is not stigmatized but approved. Although some men never marry, most do, and eventually become exclusively heterosexual.[19] The homosexual practices are justified by the belief that a boy will not mature physically unless semen is implanted in his body by an adult. Heterosexual intercourse is considered as physically weakening their vitality. If a man were to give all his semen to a woman, she would grow stronger than him and dominate him. The practices are concealed from women. The Sambian tribes of New Guinea make a similar claim about their homosexuality.[20] Homosexual love is also reported as common among the Marshall Islanders,[21] and homosexual relations have been commonly observed among the Bataks of Sumatra (there was no punishment for it) and in Bali. In Africa, Madagascar in particular, there were certain boys who lived like women and had intercourse with men, paying those men who please them.[22]

The East African Masai also did not punish sodomy.[23] And in South America in ancient Peru, boys were kept as priests in the temples, with whom it was rumored that the lords joined in company on days of festivity.[24]

Moreover, feminine men have also been observed among the Ondonga in Namibia, the Diakite-Sarracolese in the Mali, Banaka and Bapuku in the Cameroons, Zanzibar, North Africa, Egypt, among the Jbala inhabiting the Northern

[16]Ibid., p. 530; see also footnote 8, p. 556 – (Jochelson, K., *Religion and Myth*, pp. 52, 53, fn. 3).

[17]Westermarck, E., op. cit., p. 530.

[18]Greenberg, D.F., *Construction of Homosexuality*, p. 27–28.

[19]Ibid., p. 27–28.

[20]Herdt, G., *The Sambia: Ritual, Sexuality and Change in Papua Guinea* (Case Studies in Cultural Anthropology), 2005.

[21]Westermarck, E., op. cit., p. 531.

[22]Ibid., p. 531–532.

[23]Ibid., see also footnote 129 – (*Merker, Die Masai*, p. 208, p. 561).

[24]Westermarck, E., *Homosexual love*, p. 542.

mountains of Morocco, Asia Minor and Mesopotamia, Tartars and Karatchai of the Caucasus, the Persians, Sikhs, Afghans, Greeks, Muhammedans of India, among the Celts, Scandinavians and Albanians.[25]

Homosexual practices were also commonly reported among women. Among the American aborigines there were women who behaved like men. In certain Brazilian tribes there were women who behaved like men, abstained from men, wore their hair in a masculine fashion, and went to war and hunted together with men. Each of these women had a woman who served her and with whom she said she was married; they lived together as husband and wife. There are also among the Eastern Eskimo some women who refuse to accept husbands. Homosexual practices are also commonly observed among the women of Hottentot, Herero, Bali and India.[26] Thus, it is evident from the examples above that diverse forms of relationships and sexual preferences can be traced across space and time.

6.3.2 Homosexuality Under Christianity

A number of scholars have pointed out that Western societies have been historically more repressive towards homosexuality than the indigenous societies of Asia, Africa and the Americas.[27] In the *Construction of Homosexuality* Greenberg in particular writes about the history of homosexuality as an offence in various countries. He finds that when Christianity became the religion of the Roman Empire, a torturous crusade was opened against homosexuality, thereby making it a capital crime punishable with the sword or even burning alive. This attitude towards homosexuality had a profound and lasting impact on European legislation. Throughout the Middle Ages and later, Christian law-givers thought that nothing but a painful death in flames could be the only option for this sinful act. In England and France offenders were burnt alive. Thus, excessive sinfulness was attached to homosexual love by Zoroastrianism, Hebraism and Christianity, which in turn led to the unique foundation of criminalizing homosexuality. Such an attitude was obviously in stark contrast to ancient times, when some men in almost every part of the world dressed themselves in women's clothes, performed the functions of women and lived with other men as their partners or wives; this attitude was also in extreme opposition to the one in ancient Greece in which same-sex relations were not punished at all; no inquiries were made into the friendship or relationship between a youth and a man and the union was praised as the highest and purest form of love.[28]

[25] Ibid.

[26] Ibid.

[27] Greenberg, D., *Construction of Homosexuality*, p. 12.

[28] Ibid., pp. 176, 177, 180, 181, 188, 156.

It is not wrong to claim that although the mode of homosexual intercourse or relations differed from tribe to tribe, or maybe even appeared to be perverted or unnatural, homosexuality in most societies (e.g., India, China, Japan and ancient Arabic society) was not actively punished. Here, an old Sanskrit saying comes to mind: "*Virukti Evam Prakriti,*"[29] which means "what is unnatural is natural" or "perversity is diversity." It is, therefore, rightly pointed out by a number of scholars that Western societies have been more repressive towards homosexuality than the indigenous societies of Asia, Africa and the Americas.[30] In the terms of Becker, it seems homosexual behavior was labeled especially "deviant" in the rise of Christianity. Concerning the nature of deviance, Becker elaborates:

> Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has successfully been applied; hence deviant behaviour is behaviour that people so label.[31]

But what led to this new label "deviant" for homosexuality in particular? For an answer, one could turn to Foucault, who, though speaking mainly of changes in the sixteenth, seventeenth and eighteenth centuries, puts forward an answer to this question that is still relevant. For Foucault, to understand why exactly homosexuality "became a problem," the history of friendship between men must be considered. He states:

> We see the rise of it [homosexuality] as a problem with the police, within the justice system, and so on. The reason it appeared as a problem, as a social issue, is that friendship had disappeared. As long as friendship was something important, was socially accepted, nobody realized men had sex together. It just didn't matter. It had no social implication, it was culturally accepted. Whether they had sex together or kissed, had no importance. Once friendship disappeared as a culturally accepted relation, the issue arose: 'What is going on between men?'[32]

For Foucault, it was only when friendship as a social relation began to disappear, due to substantial social changes, that homosexuality became "deviant." His understanding of the history of friendship thus coincides with the ideas presented above concerning changes in perceptions of homosexuality and the influence of Christianity. In summary, despite the cross-cultural and historical presence of homosexuality, it has been and is still being subject to punishment in many places. The most likely source of the view of homosexuality as "deviant" seems to be connected to

[29]Rigveda, one of the canonical sacred text of Hinduism says "*Virukti Evam Prakriti*".

[30]Greenberg, D., op. cit., p. 12.

[31]Greenberg, D., op. cit., p. 2–3.

[32]Foucault's interview on "Sex, Power, and the Politics of Identity" was conducted by B. Galiagher and A. Wilson in Toronto in June 1982. It appeared in *The Advocate 400* (7th August 1984), p. 171.

Christian ideology: homosexuality undermines Christian values.[33] Also promoted by Christian ideology was the expression of "manliness" or masculinity. The historian Kuefler writes about how the Christian ideology "offered assurance to its followers that they might find manliness and an escape from their worries of unmanliness in accepting the demands of the Christian religion."[34] Though this passage reflects a general unease associated with unmanliness across space and time, it also points to one of the primary reasons for the "explosion" of masculine ideals in patriarchal societies. The perpetuation of such ideals is obviously still evident—and, as I will show in the following, especially in India, where effeminate attitudes are far from acceptance.

6.4 Masculinity in a Hetero-Normative Society

For Goffman in his classic text *The Presentation of Self in Everyday Life* identity is a "dramatic effect": the self is performed in everyday life in the presence of others.[35] As Goffman writes, "When an individual plays a part he implicitly requests his observers to take seriously the impression that is fostered before them."[36] If identity is, as stated by Goffman, indeed a dramatic effect, then this drama provides less scope for men to perform cross-gender roles than women, since men are always expected to be masculine or manly. This is because we play the roles, in a sense unconsciously, that others are ready to accept in order to avoid humiliation or embarrassment. In everyday life, men are expected to "perform" bravely or strongly: they are subject to the stereotyping that prevails in a patriarchal society, which discourages them from being emotional, caring, tender, delicate, weak and fearful. They are also ridiculed for not being masculine or aggressive or for being too feminine.[37] A macho man's image is admired by most. The effeminate identity of a man is always looked down upon, yet female masculinity in hetero-normative society is largely tolerated, and in many cases masculine attributes in females are even fostered.

[33]Though many scholars claim this was a misreading of scripture. See Boswell, J., *Christianity, Social Tolerance, and Homosexuality* (1980).

[34]Kuefler, M., *The Manly Eunuch: Masculinity, Gender Ambiguity, and Christian Ideology in Late Antiquity*, p. 2.

[35]Goffmann, E., *The Presentation of Self in Everyday Life*, p. 28; see also Clarke, S., "Culture and Identity," p. 511.

[36]Goffmann, E., p. 28.

[37]Feminine is supposed to be intuitive, emotional, receptive and compassionate; and feminine nature is viewed to be made up of love and wisdom. See Bhasin, K., *Exploring Masculinity*, p. 13–14.

In most societies, hegemonic[38] masculinity[39] is the norm and a root cause for all the problems pertaining to the discourses on identity, sexuality and gender.[40] This kind of masculinity is about exercising power over others. It contains the elements of control, dominance, submission and orders. For that matter, masculinity is all about being powerful and femininity about being powerless. Those who fight are masculine and those who submit are feminine. Unfortunately, till today, as will be discussed in the proceeding sections, it is only the masculine identity—with its ideal attributes (e.g., brave, strong, etc.)—that has gained acceptance. Feminine identity (e.g., typically perceived as weak, small, etc.) is still a disgrace. Most societies and cultures imagine the world to be masculine. Femininity as imagination has been less central to the construction of human identity.[41]

6.4.1 Assuming Gender Roles of the Opposite Sex

Men's choice to perform effeminate roles is viewed as a perversion or unmanly, whereas women's choice to perform masculine roles is often considered as a sign of empowerment. A man has to be a man. If he withdraws from being a man, he is stigmatized. Hence, he has to live and die as a man. He cannot be something else. Unmanliness makes him "gay." On the other hand, a woman always remains a woman whether lesbian or straight. In recent years, women have slowly started gaining privileged positions on a par with men.[42]

Masculinity is never static, it changes; according to Kamla Bhasin, it is "only the form, presentation or packaging of masculinity [which] changes."[43] Though masculinity is subject to culture and in this sense shapeable, the underlying and reinforcing "male power" or masculine ideology does not change. The question quickly becomes whether the main stay of masculinity is in fact biologically determined. The British feminist Ann Oakley fittingly asserts, "To be a man or woman, a boy or girl, is as much a function of dress, gesture, occupation, social

[38]Hegemonic means all-encompassing leadership or dominance. Hegemonic masculinity is therefore overpowering masculinity.

[39]In gender studies, hegemonic masculinity is a concept popularized by sociologist R.W. Connell of proposed practices that promote the dominant social position of men and the subordinate social position of women. Masculine means having qualities or appearances traditionally associated with men; that is, masculinity has to do with particular traits and qualities rather than with biology. *Collin's Thesaurus* has the following equivalents for masculine: "male, manful, manlike, manly, mannish, virile, bold brave, butch, gallant, hardy, macho, muscular, powerful, red-blooded, resolute, robust, stout-hearted, strapping strong, vigorous, well built." Masculinity is a social definition given to men by societies; like gender, it is a social construct; see Connell, R.W., *Masculinities*, 1995; see also Bhasin, K., *Exploring Masculinity*, p. 6.

[40]Clarke, S., *Culture and Identity*, p. 510.

[41]Clarke, S., op. cit., p. 511.

[42]Gidden, A., *Modernity and Self-Identity: Self and Society in the Late Modern Age,* p. 528.

[43]Bhasin, K., op. cit., p. 298.

network and personality as it is of possessing a particular set of genitals."[44] In other words, masculinity (as well as femininity for that matter) is not biological but a social construct. This idea will be taken up multiple times throughout this thesis and seen through the lens of Judith Butler and Foucault.

It is true that the feminist movement helped women to achieve "equality," but in reality this equality provided a platform for women to compete with men. In this entire endeavor, women tried to imitate and become like men. Concealing their true nature, women wore a mask of masculinity. This is especially true in India. For instance, today in India most educated lower, middle and even upper class women wear men's outfits like shirts or jeans, yet we hardly see men wearing skirts or sarees.[45] While men performing "feminine work," or even men behaving or acting in a feminine way, incites laughter from the public, manliness in a woman is appreciated as a sign of empowerment. Further, Indian women are forced to accept that masculinity is something higher or superior to femininity. Several women have learnt to live and die with this truth. *"Haaton Mai Chudiya Peheni Hai Kya?"* (Have you worn bangles on your hands?) is a common Hindi expression often directed as a taunt towards men by women when men fail to perform manly tasks. This shows that women accept themselves as "second class" in comparison with men. Indeed, this thought, driven by an inferiority complex, has become a permanent mental construction for most women in India. There are hardly any girls or women who would wish to have a feminine husband. In case she has one, in most circumstances he is forced upon her either by her parents or family members. On the contrary, men usually have less problems with masculine wives. For most Indians, masculinity is accepted, while femininity is often problematic. Moreover, both masculinity or masculine identity and femininity or female identity are considered as natural and divine creations. Genders are viewed as natural, biological and destined by god. Like gender, sexuality is something natural with which one is born. Therefore, the social, historical and cultural construction of identity remains far beyond imagination.

6.4.2 Performing Masculinity

Judith Butler introduced the idea of gender as performative rather than given. According to Butler, sex, gender and sexuality are socially and historically constructed, mainly devised through the power of discourse and repetitive acts of performativity. Unlike the earlier social constructionists' writings who tried to separate sex, gender and sexuality, Butler combined these discrete categories as a crucial source of human existence. She asserted that these categories cannot be understood independently, because each is interrelated or interconnected with/by

[44]Oakley, A., *Sex, Gender and Society*, p. 158.

[45]A saree is a South Asian female garment that consists of a drape varying from five to nine yards, typically wrapped around the waist, with one end draped over the shoulder, baring the midriff, see Lynton, L., *The Sari*, New York: Harry N. Abrams, Incorporated, 1995.

the others.[46] Additionally—similar to Foucault's view that identity is a process always under construction[47]– Butler states that identity is "a term in process, a becoming, a constructing that cannot rightfully be said to originate or end . . . it is open to intervention and resignification."[48]

While the notion of gender as performative has no doubt empowered the lesbian and women's movement in the West, it has not been much help to women in India. It is only to a limited extent that the feminist movement has been successful in mainstreaming gender concerns. Corresponding changes have not taken place in men's lives. Generally stated, they have resisted change, sometimes even with violence.[49] In other words, men are still men. Instead of questioning the notion of gender in general, women have assumed male roles, thus exemplifying masculine ideals. At the same time, though, in many situations they are still stuck in their traditional "feminine" role. Moreover, Butler asserts, "The cultural matrix through which gender identity has become intelligible, requires that certain kinds of 'identities' cannot 'exist'—that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from either sex or gender."[50] And this description of the intelligibility of gender identity holds true especially in India, where categories such as effeminate male, gay, transgender and the like are still considered unacceptable, as either weak or abnormal.

Focusing on lesbian identity, and playing with Butler's concepts, Callis further states:

> One can be a feminine, woman-bodied heterosexual. This is an identity that is easily socially and culturally understood and accepted. However, to attempt to mix this up, and be a masculine, woman-bodied heterosexual, or a feminine, woman-bodied homosexual, is to present a gender that is incompatible to the mainstream culture.[51]

Applying the same logic with respect to gay men, it could possibly be argued that one can be a masculine, man-bodied heterosexual; however, one cannot attempt to be a feminine, man-bodied heterosexual or a masculine, man-bodied homosexual, because all ways of being are in opposition to the mainstream culture. Hence, sexual or gender identity is just another regulatory ideal that we are required to live up to by society.[52] Far from being a biological given, "sex is an idealized construct that is forcibly materialized through time."[53] For instance, in India, male and

[46]Butler, J., *Gender Trouble*, p. 23. See also Callis, A. S., "Playing with Butler and Foucault: Bisexuality and Queer Theory," p. 226, http://blogs.enap.unam.mx/asignatura/adriana_raggi/wpcontent/upload/2013/12/Playing-with-Butler-and Foucault-and-Queer-Theory.pdf/ (accessed on June 1, 2015).

[47]See also Hall, S., "Who needs 'Identity'," from du Gay P., Evans, J. and Redman, P (eds), *Identity: A Reader*, p. 17.

[48]Butler, J., op. cit., p. 43.

[49]Bhasin, K., *Exploring Masculinity*, p. 1–2.

[50]Butler, J., *Gender Trouble*, p. 23.

[51]Callis, A.S., "Playing with Butler and Foucault," p. 227.

[52]Butler, J., *Bodies that Matter: On the Discursive Limits of 'Sex'*, p. 1.

[53]Ibid.

female *hijra*/transgender change their gender when they became *hijra*/transgender, but their gender identity remains the same. Socially, they are neither accepted as female nor male.[54] Which means, by ignoring alternate possibilities, masculinity has been persistently perceived to be a static social norm, therefore strengthening the dominance of "male power." (Although a "third gender" has been recognized as a class by the Court through its judgment delivered in April 2014.)

The omnipresence of hegemonic masculinity, and its inherent conflict with femininity, was obvious in my social anthropological findings; concrete examples of the different variations of this conflict in Indian society are demonstrated in the proceeding sections. The abuse or violence inflicted upon gay men in this form is indeed a reflection of negative "male power," a mirror image of negative masculinity. It is only the notion or appearance of masculinity that changes. Being gay or straight, hence, does not change the "male power"; the masculine ideology remains the same, as only the mode of dominance changes.

6.4.3 Masculinity and Femininity Among Gay Men

The masculine ideology is so deeply implanted in Indian society that its impact can be witnessed not only on women but even on the marginalized masculinities like gay masculinity. Feminine gay men who cannot live up to the notion of masculinity are ridiculed by other gay men. They are at times sexually exploited by stronger men.[55] Even gay men employ masculine identity to construct the notion of acceptable or non-acceptable behavior, which guides their partner choices later for sexual or intimate relations.

The traditional Indian terms for gay men like *kothi* (passive partner in sex) and *panthi* (active partner in sex) have become outdated. Such terms are more in usage among the *hijra*/transgender community or gay men belonging to the lower strata. The majority of educated or middle class gay men do not prefer to be addressed as *kothi* or *panthi*. For them, these terms are replaced by the western terms "top" and "bottom." "Top" represents the active, penetrating partner, whereas "bottom" represents the passive or receptive partner. In addition, synonymous terms like "active," "passive" and "versatile" (those active as well as passive in sex) are also common in usage on gay chat websites.[56] Such terms, largely promoted by the gay chat websites, have immense impact not only on the Indian gay men but also on the gay community worldwide. Globally, gay men connect or associate with each other using these terms. In spite of the top-bottom or active-passive sexual identities among gay men, many of them do not want to be addressed as "gay." Most,

[54]Nanda, S., *Neither Man nor Woman: The Hijra of India*, 1999.

[55]Bhasin, K., *Exploring Masculinity*, pp. 8, 61–62.

[56]See Campbell, J. E., *Getting It on Online: Cyberspace, Gay Male Sexuality, and Embodied Identity*, 2004; See also Kozinets, R.V., *Netnography: Doing Ethnographic Research Online*, 2010.

including feminine gay men, identify or introduce themselves to other men as a "straight acting man."[57] "Straight acting" to them means that they act in a manly way, or as a hetero-man. Many do not accept themselves as part of the gay community. Hence, use of terms like gay, *panthi*, *kothi*, top or bottom and active or passive, although common to all, have become more subjective. One can often read such texts even on gay chat websites like:

A: "I am a straight acting man, 34 years old, discrete and totally out of the gay scene." (Retrieved from gay chat website, May 23, 2014)[58]

During my interviews with gay men, I came across men who preferred and searched for partners who are non-feminine. For most, being sissy, girly or feminine was a turn off. Even some feminine gay men with whom I interacted introduced themselves as being straight acting and manly. Both the macho and feminine gay men showed extreme dislike and hatred towards feminine gays to the extent that they avoided introducing a feminine gay man to their families. Although terms like *kothi*, *panthi*, top and bottom represent the sexual identity of a gay man, these terms are now closely associated with their personal identity.[59] A feminine gay man has less chances to succeed in getting a partner than a macho or muscular gay man. Again, in this regard, one could read several offensive texts on the gay chat websites:

*B: "Hi, I am a 28 years gay, straight man, open for sex or relationship……. Sissy, queen and Feminine gays f**k off."* (Retrieved from gay chat website, May 23, 2014)

C: "Looking for only hot manly guys. Sissy, girly guys excuse please." (Retrieved from gay chat website, May 23, 2014)

D: "Like anyone else, I have my flaws. I believe in rights, freedom and all but I am still not confident enough of myself to comfortably date or fall in love with effeminate guys. My apologies to them. You deserve much better." (Retrieved from gay chat website, May 23, 2014)

There is an immense pressure on most gay men, whether single or married, to be accepted by other men when it comes to developing sexual encounters or relationships. Therefore, they usually prefer to introduce themselves as "straight acting men."[60] In most cases, straight acting men develop contacts with feminine gay men only for the purpose of sexual intimacy. In all of the above instances, the

[57] See Miskolci, Richard, *Machos and brothers*, p. 1–10.

[58] For privacy reasons anonymity of profile users has been maintained.

[59] With respect to the sexual behavior, "bottoms" usually prefer "tops" and vice versa. Usually, a bottom gay man will not prefer to have sex with a bottom man or a top gay man will not prefer to have sex with a top. However, there are exceptions. For instance, there is another category of sexual behavior, viz., "versatile," which means sexually one can be both top as well as bottom. In addition, some straight acting gay men do specifically look for bottom or feminine men or even cross-dressers or transgenders/*hijras*. For that matter, even two bottom gay men or two top gay men are sexually compatible with each other. I have come across diverse sexual tastes or preferences among gay men and hence there cannot be a single universal or uniform norm.

[60] See Greenberg, D., op. cit., pp. 308–309.

importance of "masculinity" or "male power" is expressed by gay men and those without such "attributes" are excluded. The power of masculinity is directed against feminine gay men. Under all circumstances, the female image is considered as something low and shameworthy. Thus, the virus of "femmephobia" injected by hegemonic masculinity is deeply rooted even among the Indian gay men.

6.4.4 Gay in the Information Age

The internet in particular has helped both married and single gay men to fasten sexual contacts and also to be able to socialize. Gay chat websites provide a platform for developing contacts and arranging meetings, gatherings and private parties. Most of these contacts are discrete. Often when such men chat via gay chat websites, their profiles are without any face photographs. One sees only pictures of nature, pets, flowers, graffiti, film actors or quotes in these profiles and genitals. Utmost care is taken so that the personal identity is not revealed to other men. Finding a place for sex is very difficult for most. A condition to arrange a place is always a prerequisite. Most gay men look for random sex-dates. One night stands are very common. As mentioned in the preceding section, they introduce themselves, and search for partners that are known as "straight acting" and "not part of the gay scene"; they create a closet relationship, trying to keep their heterosexual status while also having a sexual or committed love relationship with other men.[61] Closeted gay men are usually homophobic. The reason for this phobia is their fear of disclosing their gay identity. Some open gays do disclose their true pictures on the chat websites but many don't. The men who display self-images on chat websites are usually open and confident about their identity as gay. Hence closeted gays are either rejected or considered as cowards. Hatred is often expressed by gay men towards each other on the chats. Use of abusive language, arrogance and disrespect towards elderly and feminine gays are also very common.

An engineer, who had been married for the last five years, dated guys for sex during his free time. When asking him how he could indulge in sex while being heterosexually married, he questioned me back, with a smile on his face, as follows:

D1: "Can you eat only rice every day? You need to have many other dishes along with rice. Isn't it that simple?" (Interview with interlocutor, February 14, 2013)

It is mainly because of this attitude that the majority of single gay men dislike or even hate married and bisexual men. Such men, according to them, lead an unfaithful double life. Married gay men often hide their marital status. Being married provides less chances for sexual encounters or even for gaining normal contacts. Most married gay men do not reveal their activities due to fear of causing trouble in their marital life. In general, discrete contacts are always appreciated. A

[61] See Miskolci, R., op. cit., p. 1–10.

genuine introduction happens only when there is a necessity and the other person is trusted. Therefore, name, work, profession, place or contact addresses are never disclosed in the beginning. Even mobile numbers are not exchanged, and the sharing of landline numbers is out of the question. Some even have two mobile handsets: one for official purposes and the other for private use.

Men seeking partners for relationships prefer those who are financially independent. Hence, profession, work and financial stability are thoroughly inquired before indulging in a relationship or any other commitment. Caste or class does boost status. In fact, for most gay men, class status in society is very crucial. Although sexual relationships may develop among gay men beyond the boundaries of religion and caste, class does matter. Some gay men, whether single or married, search for decent guys with a good family background. Under such circumstances, class status becomes a very crucial factor. Decency is determined on the basis of family status, financial stability and good character without any vices. Although nobody expressly mentions it, this fact is like an open secret among gay men. Religion and caste can be compromised but not class. Again, it depends on a case-by-case basis. But for some, decency or decent contacts also means dating guys without sex or just meeting for a tea or coffee. One of my interlocutor from the medical fraternity with whom I had interacted told me that although he is a good-looking guy, he was rejected by many for not being a well-established doctor. Finally, he succumbed to marital pressure and was forced by his parents and relatives to marry heterosexually. He expressed this as:

E: "To find my soul mate I searched and travelled in different locations from all over India. I went to Kolkata, Mumbai, Madhya Pradesh and Bangalore, but I could not find a proper match." (Conversation with interlocutor, February 14, 2013)

Also, considering the prevailing circumstances (i.e., recriminalized homosexuality), the majority of gay men (single/married) are in an open relationship. To be in an open relationship means being together emotionally while having regular or multiple sex partners. On the contrary, closed relationships require monogamy. Open relationships generally happen among gay couples when they are not able to live together, are not in the same city or do not see a chance of living together in the future. Even in the case of heterosexual couples, with more women working away from home, one cannot rule out the possibility of married men having sex outside marriage since they cannot have regular sex in the absence of their wives. Hence, the reasons could almost be the same whether gay or straight. Further, in an open relationship both partners are fully aware of each other's multiple sexual encounters. In fact such relationships are mostly consented to by both partners.

In contrast, there are long-term monogamous couples even among gay men. Sex is not the only priority for such men. They even aspire to expand their family by adopting children. However, lack of security and legal recognition have the capacity to restrict many gay relationships to sexual encounters only. Most do not look for a life partner, but prefer to be in a committed friendship. Seeking a stable monogamous relationship is a dream come true for many. They find it hard to be in a faithful and trustworthy relationship.

Furthermore, on the other side, I came across some gay men who acted as guides or escorts to foreign gay tourists. They usually traveled with these foreign tourists. These travels provided them with sex, money and stays in luxury hotels, which served as a temporary refuge from their homes. Most of the time, such contacts culminated into friendship inclusive of sex for monetary benefits or even into a platonic friendship. I met one such 24-year-old gay man who narrated his experience in the following words:

F: "I meet nearly 30 to 40 foreign gays in a year and I cannot remember all of them. Certainly some are good friends who have helped me to get my house renovated. A French guy who has been a friend of mine since long provided me with a Hero Honda bike last year. Now, I want to arrange my sister's marriage." (Conversation with interlocutor, March 11, 2013)

This man knew that he would be forced to marry a woman in the near future, which is why he chose foreigners: Everything remains secret and hidden with foreigners, since they are not local. Such gay men are more comfortable with foreign men. In addition, both heterosexual and gay men may act as money seekers. I also interviewed foreign tourists (gay men) who did not hold a positive opinion about Indian gays:

G: "Some guys demanded money, whereas others didn't. But from their speech about family matters and financial problems, I felt that they expected money from me. Gay men who wanted to be with me in a relationship were only there because they wanted to explore their freedom. In fact, they wanted the freedom of the West mainly to explore and experiment with their sexual fantasies or desires. Either way they wanted to profit sooner or later." (Interview with interlocutor, March 20, 2013)

H: "I have been visiting India since 1973 and more frequently since 2001. Indian gays are good and friendly, but some have demanded money from me under one or the other pretext and never responded back." (Interview with interlocutor, March 20, 2013)

I: "As I told you, Indian guys only want sex . . . then they say goodbye. They like my muscular body and they just love to have sex . . . but when I have had them, they say bye . . . then weeks later I get a knock on the door . . . and they want sex again . . . so strange is this in a country where sex is still a big secret." (Interview with interlocutor, March 26, 2014)

On gay chat websites, there are profiles of foreign gay men rejecting proposals of gay men from Asian countries. One such sample profile text stated:

J: "Please No Indian/Asian guys . . . Excuse please . . . " "Messages from Asian guys and Money seekers will be blocked." (Retrieved from gay chat website, May 23, 2014)

However, in my opinion, this has more to do with the character of a person and individual preference or choice rather than xenophobia or racism. Money-seeking is rampant among gay men. Even profiles on gay chat websites contain texts alerting other visitors to money seekers. Furthermore, married gay men (who are discrete) have been blackmailed and threatened with the disclosure of their sexual orientation when they refused to lend money.

6.4.5 *Gay in Private, Married in Public*

Yet another instance of enduring hegemonic masculinity is the existence of men who are gay in private and married in public, a phenomenon which is highly prevalent in India. The majority of gay men I came across in India had wives and children. They often spoke of their desires of having sex with men only as a "*shauk*" (hobby), which they only pursued in the absence of their wives. Thus, married gay men often try to hide behind the facade of a marriage and convince themselves as well as others that being gay is, in their own words, only a *shauk*, and that a man is meant to settle down only with a woman, thus following the traditional male gender role. Some of the men I met tried to advise other men to stay away from sex with men, since they believed that sex between two men was not the right thing for men from good families. They promptly believed this, although they still engaged in random sex dates. Again, to identify as "gay" is a problem for most because it calls into question their masculinity. However, some accept themselves as homosexuals even though they are married and restrict sexual contact to their wives. Others imagine their wives as men during intercourse.[62] But outside their marital life, once again, such men have regular or multiple sex partners.

I interviewed a married man who said:

K: "After marriage if a man keeps his wife happy in every way that's what counts. Guys are okay here if I am married. They need my body. Not personal life, even those who are 18 years old approach me and they are fine that I am married. They say, it is nice to do that, but it is your personal life. I need you, and another person or other things hardly matter." (Interview with interlocutor, December 20, 2013)

In most cases, wives are not aware of their husband's sexual orientation. Even if they are aware of their husband's identity, they rarely complain. In most sexual relations men are subjects; their desires, likes, dislikes, tastes and preferences hold top priorities. Women, unwillingly at times, submit or suppress their sexual desires or needs. They have almost no sexual freedom as compared to men. Within marriage the woman generally sees submission to male sexual demand only as a duty. In general, for Indian women, sex is all about status, control and dominance. Even Indian women today are only seen as a commodity intended to satisfy the lust or desires of a man.[63] There is also not a choice not to marry, because marriage, and within it sexual service, is somehow a sheer destiny.[64]

However, cases have come up before the Court where either the wife or the girlfriend have filed a suit against their husband or partner under Section 377. For instance, a woman in her twenties kept a record of anal and oral sex with her husband

[62]See also Greenberg, D., op. cit., p. 464.

[63]Bhasin, K., *Exploring Masculinity*, pp. 28–29.

[64]Jeffrey R. and P.M. Jeffrey., "A Woman Belongs to Her Husband' in Gender and Political Economy," p. 133; see also Bhasin, K., op. cit.

and then filed for divorce.[65] Another woman filed a case under Section 377 against the person with whom she had been in an extra-marital relationship when her relationship was disclosed to her husband. In both the above cases, law pertaining to Section 377 has been misused only to harass the husbands or partners. It often serves as a weapon used by wives against their husbands in divorce petitions. Further, consent is an irrelevant factor to judge the application of Section 377; women's consent to unnatural sexual acts cannot save men from going to jail.

The above instances—whether the blatant rejection of effeminate or elderly men, acts of blackmailing or money-seeking or the men forced to hide their gay sexual identity—point to the abuse or violence inflicted upon gay men in the form of negative "male power," reflecting negative masculinity. Being gay does not change "male power"; the underlying masculine ideology remains the same. Only the mode of dominance changes. Thus, masculinity can do equal harm to both men as well as women, irrespective of gay or straight. It has more to do with power and dominance rather than sex or gender.[66] To put it in the words of White:

> Making an issue of masculinity therefore means not only focusing on men but on institutions, cultures and practices that sustain inequality along with other forms of domination. This will involve questioning the symbolic as well as material dimensions of power. It means working on and reorganizing the connection between the personal and professional, the politics of institutions and the global system. It will involve men and women, black and white, rich and poor, working separately and together, to forge strategic alliances based not simply on where they have come from but on where they want to go.[67]

Because masculinity is rampant in society on every front, all contribute to its dominance. If we want equality, then we need to return to and reassess every front, like institutions, cultures and practices. We need to make all of these elements free from inequality and reorganize them accordingly. It is group work that requires the effort of all individuals to create equality between all genders whether binary or non-binary.

6.4.6 Propensities of Gay Sub-Culture in India

But in the diverse relationships I observed, I also found the beginning of a positive "male power" which is constructive and creative. The rise of this positive power concerns the unfolding of what can be termed "gay masculinity." Relying on Foucault, another interpretation is equally possible: power among gay men may

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[65] http://blog.ipleaders.in/can-a-wife-file-a-case-for-unnatural-sexual-offences-against-the-husband-under-section-377-of-ipc/ (accessed on March 14, 2015); see also Section 377: Men worry about being framed by women, Swati Deshpande, TNN, Dec 17, 2013, http://timesofindia.indiatimes.com/city/mumbai/Section-377-Men-worry-about-being-framed-by-women/articleshow/27499941.cms (accessed on March 14, 2015).

[66] Bhasin, K., op. cit., pp. 23–24.

[67] See White, S.C., *Men, Masculinities and the Politics of Development*, 1997.

be stronger and freer. It can be exercised to bring sexuality into a discourse leading to knowledge about sexual identity and preference. Power among them does not create the same conflict as in the case of heterosexual relationships, where monogamy is a fixed norm.

Where hegemonic masculinity demands submission or dominance over women negatively, gay masculinity demands submission or dominance among gay men positively. For example, in many societies, sexual relations among gay men are structured on the basis of age (but it is not uncommon for gay men to overlook it). The older partner takes an active role, and the younger partner takes a passive role.[68] The same applies with respect to Indian gay men. However, there are instances where the younger partner takes an active role and the older partner remains passive. Sexuality, thus, becomes only a discovery about oneself.

Some of the hetero-normative kinship roles commonly in usage among gay men are "daddy-son"[69] and "uncle-nephew"; there are also other expressions containing other elements of dominance and submission like "mature-young" and "master-slave."[70] Younger men like to be dominated and controlled by older men. They like to be submissive, both in matters of sex and also in the intimate relationship itself with older men. On the other hand, older men like to control and love younger men. However, this dominance or control is more fun or a kind of role playing between them. A man who revealed his preference to me stated:

K:"I do not want to be treated as a son, though I would not mind being a 'Daddy's girl.' I like older men because they are 'caring' and 'loving,' in every sense of the word."(Conversation with interlocutor, April 20, 2014)

In such relationships, I see positive "male power" which is constructive and creative. It tries to unite two men irrespective of age restrictions. The intimate relationship between two gay men (older and younger) leads to creativity, as persons of two different generations learn to develop intimacy. It creates a positive energy to the extent that they love, care for each other and aspire to be in a relationship. Hence, "dominance" and "submission" are merely playful terms, representing a unique form of sub-culture among gay men. We need to understand the innovative potential of homosexual relations, according to Foucault, since such acts represent the new possibilities of pleasure which people had no idea of previously. He refers to the new possibilities of pleasure as the "desexualization of pleasure" in the sense that we can produce pleasure with very odd things or with

[68]Humphreys proposes in *Tearoom Trade: a study of homosexual encounters in public places* the substitution of the technically more precise term "insertor" and" insertee" for "active" and "passive." These terms are also not linked to gender.

[69]Steinman, R., "Social Exchanges Between Older and Younger Gay Male Partners," pp. 179–206; see Lee, J., *Through the Looking Glass: Life after Isherwood – a Conversation with Don Bachardy*, pp. 33–63; Harry, J., "Decision Making and Age Differences among Gay Male Couples," pp. 9–21.

[70]This role play has its origin in the eighteenth century where masters took advantage of their servants, sometimes male as well as female, and teachers developed sexual relations with their students. See Clark, A., *Desire: A History of European Sexuality*, pp. 1–40.

very strange parts of our bodies.[71] He writes, "For centuries, people generally have always spoken about desires, and never about pleasure. Therefore, we need to liberate our desire to create new pleasures."[72] And this pleasure unleashes positive power. In other terms, gay culture has the potential to create new relational possibilities, to "change the schema of relations," which undoubtedly will exert influence on heterosexual relations as well.

Male power in the positive sense among gay men enables them to create ties or bonds based on sexual preference and pleasure. Power has also helped gay men create and sustain relationships in the absence of social and legal acceptance. On the contrary, among heterosexual relations, men are the top priority and women very often unwillingly submit or suppress their desires or needs—a situation that not even law can help change.[73]

For that matter, even among heterosexual relations, Oakley opines:

> Along with the male's greater aggression in other fields, goes his aggression in the sphere of sexuality; males initiate sexual contact, and take the symbolically, if not actually, aggressive step of vaginal penetration – a feat which is possible even with a frigid mate. They assume the dominant position in intercourse. Males ask females to go to bed with them or marry them or both: not vice versa. The female's sexuality is supposed to lie in her receptiveness and this is not just a matter of her open vagina: it extends to the whole structure of feminine personality as dependent, passive, unaggressive and submissive.[74]

The terms dominance and submission need not be interpreted in their strict sense as in the case of heterosexual couples. For instance, men inflict violence upon women leading to different forms of gender inequalities. But in homosexual relationships there is less room for gender inequality. It is not a fixed rule that younger men always seek older partners. They may look for partners within their own age group or within a reasonable age gap of five to ten years or even less.[75] But again within the subculture there are several other "categories" like sadomasochists, bondage, kinky, bear culture, leather fetish, etc.[76]

Describing the "Bear[77] Subculture,"[78] Nino Waechter[79] states, "An older man lusting after younger men is considered fairly normal within the gay world that

[71]Foucault's interview on "Sex, Power, and the Politics of Identity," op. cit. p. 165, see https://schwarzemilch.files.wordpress.com/2009/02/foucault-sex-power-and-the-politics-of-identity.pdf (accessed on June 2, 2015).

[72]Ibid., p. 166.

[73]Bhasin, K., op. cit., pp. 28–29.

[74]Oakley, A., *Sex, Gender and Society*, pp. 99–100.

[75]Harry, J., "Decision Making and Age Differences among Gay Male Couples," pp. 9–21.

[76]Ibid.; See also Steinman, R., "Social Exchanges between Older and Younger Gay Male Partners," pp. 179–206; Lee, J., *Through the Looking Glass: Life after Isherwood – a Conversation with Don Bachardy*, pp. 33–63.

[77]Bear is a gay slang term. It describes a larger, hairier man who projects an image of rugged masculinity. Bear men have events, codes and specific identity among the LGBT communities.

[78]Wright, L., *The Bear Book – Readings in the History and Evolution of a Gay Male Subculture*, 1997.

[79]Waechter, N., "The Experienced World of Young Gay Men Who Are Attracted To Older Men. A Phenomenological Study," 1999.

generally adores youth and slim bodies, while a younger man lusting after older men is quickly considered quite a freak indeed." At least in the Indian context, in my research observations I did not come across any uniform rule or theory to justify this type of preference among gay men; in reality there are many preferences or choices. Just because some people have different tastes does not mean we should label them as "freakish." For that matter "normal," "abnormal" and even "freak" are subjective terms. We need to understand that our desires shape new forms of relationships, new forms of love and new forms of creation. Varied sexual preferences represent nothing but possibilities.[80] Bear fantasy may be only an erotic experience for some. It may not culminate into something serious. But, for some it could be intense. I have come across several Bear gay men who preferred only Bears and many younger gay men who did not like Bears. When Waechter states that younger men lusting after older men are freaks, this is only on the basis of his own personal experience. As he states: "I had noticed that there were quite a lot of "Cubs," young men (including myself) who search for the company of men much older, often heavy-set and bearded, than themselves."

Sexual fantasies can be diverse and can differ from person to person. Apart from the Bear subculture, there are many other possibilities. As mentioned earlier, some have a leather fetish, like bondage, kinky, strip-teasers (dance sex), role plays, swingers and sado-maso, whereas others prefer porn, soft play, mutual masturbation, foreplay and oral sex. Other exceptions to incur sexual pleasure cannot be ruled out, e.g., the contemporary fetish towards anime sex is a recent phenomenon. And in this sense, pleasure itself can create an identity.[81]

I also came across gay men frequenting cruising places like parks and loos. Loo encounters are a thrill for many. My interlocutor, who was a casual visitor at such places, expressed his positive opinion about loo sex. He said:

L: "I myself find the idea of hooking up with strangers very sensual but haven't found the courage yet to explore it to the fullest in real life. The fact that I am an introvert does not help. I tried visiting a loo once but could not stay for more than 2 minutes. But I will certainly not sit in judgment of guys who find it exciting or who have no option but to use those places. To each his own. In most cities, the loos are more of a cruising point rather than a place to have sex." (Conversation with interlocutor, January 12, 2014)

Loo encounters are not only for the uneducated or those who cannot afford the internet or go to parties, but even educated, wealthy men experience the thrills of cruising in and around loos. The thrill of getting caught or being watched by others is awesomely exciting for some. It is not about "have" and "have not." It is more about excitement. For some, loo sex can be exceptionally more exciting than bedroom sex. A 32 year old man who revealed his opinion to me said:

[80]See Foucault's interview on "Sex, Power, and the Politics of Identity," op. cit.
[81]Ibid.

M: "It is about what kind of guys you are into. If you are into rugged men like security guards, labourers, truck drivers, army men, etc., you are not going to find them on the internet. Hence, the loo is the right place where such a man may frequent." (Conversation with interlocutor, January 15, 2014)

6.4.7 Locally Commercialized Gay Sex

Although homosexuality is decriminalized in India, locally commercialized gay sex is blooming with the blessings of law enforcing authorities. A spate of massage parlors have mushroomed in the Indian metros, usually offering home/hotel service. One needs to first settle the rate over phone before calling for a massager. They generally have young men as masseurs, who offer a lot more than only a decent massage. They are generally not gay, but willing and eager to please their customers for a nominal tip.

Health clubs, complete with a well-equipped gymnasium as well as steam/sauna and massage rooms, are also secretly blooming in the cities, with gay men as members. These spas in the cities offer a venue for sexual activities with masseurs and fellow guests. In addition to these, parlors showing movies operate in the congested and small streets of metros. This was what one of my interlocutor expressed in a Hindi-film style:

N: "Mumbai me rahne vale 90 percent logonko mumbai ki puri malumaat nahi, yahaan choti choti galiyon me karodon ka karobar hota hai. raat ki mumbai jisne dekhi hai vah mumbai chodkar kabhi jaa nahi sakta." (90 % inhabitants of Mumbai are not fully aware about the city life in Mumbai, in the small lanes and streets of Mumbai there takes place dealings worth crores of rupees, the one who has seen night life in Mumbai, will never leave Mumbai.")—(Conversation with interlocutor, May 24, 2014)

Of course these small lanes and streets are not completely safe. Although rare, police still raid such places. If a gay man is caught watching a porn film in these video parlors, he is taken to a police station and put in a lock-up, and his family is accordingly informed. These parlors are very dark inside, and one really cannot see clearly. *"All cats look the same in the dark."* These parlors in the Indian metros are analogous to the saunas and dark rooms operating in the U.S. and Europe.

Finding a place for sexual relations is a huge problem for gay men living in cities or elsewhere. In India, most people live with their families or share accommodation with friends. If people have two houses, the other house is sublet on rent. There are hardly any safe, open places for gay men in cities. So, such parlors seem to be the only haven for fun. Men from the upper class usually stay away from such areas. However, some do take a chance. It is not always the men who do not have such facilities who visit these kinds of places, but some do it for the thrill of it or for voyeuristic pleasures as well. There are also parlors which operate in city prime locations. Here, the rates are higher. Such parlors manage the show for high class people. Yet, there are some parlors where the entry is restricted only to known and

regular visitors. According to a *Paanwala*,[82] with whom I interacted in a friendly manner and who sold *Paan* outside one such parlor, he sold more condoms than *Paan* or cigarettes.[83] These parlors also have masseur who offer sex during a massage.

Every month, anonymous party invitations are also sent to gay men through social networking or gay chat websites to meet at a scheduled place, which is normally the house of one of the organizers. The organizers use the internet and dating websites to invite people. These parties include all types of fun including sex. In addition, nudist parties are hosted on the coastal belts. A few politicians have also been linked with all such activities. They have their investments especially at various beach outlets. Gay men visit such cruising places with a hope to find a sex partner. Although visiting such places provides no guarantee, it at least gives them a chance to explore different options. Otherwise, most gay men live a hidden life and are not open nor do they wish to participate in any sort of gay activism.

6.4.8 Cultivating Positive Power

In conclusion, such acts like loo cruising do not become "wrong" or "freakish" because some people do not like them. The culture is so vast and diversified in its actions that it is practically impossible to organize under one roof. Everything is fair in love, war and consensual sex. Man cruising exists even in the most remote parts of the country. Instead of rejecting such practices, we need to understand their innovative potential for both homosexual and heterosexual relations alike. Along with new possibilities of pleasure and the "desire to create new pleasures" emerges positive power. Although sexual identity cannot be an ethical and universal norm, its liberation enables us to free ourselves from the state's domain. More specifically, the liberation of sexual identity implies less state interference into the private lives of the people.

Human beings will always invent new ways to define themselves and others. In fact, it is our inborn nature to be dynamic in order to trace our own substance. Therefore, every effort—whether weak or strong, perfect or imperfect—needs to be appreciated. This includes also finding and defining the real identity of pleasure, which is like an art and a part of our behavior, rather than merely a science or scientific knowledge.[84] Thus, sexual identity can help interpret and define sexual fantasy or choice; it can speak for the right to choose one's sexuality as a human right and it can create new possibilities for establishing relationships and friendships. The form of such relationships is diverse, ever-changing and differs from society to society or culture to culture,[85] but its genesis remains the same. In other

[82]Betel leaf seller.

[83]Conversation with interlocutor, April, 17, 2014.

[84]Foucault's interview on "Sex, Power, and the Politics of Identity," op. cit., p. 163.

[85]Ibid., pp. 167–168.

words, sexual identity contains power which cannot be destroyed easily. It exists at all times and for all purposes.

From the above findings, it is correct to claim that gay masculinity, although marginalized, challenges hegemonic masculinity. Locally commercialized gay sex is merely one example of the power of the gay community. Also, the diverse variations of male sexuality and discourses existing among gay men make it clear that masculinity and femininity are not about sex, gender or orientation but more about power and powerlessness, which is either positive or negative.[86] As Foucault writes: "Power is not just a negative force but a productive one; that power is always there; that where there is power, there is resistance; and that resistance is never in a position to externality vis-a-vis power."[87]

On the basis of these propositions, one could argue that internal power, in terms of preferences or choices among gay men, is not always negative. This is mainly because it is predominantly exercised to form relationships (either social or sexual) or to accept the "identity" of the other. And if either of the two partners refuse to accept each other, there are options for both of them to explore new possibilities. Rejection under such circumstances simply becomes a matter of obedience and acceptance of the decision. Nobody can dominate or be dominated unwillingly. This is in contrast to heterosexual relationships, where monogamy is a fixed norm. Domination would only mean to create positive power in the form of intimate and sexual relationships.

Also, internal conflict among gay men differs from their conflict with patriarchy and hegemonic masculinity, which do not approve of their identity and lifestyle. The conflict among gay men is used more to form or build relationships. Discourses of knowledge pertaining to gay masculinity and femininity can thus be seen as an instrument of positive power.[88] That is to say, most gay men believe more in freedom and the "live and let live" policy for all individuals. In fact, such discourses can be extremely significant when it comes to enlightening our personal liberation and freedom with respect to sexual orientation and individual liberty. Hence, I agree with Foucault that liberation and freedom, which are long-term endeavors, can be attained only by free deliberations in the form of discourses.[89]

Discourse, power and knowledge are thus interrelated. Gay men and their relationships do provide ample scope for discourses. The discourses help declare the kind of knowledge one should possess regarding masculinity, femininity and sexuality, especially when it comes to constructing relationships involving the elements of power and equal respect towards each other. Power can liberate people just as much as it can restrict their lives. Thus, gay masculinity, although being hidden and socially non-acceptable, can make hegemonic masculinity weaker.

[86]Bhasin, K., op. cit., pp. 22–23.

[87]Foucault's interview on "Sex, Power, and the Politics of Identity," op. cit.

[88]Foucault, M., *History of Sexuality*, pp. 81–85.

[89]Ibid.

Understanding and challenging masculinity, therefore, would mean to understand power and challenge the hierarchical power relations.[90] Gay masculinity aptly serves this purpose.

Change can bring about change, but to see a change in society we need to first be the change. We are somehow responsible in our own way to take a step forward and make that change happen. And this change is possible only with the help of power in us: people must be accepted and respected the way they are. Hence, the actual difficulty lies not in biology, skin color or sex but in our mindset and the hierarchical social systems.[91]

6.5 The Living Law Approach by Ehrlich

In the following section, on the basis of my ethnographic research presented above, which brought light to the widespread occurrence of same-sex sexual relations and in terms of the living law, I argue that the Court and State need to achieve a better understanding of the situation of gay people in India; to do so, their lives must be understood in terms of their lived experiences, i.e., day-to-day activities and encountered difficulties in the absence of social and legal support.

According to the living law approach put forth by Ehrlich, the real source of law is not the statute itself, but the actions of the people living in the society. To quote Ehrlich:

> The centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. . .The state existed before the constitution; the family is older than the order of the family; possession antedates ownership; there were contracts before there was a law of contracts; and even the testament (will), where it is of native origin, is much older than the law of last wills and testaments.[92]

The observation of Ehrlich was that the laws found in formal legal sources, such as statutes and decided cases, give only an inadequate picture of what really goes on in a community.[93] Therefore, the living law of society has to be sought outside the confines of formal legal sources, i.e., in society itself. This is because only a very small fraction of social life comes before the courts, and even then it usually represents some form of breakdown of social life.[94] After determining that society consists of intermingling normative and official associations,[95] which operate through an inner order, Ehrlich concluded that it was in this inner order that one could find the living law. The essential body of legal rules is therefore based not on

[90]Bhasin, K., *Exploring Masculinity*, p. 25.

[91]Ibid., p. 24–25.

[92]Mahajan, V.D., *Jurisprudence and Legal Theory*, p. 625.

[93]Ehrlich, E., *Fundamental Principles of the Sociology of Law*, pp. 16–17, 24, 133, 136.

[94]Mahajan, V.D., *Jurisprudence and Legal Theory*, p. 626.

[95]Ehrlich, E., *Fundamental Principles of the Sociology of Law*, p. 26.

state intervention via means of compulsion, but on social facts of law, which are: usage, domination, possession and declaration of will.[96] Firstly, these social norms determine societal law and law within the inner order of associations; secondly, organizational norms must be effectively combined and coordinated with decision making norms (which are also to be regarded as a type of social norm)[97] if the traditional values of a society are to continue to be living law and thirdly, organizational norms employ their full societal potential when pitted against the norms of the second order from the superimposing state law.[98] Hence, living law is to be discovered by observing the people living among them and noting their behavior.[99]

Law-makers and interpreters of law therefore need to consider the social facts; i.e., they need to understand the problems faced by gay people by observing their lives in terms of their lived experiences. Such an understanding must be cultivated to prevent any future biased convictions of gay men for indulging in sex. While one may morally disagree with homosexuality, it is ethically contemptible to discriminate against persons based solely on their sexual preferences; in fact it is a violation of human rights. As mentioned earlier, though people may imagine the world in a particular way, it does not always correspond with the reality of others. For instance, gay people are often stereotyped as promiscuous. But when their identity and life itself are at stake, with lack of security, support or protection of law, no consequences can follow, in contrast to heterosexual relationships, which are controlled by law. Therefore, we need to look for law beyond the law, which is possible only when we understand the social facts of law.

Ehrlich also writes that a statute or law which is habitually disregarded is no part of the living law. In the recent case of homosexuality in India, despite Section 377, both the State and Court must be aware of whether this provision is regarded or disregarded in practice. That is to say, Section 377 penalizes carnal intercourse (oral or anal) between consenting adults (whether homosexual or heterosexual) even when it is committed in private. But it could logically be reasoned that, firstly, why should (or how can) the State even enter into the bedrooms of citizens in the first place; and secondly, what preventive measures can be taken by the State to curtail the so-called "offensive" acts? In this regard, neither the State nor the Court can justify their stance. Hence, the legal provision Section 377 is only a paper tiger. It is impossible for law enforcing authorities to prohibit people from having oral or anal sex, unless the State decides to place closed-circuit televisions (CCTV) in all houses or at such places where it may be possible to see this offence being committed.

[96]Hertogh, M., *Living Law: Reconsidering Eugen Ehrlich*, p. 89.

[97]Ziegert, K.A., *The Sociology behind Eugen Ehrlich's Sociology of Law*, p. 114.

[98]Banakar, R., "Sociological Jurisprudence," in Banakar, R., & Travers, M., (ed.), *An Introduction to Law and Social Theory*, pp. 33 and 44.

[99]Mahajan, V.D., *Jurisprudence and Legal Theory*, p. 626; see also Dias, R.W.M., *Jurisprudence*, pp. 425–427.

As is highly evident in the fieldwork observations, sex is rampant everywhere among homosexuals and heterosexuals alike. Oral and anal sex are merely individual tastes and preferences. During my fieldwork, I came across some gay men who did not like to indulge in anal or oral sex and heterosexuals with an inclination towards anal or oral sex. Hence, it seems that these acts merely correspond to individual likes or dislikes. Of course, if the act is without consent, then punishment is always justified. But when two consenting adults engage in such acts, it should not be a state concern: it harms neither the public nor state or society. State interference would actually violate the individual right to privacy, which is a fundamental right under Article 21 of the Indian Constitution.

Furthermore, different societies, and even the same society at different times, have had different feelings about what is socially accepted and what is not. In fact, the line between legal, moral and social rules has constantly fluctuated.[100] In the past, dowry,[101] *sati* practice,[102] child marriage and *devadasi*[103] were socially approved. But today they are no longer in force. Similarly, the Court in recent years through its landmark judgments have given a green signal for live-in relationships and pre-marital sex.[104] This makes it clear that the norms or rules governing people's lives in the society are partially reflected in the formal law of the state. This in turn would mean that without society the formal law is incomplete and immature. One learns little about the living law by reading only the statute books. Only a small portion of social life comes before the courts and it may represent some disintegration of social life. In certain cases, law may even contradict the practice of that topic. Also, there is always a gap between the living law and the formal law. The formal law can never catch up to the living law.[105]

6.5.1 Criticism of the Living Law Approach

Some critics like Allen have criticized Ehrlich's notion of living law as megalomaniac jurisprudence.[106] According to Allen, if living law is seriously embarked upon, then one life span would be required to deal with every law. But in Ehrlich's defense, he only wanted to convey the simple message that the law-makers and interpreters of law should not only study the formal legal system but see to it that it is compatible with the present social life or societal changes. His notion of living

[100] Ibid.

[101] Dowry is a transfer of parental property at the marriage of a daughter.

[102] Practice of burning of the Hindu widow.

[103] Devadasi system was a religious practice in parts of south India whereby parents marry a daughter to a deity or a temple which dedicated girls to a life of sex work in the name of religion.

[104] *S. Khushboo v. Kanniammal AIR 2010 SC 3196.*

[105] Mahajan, V.D., *Jurisprudence and Legal Theory*, p. 626.

[106] Ibid., p. 627–628.

law should be viewed in the light of changing circumstances: it has changed and it should change as per the societal demands and needs of the time.

Ehrlich's claims seem especially relevant concerning Section 377, which is a law from 1860. With the passage of time, the law must evolve, just as religion, culture, society and humans are constantly evolving. Lack of legal development can be a hindrance to human development. To put it in the words of Ehrlich: "In order to be able to state the sources of law, one must be able to tell how the state, the church, the community, the family, the contract, the inheritance came into being, how they change and develop."[107] Hence, law should be continually tested against the contemporary social circumstances.

Another criticism of Ehrlich is that he failed to attach importance to the way in which formal law influenced and reformed the practices of society. Critics[108] assume that if formal law only confirmed the norms of social law, it would tend to deprive the powers of the law-makers by making them only a rubber stamp without any creative energy.[109] But such a critique neglects how Ehrlich's approach enables the law-makers and courts with a kind of creative power. Living law provides a wider scope for legislators to interpret public opinion and give it the shape of formal law. By doing so, a rapport or positive relationship is developed between the two, i.e., the people and the law-makers or law interpreters. It does not make the position of either party weak.

Critics also assert that there are cases where only the legislation imposes a novel idea of public opinion, which in turn makes the public accept it.[110] However, one must only consider, for instance, the many instances in the Indian context in which the public approached the Court to compel the state or lawmakers to strike down their innovative laws. In *Mithu v. State of Punjab*[111] the Court of India struck down Section 303 of the Indian Penal Code as unconstitutional. Section 303 states: "Whoever, being under sentence of [imprisonment for life], commits murder, shall be punished with death." The Court found that such a classification—between persons who commit murders whilst under the sentence of life imprisonment in contrast to those who are not—was not based on any rational principle.

Further, in *All India Imam Organisation v Union of India*,[112] the Court held that the Imams, who are in charge of religious activities of the Mosque, are entitled to emolument even in the absence of statutory provisions in the Wakf Act, 1954 because the right to it enshrined in Article 21 means the right to live with human dignity. The Court did not accept the contention of the Wakf Board, who stated that since Imams perform religious duties they are not entitled to any emoluments. The Court further held that the ancient concept has undergone a change: Mosques are

[107] Mahajan, V.D., op. cit., p. 628.

[108] Dr. Friedmann, Lord Lloyd, R.W.M. Dias and V.D. Mahajan.

[109] Mahajan, V.D., p. 628.

[110] Ibid.

[111] *AIR 1983 SC 473: (1983) 2 SCC 278.*

[112] *AIR 1993 SC 2086.*

subsidized and the Imans are paid their remuneration even in Muslim Countries. The Court gave detailed directions to the Government of India and the Central Wakf Board to prepare a scheme for determining the remuneration of Imams of various categories of Mosques and finding out sources of income necessary for the purpose.

Also, in *People's Union for Democratic Rights v Union of India*,[113] it was contended that the Employment of Children Act, 1938 was not applicable in case of employment of children in the construction work in Delhi since the construction industry was not a process specified in the schedule to the Children Act. The Court rejected the contention and held that the construction work is hazardous employment and that no child below the age of 14 years can be employed in construction work, even if the construction industry is not specified in the schedule to the Employment of Children Act, 1938. Expressing concern about the "sad and deplorable omission," Bhagwat advised the State Government to take immediate steps for the inclusion of construction work in the schedule of the Act, and to ensure that the constitutional mandate of Article 24 is not violated in any part of the country. And in another noteworthy recent judgement, the Court struck down the legal provision under Section 66 of the Information Technology Act of India (2000) barring "offensive messages" online, saying it violated constitutional guarantees of free expression.[114]

In all of the above cited cases, the innovative laws passed by lawmakers were scrapped by the Court in the interest of safeguarding the fundamental rights of citizens. Thus, the populace may refuse to observe portions of the imposed law and attempt to evade it wherever possible, or, conversely, the government may refuse to accept the prevailing ways of life and attempt to change them by force if necessary. In this context, a dispute may arise as to whether governmental or popular command will represent the "true law."[115] That is to say, if the government is too far ahead of what the people are ready to accept, or if a forward-moving nation is held back by a retrogressive-minded government (like in the case of Section 377 recriminalizing homosexuality), the legal system, in whole or in part, is headed for trouble.[116]

As Locke rightfully pointed out so many years ago, kings disregarding basic rights and passing arbitrary laws "put themselves into a state of war with the people, who are thereupon absolved from any farther obedience."[117]

When the instrumentality of positive law is legitimately used to overcome social inertia, it could help pave the way for basic readjustments in the mode of living of a

[113] *AIR 1983 SC 1473*.

[114] *Shreya Singhal v. Union of India*, (2013) 12 SCC 73 Judgment delivered on 24 March 2015, see http://supremecourtofindia.nic.in/FileServer/2015-03-24_1427183283.pdf (accessed on May 28, 2015).

[115] Bodenheimer, E., *Jurisprudence: The philosophy and method of the Law*, pp. 221–222.

[116] Ibid., p. 222.

[117] Bodenheimer, E., op. cit., p. 224.

people. For instance, in India, the Government by positive enactments has set aside the outworn caste system.[118] And concerning the gay community in India, there are several organizations working for the causes of gay people. They are also funded by state AIDS control societies. The birth of these organizations itself stands as a contradiction to the law criminalizing homosexuality under Section 377. Also, in spite of homosexuality being recriminalized, gay pride parades are regularly hosted in the major cities like Mumbai, Pune, Delhi, Bangalore, Chennai, Kolkata, etc.

The power evident in such organizations clearly transcends the limits set by the law and the morality of the law. In other words, the power of a single gay man is considerably enhanced with the cooperation of a larger sympathetic group. And the law itself has given this power to the progressive (gay) minority to be exercised upon a recalcitrant (hegemonic) majority. Thus, law is something much wider than legal regulations, and the jurisdiction of law is much broader than the state, since the state is, as claimed by Ehrlich, historically a later development. The state's will is nothing but the will of the people who compose it. The individual is at the root of both state and law.

6.5.2 Concluding Remarks

Based on this reflection, it can be confirmed that Ehrlich's living law provides all the inputs and ingredients required for the socio-legal transition of gay rights. I agree with Friedmann's comments in praise of Ehrlich's work. In the words of Friedmann,

> Ehrlich's work is full of stimulating suggestions for scientific approach to law which relates the law more closely to the life of society. It has played a leading part in the reaction of legal thinking towards the turn of the century against the surfeit of analytical jurisprudence which had characterized legal thinking of the preceding generation . . .[119] though he appears to have adopted Savigny's line of thought, he differs from him in many respects. In Savigny's view, law is tied to the primitive consciousness of the people. However, Ehrlich locates law in the present-day institutions of society. His approach is more practical and purposeful. He concentrates more on the present than on the past law. He thus emphasizes the social function of law.[120]

Ehrlich would most likely have approved of the possibility and necessity of judicial activism driven by universal human rights to non-discrimination, which is evident in multifaceted approach to law. Although it is quite obvious that Ehrlich could not foresee the future development in the field of universal human rights leading to judicial activism and legal problems thereto due to his premature death in

[118]Ibid., fn. 4, p. 223.

[119]Cited in Mahajan, V.D., *Jurisprudence and Legal Theory,* p. 629; Friedmann, W. *Law in the Changing Society,* Stevens and Sons Ltd., 1959; Friedmann, W. *Legal Theory,* Fifth Edition, Stevens and Sons Ltd., 1967.

[120]Friedmann is quoted by Mahajan, V.D., op. cit., p. 629.

1922, through his 'living law' he put forth a philosophical perspective that assures for human autonomy and freedom by balancing the individual and collective interests.[121]

Mikhail Antonov has rightly acknowledged this fact in the following words:

> After the debates ended, Ehrlich re-elaborated the chief ideas of his legal sociology, paying much more attention to legal statements (propositions), to the judicial application of the law, and to analytical jurisprudence. These changes are patent in his two later works, published in 1917–1918. . .The turbulence of the years of the First World War and of the following years kept the legal scholar from Bukovina from finalizing the revisions to his socio-legal conception, and his premature death in 1922 put an end to further development of his methodological project. . . . Eugen Ehrlich died in 1922 and did not witness the ensuing atrocities of the Nazi regime, but having led most of his professional life in the pluralistic society of Bukovina, he felt the importance of guaranteeing minorities' rights, which led him to the issue of constitutionalisation of fundamental rights. . . . the law is a technique for enforcing peaceful co-existence between human beings, none of whom is entitled to impose his or her views or values on other people. All people living in society should be equally subordinated to the law, no matter what values they endorse (justice, certainty, equality, peace, etc.), and the law should be applied equally to all.[122]

The modern discourses on human rights mark the revival of the old natural law theories. Hence, when applying the ingredients of living law, the nature of human rights, judicial activism, its limitations, interpretations need to be revived or renewed since these are subject that vary depending on the local cultures and local normative frameworks.[123] For "what matters for the protection of human rights is not written texts, but rather the mentality of judges. The way they make a link between the factual situation and the first constitution (the basic norm) that endorses reinterpreting and rules in their application."[124]

In support of Ehrlich it can also be stated that his notion of living law is not exhaustive and has wide interpretations. No theory can be complete in itself and it is not possible to include all the elements in it.[125] Although he did not distinguish between legal and social norms, his expression "living law" referred to "the lived experiences of people living in society," i.e., how people actually perceive the formal law and whether they accept and obey all the laws imposed upon them by law-makers. The expression "living law" should not be interpreted in its literal sense. It has to do more with the development of a "sociology of norms" than a

[121]Mikhail, A. The Legal Conceptions of Hans Kelsen and Eugen Ehrlich: Weighing Human Rights and Sovereignty (January 18, 2016). Higher School of Economics Research Paper No. WP BRP 62/LAW/2016, p. 27. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2717494 (accessed on July 9, 2016).

[122]Ibid, pp. 11, 19, 20.

[123]Mikhail, A. "In the Quest of Global Legal Pluralism." In: *Positivität, Normativität und Institutionalität des Rechts. Festschrift für Werner Krawietz zum 80. Geburtstag*. Berlin, 2013, p. 15–30.

[124]Mikhail, A. The Legal Conceptions of Hans Kelsen and Eugen Ehrlich: Weighing Human Rights and Sovereignty, p. 24.

[125]Kapoor, S.K., *International Law and Human Rights,* p. 102.

"sociology of law."[126] In this sense, it has a much wider interpretation and hence it may not be the law on paper but law pertaining to the lives of the people, i.e., their experiences (good or bad) with respect to the formal law. For instance, one can learn little about factories by reading only the Factories Law. One has to go to a factory to truly observe how far the formal law is followed, modified, ignored and supplemented.[127]

In a democracy, the contemporary social conditions demand a more and more active role on the part of the state. The welfare state must work for the betterment and welfare of the community as a whole. It should confer equal rights on all citizens irrespective of who they are without any discrimination. In this manner, the state should strive for the socio-legal development and progress of the society at large.

Ehrlich's living law approach can be aptly applied to the case of homosexuality in India. Although Section 377 prohibits anal or oral sex between two adults regardless of consent, people commit these offences every day. The police also cannot prosecute all those who are guilty of these offences. This in turn makes the law weaker. It lucidly shows that Indian law is in contradiction to the actual lives of Indians. Hence, their relationships and lives serve as a challenge to both the State and to the law enforcement machineries. Ehrlich concludes, if we want to know the living law of a society, we cannot restrict ourselves to the formal legal content but have to examine how people actually live. Ehrlich opines: "The individual is never actually an isolated individual; he is enrolled, placed, embedded, wedged into so many associations that existence outside of these would be unendurable."[128] He further adds that law which is not regularly obeyed should not be a part of the living law of the society. Similarly, Section 377 is outdated and unreflective of lives in India.

Ehrlich has used the expressions "living law" and "formal law" merely as illustrations to simplify his perception about law in the changing society. In this sense, I would say that his living law is more focused on the present and future than the past. Thus, Ehrlich's theory provides crucial support for understanding the living law of gay men in India. The topic of homosexuality in India is not the same as in Europe or the US. Homosexuality is a crime, and the institution of marriage is restricted to heterosexual people. Hence, gay people do not qualify for marriage, family and kinship.

To my understanding, the current situation could be improved if the Court accepted the lived experiences and realities of gay people. It should not pretend as if they do not exist, but should accept them and their social lives irrespective of every form of discrimination. If law-makers and the Court can digest this truth, they will see that Section 377 is merely a paper tiger that needs to be removed from the statute books. The lives of gay people and their lived experiences form a social law

[126]Nelken, D., *Law in action or living law? Back to the beginning in sociology of law*, pp. 157, 173.
[127]Dias, R.W.M., *Jurisprudence*, p. 424.
[128]Dias, R.W.M., op. cit., p. 627.

which indeed serves as a challenge to the State to frame a formal law to that effect: especially to account for the number of kinship ties and relations existing outside the ambit of law, which do not conform to the already established legal norms.[129] A deeper investigation of such kinship ties and relations will be considered in the following.

6.6 Towards Law and Beyond Law

The famous Indian philosopher Sri Aurobindo wrote the following about what he terms "The Ideal Law of Social Development": "That law is that all things are one in their being and origin, one in their general law of existence, one in their interdependence and the universal pattern of their relations; but each realizes this unity of purpose and being on its own lines and has its own law of variation by which it enriches the universal existence."[130] Uniformity is not the law of life. Life exists by diversity; it insists that every group, every being, shall be one with all the rest in its universality, yet by some principle or ordered detail of variation unique. Order is indeed the law of life, but not an artificial regulation.

It should be founded on the greatest possible liberty; for liberty is at once the condition of vigorous variation by division into groups and insists on liberty by the force of individuality in the members of the group. Therefore, the unity of the human race to be entirely sound and in consonance with the deepest laws of life must be founded on free groupings, and the groupings again must be the natural association of free individuals.[131]

That is to say, all individuals need not possess the same identity, taste, preference or choice. They need not have a common lifestyle. They can differ from each other in principle or temperament, but may gain and influence each other to that end by their separateness. For instance, a communal group can be conservative and static in its consciousness, but the individual is creative and the conscious progressive. It is the individual who can largely contribute towards the creation of a progressive and welfare society. Indeed, the state, nation, community and group are the reflections of individuals and vice versa.

According to Sri Aurobindo, "The individual does not owe his ultimate allegiance either to the state or to the community which is a part of life and not the whole of life. Individual allegiance must be to the Self which is in him and in all; not to subordinate or lose himself in the mass, but to find and express that truth of being in himself and help the community and humanity in its seeking for its own

[129] Butler, J., *Is Kinship Always Already Heterosexual?*, p. 14–16; see also Schneider, D., *A Critique of the Study of Kinship*, 1984.

[130] Aurobindo, G., *Social and Political Thought: The human cycle, the ideal of human unity, war and self-determination*, p. 63.

[131] Aurobindo, G., op. cit., p. 53–54.

truths and fullness of being."[132] This means that the individual by enriching his own personal life actually enriches the life of humanity. Hence, individual freedom and liberty should not be limited by the society or nation: one should be free to pursue one's own wishes provided no serious harm is caused to others. And in this sense, all repressive or preventive laws are only a substitute for the true law which must develop from within and not hinder individual liberty.

Thus, society stands as an intermediary force between the individual and humanity and it exists not merely for itself, but for all. It has the right to be itself and to fight against any attempt of domination or attack upon it by other nations. This right must be asserted in the interest of humanity. Thus, the law for the individual is to perfect his individuality by free development from within, while respecting and aiding the same free development in others. Society, therefore, forms the source of law.

6.7 Conclusion

The current judicial and legal system is somehow unable to acknowledge the truth of gay life in India. Therefore, through this analysis I propose thinking in terms of "a law beyond the law," that is, legalizing homosexuality and further recognition of gay unions. Relationship and kinship ties cannot be viewed as distant from community and friendship, nor will they vanish just because the formal law fails to recognize them. Even when the formal law disapproves of a kinship, it still exists in society. The existence itself forms the source for the Court and the State to aptly acknowledge it and legally or formally approve it, because contemporary law is based primarily on written statutes. Legalizing homosexuality, therefore, would mean a further investment in gay marriage law or law for marriage-like unions. To give it the shape of a code or a statute, courts also need to rely upon the social facts. Further, in some contexts, the symbolic allocation of marriage, or marriage-like arrangements, is preferable to altering the requirements for kinship to secure individual or plural rights to bear or adopt children or, legally, to parent.[133] Even if the question is not one of marriage, why should marriage be a base or criterion for conferring rights or benefits upon people? Why cannot all the rights or benefits be conferred upon people irrespective of who they are? That is to say, irrespective of their marital status, gender or sexual orientation. To put it in the words of Judith Butler:

> If one argues for marriage as a way of securing health care entitlements, then does one not also affirm that entitlements as important as health care ought to remain allocated on the basis of marital status? What does this do to the community of the non-married, the single, the divorced, the uninterested, the non-monogamous, and how does the sexual field become

[132] Navjata, "Next future," p. 37.

[133] Butler, J., *Is Kinship Always Already Heterosexual?* pp. 16–17.

> reduced, in its very legibility, when we extend marriage as a norm? In terms of global economy kinship loses its specificity especially when one considers the politics of international adoption and donor insemination. For new families are sometimes conditioned by innovations in biotechnology or international commodity relations and the trade in children. Under such circumstances, kinships ties may or may not be based on enduring or exclusive sexual relations, and may well consist of ex-lovers, non-lovers, friends, community members.[134]

Based on the above submissions, I propose that marriage should not be a sole qualification or criterion for granting rights to citizens. Whether a person is single, married, divorced, gay or straight, equal rights, concern and respect should be the state policy. Conferring benefits or privileges to some people on the grounds of marital status, and denying the same benefits to others would amount to discrimination and thus exacerbate inequalities. This is the negative characteristic of justice. It is only possible to balance public interest through the positive characteristics of justice. Indeed, this should be the responsibility of the judiciary and the state.

At times, there are trends caused by the interests that flourish in society which ultimately influence even those who are not involved in these conflicting interests. The judge who decides according to justice understands that he himself is dominated by such interests. For instance, a society may be so organized that justice according to law favors unduly the dominant section, and the judiciary, by being drawn from that section, consciously or unconsciously, will tend to favor the needs of that section to the detriment of the rest of society.[135]

To sum up, justice does not proceed from the individual, but arises in society. The notion of living law put forth by Ehrlich serves the purpose of promoting justice. Liberty, equality, fraternity—the motto which became the slogan of the French Revolution—were necessary for securing the rational principles in individual and social human life. However, the practical implication of these endeavors did not bring instant results. Humanity required its gradual effectuation in several subsequent revolutions. Human dignity and freedom has been a long-term endeavor and hard struggle. Democracy is still evolving even today. We should not let humanity and human values fade, which are more supreme than any other static non-democratic systems like tyranny, dictatorship, despotism, monarchy, autocracy, theocracy, etc. In fact, the new *dharma*[136] (religion) has to do with modern ideas: the right of all to liberty, freedom, equal concern and respect for both, individuals and nations setting aside every sort of discriminatory practice.

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[134] Ibid., p. 21.

[135] Lloyd, D., *Introduction to Jurisprudence*, pp. 184.

[136] Aurobindo, G., *Social and Political Thought: The human cycle, the ideal of human unity, war and self-determination*, pp. 180–193.

Chapter 7
Global Discrimination Against Gay Families

7.1 Introduction

The predominant influence of the traditional nuclear family model on national and international laws is undeniable. But this model obviously fails to account for the differences encountered in gay families, who are unable to fulfil the "traditional" family ideal, thus marginalizing, excluding and discriminating against them. Yet it is also undeniable that the traditional nuclear family is gradually becoming outdated. As Hodson brings out in her important work "Different Families Same Rights: Lesbian, Gay, Bisexual and Transgender Families under International Human Rights Law": "Divorce is now common, leading to a rise in single-parent households and step families. Several couples are choosing single life, leading to greater number of children born out of the wedlock. Increasingly sophisticated reproductive technologies are becoming also available which challenge the traditional assumptions about parenthood and family."[1] All of these gradual changes combined—rising divorce rates, a preference for a single lifestyle and the increasing use of reproductive technologies—demonstrate the general evolution of family as a flexible unit among changing social circumstances. And in the succinct words of one Canadian Supreme Court Justice: "Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them worthy of concern, respect, consideration and protection under the law."[2]

Neglecting non-traditional relationships—relationships which are still of utmost importance, that are intimate and loving—by keeping them outside the framework of legal protection, in Hodson's words, "can be very depressing and devastating."[3]

[1] Hodson, L., "Different Families Same Rights: Lesbian, Gay, Bisexual and Transgender Families under International Human Rights Law," p. 9.

[2] *L'Heureux Dubé, J. in Miron v Trudel [1995] 2 S.C.R. 418, para. 80*

[3] Hodson, L., op. cit., p. 9.

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Y. Naik, *Homosexuality in the Jurisprudence of the Supreme Court of India*,
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And such neglect fails to ensure the principles on which international human rights law is founded: equality and dignity; for international human rights law to keep its promise to ensure equality for all, it must recognize and protect the rights of gay families. The important question thus arises, What is the current state of international human rights law concerning family rights? To achieve deeper insight into this question, an understanding of the significant developments of international human rights law is necessary. In particular the following presents an examination of family rights put forth in the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and in the European context the European Convention on Human Rights and the Charter of Fundamental Rights, which give the EU the authority to take further measures to protect LGBTI families.

Important judicial rulings are also given due consideration in this chapter, such as rulings by the UN Human Rights Committee concerning discrimination against sexual orientation in *Joslin et al v. New Zealand* and *Young v. Australia*. Rulings regarding discrimination against sexual orientation by the European Court of Human Rights in connection with the family are also highlighted, such as *Salgueiro da Silva Mouta v. Portugal*, *Frette v. France* and *Karner v. Austria*. Besides rulings concerning discrimination against sexual orientation in connection with the family, there will also be a discussion of rulings by the European Court of Human Rights which shed light on what constitutes "family life" in the first place: *Marckx v. Belgium*, *Keegan v. Ireland*, *Lebbink v. Netherlands*, *Nylund v. Finland*, *X, Y & Z v. UK*, among others. The influence of marital ties, biological ties, ties of constancy and long-term relationships become the focus here.

The second part of this chapter investigates marriage law in India. Not only are same-sex relations under fire, but same-sex marriage and the formations of alternative families are as well. Despite the appearance of marriage law in India, especially Hindu Marriage Law, 1955, which recognizes every "marriage between two Hindus" (i.e., gender-neutral), marriage is only validated between partners of the opposite sex. Through an analysis of Hindu, Christian and Muslim marriage law, it will be shown that the primary requisite of marriage in India is consent and, as stated in a case by the Court itself, the primary value is companionship. Therefore, there is no reason for Indian laws to have no provision for marriage between same-sexes in unions that are consenting and value companionship highly. Marriage is also examined in light of customary law of India, which maintains a balance between a centralized State and localized communities. Customary law excludes the State from defining marriage or declaring it as void, i.e., State law is subordinate to customary law in marriage. Due to the strong presence of customary law, it will be argued that if a particular custom is approved by a certain social group, it should be considered as valid irrespective of whether the group is in the minority or majority. Another way gay culture challenges patriarchy (in reference to the discussion in Chap. 6) is by disrupting the notion of the traditional family by

means of "extra-familial kin ties"—the ties that extend beyond the domestic family—which have emerged outside the heteronormative family system.

Indian Marriage Law in part seems to apply to same-sex unions. For instance,

> The Special Marriage Act is non-religious in character, it does away with the requirement to recognize the marriage by a particular religion. The Law makers or the judiciary can therefore legalize the same-sex unions or marriages by amending the Special Marriage Act, 1954. This can be possible either by legislative interference or by challenging the constitutionality of the Act so as to include same-sex marriage into it.[4]

Further, if "civil unions" between opposite sex couples are recognized as marriages under the Special Marriage Act, applying the principle of equality, same-sex unions can also be recognized as marriage under the Act. Amendment to the Special Marriage Act can thus help resolve the burden of legal pluralism pertaining to personal marriage laws based only on religion. In other words, the Special Marriage Act can rightly bring a balance between the existing law and the living law or legal pluralism, in the words of Ehrlich. The strong existence of extra-familial kin ties in India, or the significance of "outside kin," implies the changing definition of "family," which must also be included under the protection of Indian constitutional law today, because these relationships realize the very values of the "family" itself. These new forms of "family" outside heteronormality must therefore be eventually recognized by the State.

This chapter can be seen, in a certain way, as an elaboration of both Chaps. 3 and 6. As Chap. 3 considered the various international human rights instruments related to the protection of sexual orientation and gender identity, now the international human rights instruments related to gay families in particular will be considered in more detail. And akin to Chap. 6, which used ethnographic research to depict the current, threatened state of homosexuals in India and argued that the recriminalization of oral and anal sex by the Court is a blatant rejection of how many people actually live in India today, the second part of this chapter will use ethnographic research to depict the current, proliferating forms of families in India in order to argue for their recognition. In other terms, ethnographic descriptions are put forth as evidence of the proliferating same-sex unions and alternative forms of family and kinship in India, despite their legal non-recognition.

7.2 The United Nations and Family Rights

Family rights are an essential part of human rights that need to be safeguarded against the dominance of the State.[5] As a general principle, we are all entitled to establish, enjoy and maintain intimate relationships free from any external

[4] John, T., "Liberating Marriage," in Arvind Narrian and Alok Gupta's eds. *Law Like Law*, pp. 357, 370.

[5] Friedmann, W., *Law in a Changing Society*, pp. 172–173.

interference. The right to marry also includes appropriate legal framework or security (both legal and social) that provides relationships with recognition and protection. Family rights are embodied in all of the major international and regional human rights instruments; yet as Hodson claims, although there has been progress, the protection of the rights of gay families is often still disregarded. International human rights law thus, in her words, fails to keep "its promise of ensuring equality for all."[6]

Although the Universal Declaration of Human Rights (UDHR) proclaimed by the UN General Assembly is not legally binding, Hodson declares that it "remains the principal international statement of the inalienable rights and fundamental freedoms that belong to every human being. Those rights are based on the principles of equality and respect for the inherent dignity of all members of the human family."[7] The family, according to the UDHR, is "the natural and fundamental group unit of society and is entitled to protection by society and the State." Moreover, "It is the responsibility of States to ensure that these basic rights are enjoyed equally by everyone."

Several Articles of the UDHR make specific reference to family rights. As cited previously, Article 12 provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." And Article 16 (1) states, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted in 1979 by the UN General Assembly, elaborately lays down "the principle of equal rights of men and women in the matter of entry into marriage, consent for marriage, responsibilities during marriage and at its dissolution, reproductive rights, responsibilities with regard to guardianship, wardship, trusteeship and adoption of children and in the matter of ownership, acquisition, enjoyment and disposal of property."

After the adoption of the UDHR on December 10, 1948, the UN turned to the task of turning its gambit of rights into legally binding international agreements. The International Covenant on Civil and Political Rights (ICCPR), which was adopted for signature on December 16, 1966 and came into force on March 23, 1976, is one of major UN treaties that emerged out of this project.[8] The relevant ICCPR Articles are Article 10 (1): "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." Article 7 (a) (ii) states the importance of States Parties to recognize "the right of everyone to the enjoyment of just and favorable conditions of work which ensure . . . a decent living for themselves and their families." Article 11 (1) asserts how States Parties must recognize "the right of

[6]Hodson, L., op. cit., p. 9.

[7]Ibid., p. 13.

[8]Kapoor, S.K., *International Law and Human Rights*, p. 830–831.

everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." In short, all of these rights require State Parties to take appropriate steps to ensure that *all* families have adequate resources to ensure their survival and well-being.

In a similar vein, the International Covenant on Economic, Social and Cultural Rights (ICESCR), also adopted by the UN General Assembly on December 16, 1966 and in force from January 3, 1976, like the ICCPR, asserts that "equality is a central idea of human rights law and it expressly states that its rights are to be enjoyed equally by everyone, without discrimination."[9] States are therefore responsible for taking steps towards the realization of the needs and comfort of all families. Like the ICCPR, States Parties to the ICESCR are required to regularly report to a monitoring body on how the rights are being implemented.[10]

Furthermore, the Convention on the Rights of the Child (CRC), adopted by the UN General Assembly in November 1989 and in force September 2, 1990, is a human rights treaty that more fully embodies the rights of children who form a crucial part of family. "It sets out the rights that children need in order to develop and reach their full potential . . . It is the most widely ratified human rights treaty, with 193 States parties."[11] The CRC recognizes that the family provides the best environment for raising children. It states that a child "should grow up in a family environment, in an atmosphere of happiness, love and understanding."[12] The CRC contains several references to the child's right to a family life. In particular, it states that the child has a right to know and to be cared for by his or her parents;[13] to preserve his or her family relations;[14] to not be unlawfully separated from his or her parents against his or her will[15] and the right to freedom from arbitrary interference with his or her family or home.[16] It also recognizes the possibility "that legal guardians, as opposed to parents, may have primary responsibility for a child's upbringing."[17] It provides that "parents have a right and duty to help children to exercise their rights." It also recognizes that this responsibility may be assumed "by members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child."[18] In addition the CRC reiterates the equality provisions. States are duty bound to protect children's rights on the basis of equality. Article 2(1) provides: "All State Parties shall respect

[9] Article 2§2 ICESCR.

[10] Agarwal, H.O., op. cit., pp. 404–405.

[11] Agarwal, H.O., op. cit., p. 429; see also Hodson L., op. cit., p. 16.

[12] Article 18 (1).

[13] Article 7 (1).

[14] Article 8 (1).

[15] Article 9 (1).

[16] Article 16 (1).

[17] Article 18 (1).

[18] Article 5.

and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." Most importantly for this thesis, the CRC acknowledges that "a child's family may encompass something broader than the nuclear family."[19] Hence discrimination on grounds of the sexual orientation or gender identity of the child's parent or guardian is incompatible with the CRC.[20]

7.3 European Union and Family Rights

Giving effect to the UDHR is the European Convention on Human Rights (ECHR), adopted by the European Court of Human Rights on November 4, 1950 and in force in 1953, which recognizes the utmost significance of intimate relationships to human happiness and dignity. Hence it requires Member States to provide families with special recognition and respect.[21] The following provisions provide for maintaining the integrity of the family unit.

Article 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence." And Article 12 provides: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Like the UN treaties, the ECHR prohibits discrimination in relation to the enjoyment of the rights contained within it.[22] Protocol 12 is another development to the ECHR that came into force in April 2005. Not all Member States are party to this Protocol, but it expands the equality principle of the ECHR and provides that the "enjoyment of any right set forth by law shall be secured without discrimination on *any* ground."[23] This general non-discrimination clause which applies to any legal right represents a significant development for LGBTI families.

Correspondingly, the Charter of Fundamental Rights of the European Union, which was signed and proclaimed in 2000, embodies a whole range of civil, political, economic and social rights that are also found in the other international conventions. "In spite of its signature, the status of the Charter had remained uncertain until the EU Member States ratified the Reform Treaty."[24] Article 7 explicitly refers to the family: "Everyone has the right to respect for his or her

[19] Article 18 (1).

[20] Agarwal, H.O., *International Law and Human Rights,* pp. 429–431.

[21] Hodson, L., op. cit., p. 17.

[22] Article 14.

[23] Article 1(1).

[24] The UK and Poland have obtained an opt out from the Charter and it will thus not be enforceable within these two countries, see Hodson, L., op. cit., p. 18.

private and family life, home and communications." Concerning the family Article 9 provides: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Article 33 provides: "1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to be paid maternity leave and to parental leave following the birth or adoption of a child."

Also relevant to this thesis is Article 21(1) of the Charter, which prohibits "any discrimination based on any ground such as ... sexual orientation." This absolute prohibition of *any* discrimination sits interestingly next to the Charter's protection of family life in similar terms to the ECHR.[25] The Charter also provides that "the family shall enjoy legal, economic and social protection."[26] Article 9 provides for the right to marry, but removes the reference to men and women. Following the signing of the Charter, the ECHR made a direct reference to this fact in the *Christine Goodwin*[27] case, "There have been major social changes in the institution of marriage since the adoption of the Convention (in 1950). Art. 9 of the (2000) (EU) Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Art. 12 (EConvHR) in removing the reference to men and women." Hodson asserts, "In removing this phrase the Charter ignores the argument that marriage is inherently a union of heterosexual couples."[28]

In summary, the ECHR and the Charter give the EU the authority to take further measures to protect LGBTI families. Most significantly, the family life of all kinds of families is to be respected.

7.4 Rulings of the UN Human Rights Committee

In the international arena, there have been some judicial decisions on the right to privacy, marriage and family concerning gay people. In this context the ICCPR is important. In 1994 in the case of *Toonen v Australia*[29] the UN Human Rights Committee held that reference to "sex" in Article 2, paragraph 1 - (non-discrimination) and Article 26 (equality before law) of the ICCPR should be taken to include sexual orientation. With this case, the UN Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against gay people.

[25] Article 7.

[26] Article 33 (1).

[27] *Christine Goodwin v. The United Kingdom, Application No. 28957/95 (11 July, 2002).*

[28] Hodson, L., op. cit., p. 17–18.

[29] *United Nations Human Rights Committee, Report of the Human Rights Committee Communications No. 488/1992, U.N. Doc CCPR/C/50/D/488 (4 April 1994) ('Toonen').*

In 1994 the UN Human Rights Committee recognized that "the criminalization of sexual contact between consenting adult men in private can amount to a violation of the right to privacy,"[30] but it still has not been very upfront about defining "the family." It has taken as its starting position that "the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to provide a standard definition."[31] It thus seems that the UN Human Rights Committee has left the meaning of "the family" to be determined by law and practices of States.

The UN Human Rights Committee was first asked to address sexual orientation discrimination in family life matters in a case brought by two lesbian couples, *Joslin et al v. New Zealand*.[32] Each of these couple was living together, raising children together, and had pooled financial resources. They had also attempted to get married, but had been refused on account of the absence of law since marriage law applied only to heterosexual couples. The four women complained to the Human Rights Committee that they faced discrimination caused by the non-recognition of their relationships and that their right to marry had been violated. The UN Human Rights Committee held that the couples had no right to marry. The use of the term "men and women" in Article 23, the Committee said, "has been consistently and uniformly understood" as obliging States "to recognize as marriage only the union between a man and a woman wishing to marry each other."[33] The UN Human Rights Committee thus skirted the controversial issue in their ruling. Similarly, the UN Human Rights Committee also commented in another context that the "right to found a family implies, in principle, the possibility to procreate and live together."[34] This message thus seems to deny the right of LGBTI persons to marry.

However, the UN Human Rights Committee struck a slightly different cord in its 2003 judgment in *Young v. Australia*.[35] In this case, Young was denied his dependent's pension, his long-term partner who was a deceased war veteran. Young was denied his partner's pension, because Australian law only recognized dependents from opposite sex relationships. This spurred him to complain to the UN Human Rights Committee about discriminatory treatment (a violation of his right to Article 26 of the ICCPR) and his arguments were successful. The UN Human Rights Committee found that Australia was in fact in violation of Article 26. This decision thus protected LGBTI family rights in the truest sense.

[30] *Toonen v Australia*, *HRC Communication no. 488/1992, 31 March 1994.*

[31] General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23), 27 February 1990, at para. 2.

[32] *HRC Communication no. 902/1999, 17 July 2002.*

[33] Ibid., at para 8.2.

[34] Hodson, L., op. cit.

[35] General Comment No. 19, op. cit., see *U.N. Doc. CCPR/C/78/D/941/2000 (2003).*

7.5 Rulings of the European Court of Human Rights

The European Court of Human Rights' earliest and most important decision about family life was delivered in the case of *Marckx v. Belgium*[36] In this case it was held:

> Belgian law, which discriminated against 'illegitimate' children, was incompatible with the right to respect for family life. In this instance an 'illegitimate' child and her mother were found to have a family life, regardless of the status of their relationship under Belgian law. This judgment consequently established a view of 'the family' that is not confined to marriage based relationships. The Court went on to find that States may be required to take certain measures to ensure that family life is respected and to create conditions in which people can lead a normal family life.[37]

Biological ties are one factor that the European Court of Human Rights has given considerable weightage. It has held that the relationship between adult siblings,[38] grandparents and grandchildren[39] and between an uncle and nephew[40] may all amount to "family life." In *Marckx v. Belgium* the European Court of Human Rights commented that "Paula Marckx assumed responsibility for her daughter Alexandra from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them. The Court looked into the generic link and the emotional bond between them."[41] Similarly, in *Keegan v. Ireland* (1994)[42]:

> [T]he applicant complained of an interference with his family life because his daughter (born outside of marriage) had been released for adoption without his knowledge or consent. In recognizing the existence of a *de facto* family in this case, the Court took specific notice of the fact that the child had been conceived as a result of a deliberate decision, which was made by parents who had planned to marry. These factors and intentions, the Court held, gave their relationship the shape of family life.

In *Lebbink v. Netherlands* (2004):

> [T]he Court focused on the importance of evidence of a caring paternal role before Article 8 of the ECHR is engaged. The existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties. Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth.[43]

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[36] *13 June 1979, 2 EHRR 330.*

[37] *Application No. 6833/74, (1979) 2 EHRR 330, [1979] ECHR 2.*

[38] *Moustaquim v Belgium, 18 February1991, 13 EHRR 802;* see also *Boughanemi v France, 24 April 1996, 22 EHRR 228.*

[39] *Marckx case, 13 June 1979, 2 EHRR 330.*

[40] Report adopted in *Boyle v UK, no. 16580/90, 9 February 1993.*

[41] *Marckx case, 2 EHRR para 31.*

[42] *26 May 1994, 18 EHRR 342.*

[43] *1 June 2004, 40 EHRR 18, para. 36.*

Hodson observes concerning the abovementioned cases, "While the Court appeared well disposed towards recognizing *de facto* relationships bound by biological ties (even in the absence of cohabitation), some evidence of real and constant relationships are normally needed before such relationships are afforded the protection of Article 8."[44] In other words, although the European Court of Human Rights places importance on biological ties for defining the notion of "family," it also takes a stand that it cannot be the "sole criteria for determining *de facto* family relations."[45] This is why in *Nylund v. Finland*[46] the European Court of Human Rights held:

> [T]here was no family life between a man and a child whom he had never met and with whom he had established no emotional bonds, in spite of the fact that he had been engaged to the child's mother when the child was conceived (although it undoubtedly considered it significant that the mother had remarried before the child's birth and had denied Mr Nylund's paternity.[47]

By contrast a family relationship may exist *de facto* between parents and their children even in the absence biological ties. In *K & T v. Finland*[48] the European Court of Human Rights had difficulty in finding whether a man who cohabited with a woman and her children from an earlier relationship had a "family life" with those children.

Hodson notes, "Although most of the European Court of Human Rights' cases concerning *de facto* family relationships relate to parent-child relationships, the Court has extended the interpretation of Article 8 to include other intimate relationships."[49] The leading case on this issue is *Johnston v. Ireland*[50]:

> [A] man and woman had lived together unmarried for some fifteen years and had a child together. The couple were unable to marry since the Constitution of Ireland prevented Mr Johnston from obtaining dissolution of a marriage that he had previously entered into with another woman. In its judgment the Court held that the couple had established family life, "notwithstanding the fact their relationship exists outside marriage." It did not, however, find that the couple's inability to marry was a violation of Article 8.[51]

In the case of *Velikova v. Bulgaria* the European Court of Human Rights allowed the unmarried applicant to bring a complaint concerning the death of her long-term partner, as there was "no valid reason to distinguish the applicant's situation from that of a spouse."[52] Whether adults with no legal or biological ties can establish family life was addressed in detail in *X, Y & Z v. UK* in which a transgender male

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[44]Hodson, L., op. cit., p. 25.

[45]Ibid.

[46]*Application No. 27110/95, Dec. 29 June 1999.*

[47]Ibid., see also Hodson, L., op. cit.

[48]*12 July 2001 [Grand Chamber judgment], 36 EHRR 18.*

[49]Hodson, L., op. cit., p. 25.

[50]*18 December 1986, 9 EHRR 203*

[51]Hodson, L., op. cit., p. 25.

[52]*Application No. 41488/98, Dec. 18 May 1999.*

complained that he could not be registered as the father of the child whom his long-term partner had conceived by alternative insemination. When deciding whether a relationship can be said to amount to "family life," a number of factors may be relevant, including whether the couple lives together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.[53] Although the European Court of Human Rights did not find a violation of Article 8 in this case, it nevertheless found that X had lived "to all appearances" as Y's male partner, and "acted as Z's 'father' in every respect since the birth." It also observed that the three applicants had a family life.[54] Hodson writes,

> The Court thus began to recognize *de facto* family ties in its case law and to extend the meaning of family life under the ECHR beyond marriage and relationships of blood to certain long-term committed relationships. Such an approach suggests that the definition of the family under the ECHR is inclusive and based on the social and emotional realities of family ties, and does not depend solely upon definitions of the family found in national laws.[55]

Nevertheless, the European Court of Human Rights' approach has been uneven. LGBTI families have been excluded from equal enjoyment of their rights.[56] But it cannot be ignored that the European Court of Human Rights acknowledged LGBTI families as *de facto* families.

By contrast in 1983 the European Union Commission had the opportunity to consider the case of a same-sex couple, a Malaysian and a British national, who were living together in the UK:

> A deportation order was made against 'Mr.Y', the Malaysian man, which was challenged without any success. The Commission held that the applicant's relationship did not fall within the scope of the right to respect for family life. The Commission consequently analyzed the man's relationship as a matter of private life. As a result, the Commission found that there was no duty on the UK to allow 'Mr Y' to reside in the UK, and the couple's application was declared inadmissible.[57]

The Commission continued to follow this decision for several years in other cases concerning the deportation of members of bi-national same-sex couples.[58]

In *S v. UK* (1986)[59] and *Röösli v. Germany* (1996)[60]:

> The Commission addressed complaints about property laws that treated those in same-sex relationships less favourably than those in (unmarried) opposite-sex relationships. Both

[53] *22 April 1997, 24 EHRR 143, para. 36.*

[54] Ibid., at para. 37.

[55] Hodson, L., op. cit., p. 26.

[56] Ibid.

[57] *X & Y v U.K, application no. 9369/81, Cm Dec. 3 May 1983.*

[58] *W.J. & D.P. v UK, application no. 12513/86, Cm Dec. 13 July 1987; Z.B. v UK, application no. 16106/90, Cm Dec. 10 February 1990;* see also Hodson, L., op. cit., p. 27.

[59] *Application no. 11716/85, Cm Dec. 14 May 1986.*

[60] *Application no. 28318/95, Cm Dec. 15 May 1996.*

> applicants had been in long-term stable relationships and both had been left with no right to remain in their homes after their partners, the legal tenants of the properties, had died. In these cases, the Commission once again failed to recognize that same-sex relationships could establish family life.[61]

In *Kerkhoven v. Netherlands* (1992)[62] the Commission appeared to confine same-sex relationships within the ambit of private life, thus indirectly suggesting that such relationships are shameful and to be kept secretive. Furthermore, because the Commission declared all cases that came before it concerning same-sex relationships inadmissible, issues of LGBTI families could not be addressed by the European Court of Human Rights until the Commission was abolished in 1998. As Hodson notes, "After the Commission was abolished, the Court has delivered a few judgments relating to LGBT relationships."[63]

The European Court of Human Rights adopted the Commission's approach to exclude LGBTI relationships from the definition of "family": "The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation."[64] Hodson views this approach towards LGBTI relationships as outdated and unreflective of changing national trends. She opines, "It is somewhat reassuring that there are signs that the Court is gradually responding to the remarkable legal and social developments that have taken place throughout Europe during the last decade, in which many European States have come to offer legal recognition to same-sex relationships, whether in the form of marriage or civil partnerships."[65]

In *Smith and Grady v. UK* (2000), a military personnel was dismissed on the ground of sexuality. The European Court of Human Rights held that "convincing and weighty" reasons were required to justify discrimination pertaining to sexual orientation.[66] This judgment significantly widened the scope of non-discrimination. This approach was reiterated in *Salgueiro da Silva Mouta v. Portugal* (1999),[67] in which the applicant's request for a parental responsibility order for his daughter was denied exclusively on the basis of the applicant's sexual orientation. The European Court of Human Rights hence found this to be discrimination against sexual orientation.

A comparison of two more judgments provides a clearer picture of the European Court of Human Rights' approach towards LGBTI families. In *Frette v. France* (2002)[68]:

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[61] Hodson, L., op. cit., p. 27.

[62] *Application no. 15666/89, Cm Dec. 19 May 1992.*

[63] Hodson, L., op. cit., p. 27.

[64] *Mata Estevez v Spain, application no. 56501/00, Dec. 10 May 2001;* see Hodson, L., op. cit.

[65] Hodson, L., op. cit., p. 28.

[66] *25 July 2000, 31 EHRR 24.*

[67] *21 December 1999, 31 EHRR 47.*

[68] *26 February 2002, 38 EHRR 21.*

> An openly gay man complained that his application for authorization to adopt a child had been dismissed on the grounds of his 'lifestyle', which the Court took to be a reference to his sexuality. The Court found that the discriminatory treatment experienced by Mr Frette was objectively justified in light of the lack of scientific consensus on the effects on children of being brought up by gay parents.[69]

Subsequently, the European Court of Human Rights took a broader approach in the landmark case of *Karner v. Austria* (2003). The applicant in this case, who had been in a long-term same-sex relationship, complained about discriminatory property laws that denied him tenancy succession rights after his partner died. The European Court of Human Rights took notice of the fact that "[a] growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that, that view was supported by recommendations and legislation of European institutions."[70] The European Court of Human Rights observed that the relevant Austrian laws violated the applicant's right to respect for his home. In reaching this decision the European Court of Human Rights reiterated that "differences based on sexual orientation require particularly serious reasons by way of justification."[71] This was a welcoming decision and a step in the right direction towards equal concern and respect for LGBTI families. The European Court of Human Rights somehow agreed "that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment."[72]

In a landmark judgment in *Christine Goodwin v. UK*[73] the European Court of Human Rights appears to have accepted transgender families: "The Court held that Article 12 refers to the right of a man and a woman to marry and nonetheless found that such gender categories cannot be determined by biological criteria."[74] As a response to this judgement, the UK government acted swiftly and came out with the Gender Recognition Act 2004. Under this Act, transgender people can now legally have their gender recognized.[75]

In several other cases the European Court of Human Rights has had opportunities to determine the legality of same-sex marriages. In *Rees*,[76] *Cossey*[77] and *Sheffield and Horsham*,[78] the European Court of Human Rights held that marriage

[69] Ibid.

[70] *24 July 2003, 38 EHRR 24, para. 36.*

[71] Ibid., para. 37.

[72] Ibid., para. 40.

[73] *11 July 2002, 32 EHRR 18.*

[74] Ibid., *32 EHRR 100.*

[75] Hodson, L., op. cit., p. 31.

[76] *Rees v. U.K. (1987) 9 EHRR 56.*

[77] *Cossey v. U.K. (1991) 13 EHRR 622.*

[78] *Sheffield and Horsham v. U.K. (1999) 27 EHRR 163.*

as protected under Article 12 was the union of two persons of the opposite biological sex, thus restricting the right to marry of "gay men and lesbian." In *Botta v. Italy*,[79] the ECHR held that the right to respect private life certainly comprises the right to establish and develop relationships with other human beings. In *Bensaid v. United Kingdom*,[80] the Court held that gender identification, name, sexual orientation and sexual life are protected by Article 8 of the ECHR as part of "private life." Concerning same-sex relationships the ECHR held in the case of *Mata Estevez v. Spain*,[81] "with regard to private life the Court acknowledges that the applicant's emotional and sexual relationship related to his private life within the meaning of Article 8(1) of the Convention."[82]

Furthermore, Protocol 12 of the ECHR, which came into force in April 2005, is a significant development for LGBTI families. Protocol 12 (discussed in the preceding) introduces a general non-discrimination clause which applies to any legal right. However, according to Hodson,

> Protocol 12 departs from the recent trends in international law by not specifically referring to sexual orientation and gender identity as a prohibited ground for discrimination, in spite of calls from the Parliamentary Assembly for its inclusion . . . While sexual orientation and gender identity discrimination is obviously not excluded from the Protocol's ambit, the message Protocol 12 gives to Council of Europe States about sexual orientation and gender identity discrimination is somewhat equivocal.[83]

7.6 Summary and Conclusion

The UN Human Rights Committee has not attempted to define the notion of "family," and it could even be stated that in the past it has sought to avoid the difficult, controversial issue altogether. Such avoidance was especially apparent in *Joslin et al v New Zealand*, in which the UN Human Rights Committee was initially sought out to address sexual orientation discrimination in family life matters. In the end, the UN Human Rights Committee seemed to bypass the controversial topic of same-sex marriage in their ruling. But the tone changed a few years later in *Young v. Australia,* where the UN Human Rights Committee found that Young had in fact experienced sexual orientation discrimination, thus ultimately protecting and promoting LGBTI family rights.

In the ECHR, discussion of family rights has primarily centered on the role of marital ties, biological ties and long-term committed relationships. In *Marckx v. Belgium* a child and her mother were found to have a family life, regardless of

[79] *Application No. 21439/93, 24 February1998, (1998) 26 EHRR 241, Para 32.*

[80] *Application No. 44599/98, 6 February 2001, (2001) 33 EHRR 205, Para 59.*

[81] *Application No. 56501/00, 10 May 2001.*

[82] Ibid.

[83] As per the Parliamentary Assembly Opinion No. 216 (2000); see also Parliamentary Recommendation 1474 (2000); see Hodson, L., op. cit., p. 30.

the status of their relationship under Belgian law. The ECHR thus recognized the protection and respect of family life for non-traditional family forms. Ruling outcomes were similar in *Keegan v. Ireland* and *Lebbink v. Netherlands*: family life existed regardless of marriage, though the ECHR mainly recognized family life in these cases based on biological ties. But biological relationships alone are normally insufficient to establish *de facto* family ties: in *Nylund v. Finland* it was ruled that there was no family life between a man and a child whom he had never met and with whom he had established no emotional bonds. As Hodson observes, "While the Court appeared well disposed towards recognizing *de facto* relationships bound by biological ties (even in the absence of cohabitation), some evidence of real and constant relationships are normally needed before such relationships are afforded the protection of Article 8."[84] Therefore it seems a number of factors may be relevant to determine "family life," including proximity, the relationship's length and whether commitments have been demonstrated. Since biological ties are no longer the absolute measure of family life, in *X, Y & Z v. UK* the ECHR acknowledged LGBTI families as *de facto* families.

An examination of ECHR rulings regarding family rights also includes examining discrimination on the basis of sexual orientation. In *Salgueiro da Silva Mouta v. Portugal* (1999),[85] in which the applicant's sexual orientation caused his request for a parental responsibility order in respect of his daughter to be denied, the ECHR found this to be sexual orientation discrimination. Likewise, the ECHR found in *Frette v. France* that the denial of Frette's application for authorization to adopt a child was a discrimination based on his sexual orientation, and in *Karner v. Austria* it was held that unmarried different-sex partners and unmarried same-sex partners were to be treated equally.

Finally, Protocol 12 is another development to the ECHR, which expands the equality principle, stating a non-discrimination clause: "enjoyment of any right set forth by law shall be secured without discrimination on *any* ground."[86] While this seems to represent a significant development for LGBTI families, Hodson also finds:

> Protocol 12 departs from the recent trends in international law by not specifically referring to sexual orientation and gender identity as a prohibited ground for discrimination, in spite of calls from the Parliamentary Assembly for its inclusion . . . While sexual orientation and gender identity discrimination is obviously not excluded from the Protocol's ambit, the message Protocol 12 gives to Council of Europe States about sexual orientation and gender identity discrimination is somewhat equivocal.[87]

Thus, in the international arena, the courts have been active in analyzing, interpreting and deciding whether the relationship between two persons can be

[84] Hodson, L., op. cit., p. 25.

[85] *21 December 1999, 31 EHRR 47.*

[86] Article 1 (1).

[87] As per the Parliamentary Assembly Opinion No. 216 (2000); see also Parliamentary Recommendation 1474 (2000) and Hodson, L., op. cit., p. 30.

characterized as "private life" or "family" within the meaning of the provisions stipulated in the Convention. Courts have no doubt played a pivotal role in upholding individual rights and have acted as a catalyst against abuses which undermine the Convention principles. The discrimination suffered by gay couples takes various forms. Undoubtedly, lack of legal recognition hinders many intimate, loving relationships between two consenting adults. The discriminatory treatment meted out to gay people leads to the denial of equal respect and concern towards same-sex families and rights therein. Thus, in general gay people face widespread discrimination in the enjoyment of their family rights, which is contrary to the promise of equality.

7.7 Family Life in India

Part I provided an elaborate account on the evolution of family and rights thereto on an international front. It described the discrimination meted out towards non-traditional relationships and families. In spite of the various international instruments, viz., UDHR, ICCPR, ICESCR, ECHR, EConvHR, etc., the judicial rulings evolved gradually from non-acceptance to acceptance of same-sex families and their rights. This evolution is clearly visible in its various contradictory judgments. In fact, it took a certain amount of time for the courts to realize, acknowledge and duly recognize the seriousness and depth of gay relationships and family life.

In contrast to the global judicial approach, the Indian Judiciary deliberately ignores or overlooks the provisions enlisted in the international human rights conventions and rulings pertaining to same-sex relationships and family rights. In addition, the Judiciary in India also fails to analyze and appreciate the importance of same-sex relationships in the light of customs (especially the *Hijra* Culture) and the prevailing gender-neutral personal acts pertaining to marriage. It simply escapes the issue by shifting the entire burden, stating that any further change concerning the repeal of the law pertaining to homosexuality in India or even the life of gay people in India would be the task and entire responsibility of the law-makers.

Similar to Chap. 6, where ethnographic research was used to depict the current, threatened state of homosexuals in India, I rely on my ethnographic observations to depict the current state of India concerning same-sex unions and alternative forms of family and kinship. Arguing in Ehrlich's terms, I claim that the law should take account of the changing social circumstances in regard to family life. In making the law, the requirements of the present day society should be taken into consideration, and in present day India my ethnographic observations confirm that same-sex unions and alternative forms of family and kinship are proliferating, despite the State's non-recognition.

7.7.1 Customary Law of India

In India each community possesses its own personal law. The Hindus have their separate family law; the Muslims, Christians, Parsis and Jews also have their own separate family laws. But the family law of each of these communities is not necessarily purely governed by religion. For instance, the members of the community are not even required to be strong believers or followers of their religion. It is sufficient for a person to be a member of the community by birth or conversion.[88] For instance, *in Mohandas v. Devaswom Board*, *1975 KLT 55*, "Jesudas, famous play back singer, was a catholic by birth. He used to render devotional music in a Hindu temple and used to worship the presiding deity. He also filed a declaration stating that he was the follower of Hindu faith. It was held that such a bonafide declaration amounts to his acceptance of Hindu faith and becomes a Hindu by conversion."[89] In *Ratansi Morarji v. Administrator General of Madras*, *52 Mad. 160:*

> An Austrian Lady who was born in the Christian religion was converted to Hinduism by the Hindu Missionary Society of Bombay. She then married a Hindu. She died leaving a will which she executed at Adyar in the mofussil of Madras Province. The will was not attested. The question arose whether the lady was Hindu or not. It was held by Venkata Subbarao. J., that Hinduism recognised conversion and that the Austrian lady had become a convert to Hinduism and was governed by Hindu Law. The validity of the will was accordingly upheld.[90]

In *Raj Kumar v. Barbara*, *AIR 1989 Cal. 165* "a child was born to a Hindu and Christian mother. Though, it was not shown that the child was brought up as a Hindu, there was also nothing to show that the child was a Christian, Parsi, Muslim or a Jew. The Calcutta High Court held that the child was a Hindu."[91] In *Vilayat v. Sunila*, *AIR 1983 Delhi 351*, the question arose whether a Hindu husband who has embraced Islam subsequent to the marriage can file a petition for divorce under the Hindu Marriage Act. "It was held by Justice Leila Seth that 'he could do so for at the time of presentation of the petition, the parties need not be Hindus.' Suppose both the parties to the marriage embrace Islam, the view of Leila Seth, J., would still subject the parties to the remedies available under the Hindu Law in regard to the dissolution of marriage."[92]

In *Perumal v. Ponnuswami*, *AIR 1971 SC 2352*, the Court held that "the acceptance of marriage in Hindu form itself was proof of conversion. It has been held that if a person expresses his or her intention to become a Hindu followed by the conduct of community or caste taking into the fold of which he or she is ushered accepts him or her as a member, then he or she is considered Hindu. No formal

[88]Diwan, P., *Family Law*, p. 2.
[89]Subha Rao, G.C.V., *Hindu Law*, p. 45.
[90]Ibid., 44.
[91]Ibid., 43.
[92]Ibid., 48.

ceremonies to effectuate conversion are required." These cases show that the common phrase "Hindus born and not made" is now no longer being used. Hence, according to Subha Rao, "a person who is not a Hindu by birth may come within the ambit of Hindu Law by conversion to Hindu. Hindu Law can thus be applied to all persons who are not Muslims, Christians, Paris or Jews unless the contrary is proved."[93]

A significant aspect of family law or personal law in India is the role of custom. Custom either expands or modifies the personal law of some communities, and some communities are either partly or wholly governed by customs.[94] In *Ramalakshmi v. Sivanatha, (1872) 14 MIA585,* the Privy Council observed: "Custom is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence."[95] In other words, for a custom to be valid, it should be ancient or time immemorial. In *Abraham v. Abraham*, *1863 (9) MIA 195*, the Privy Council pointed out that "when a Hindu is converted to Christianity, it is open to him to continue the Hindu Law as a family usage. He may also give up this usage and adopt the customs of the community to which he has attached himself as a result of conversion. So he may be governed by Christian Law at his option."[96] Conversion can also be witnessed in the case of marriage ceremonies. As per Section 5 of the Hindu Marriage Act, 1955, for a valid marriage, both the parties to the marriage must be Hindus at the time of marriage. However, the Bombay High Court held[97] that "where a non-Hindu girl entered into marriage with a Hindu boy in accordance with customary ceremonies, the girl was accepted in the local Hindu community as belonging to the Hindu religion, and her husband also treated her as a Hindu, absence of specific expiatory or purification ceremonies will not be sufficient to hold that she was not converted to Hinduism before the marriage ceremony was performed."

It is pertinent to note that in the absence of any rule of Hindu Law the courts have authority to decide cases on the principle of "justice, equity and good conscience." This principle has also been recognized by the Court in *Gurunatha v. Kamala Bai*, *1951 (1) SCR 1135*. However, for the sake of convenience of different communities, specific personal laws have been drafted. The Hindu marriage is governed by the Hindu Marriage Act, 1955. The Muslim matrimonial law has been statutorily modified by the Muslim Dissolution of Marriage Act, 1939, so as to allow the wife to file for a divorce. Christian matrimonial law is contained in the Indian Christian Marriage Act, 1882 and the Indian Divorce Act, 1869, amended in 2001. Parsi matrimonial law is contained in the Parsi Marriage and Divorce Act, 1865. It was modified in 1936 and 1988. Jewish matrimonial law is still based on customs.[98]

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[93]Ibid., 44.

[94]Diwan, P., *Family Law*, p. 3.

[95]Subha Rao, *Hindu Law*, pp. 56–57.

[96]Ibid., 57.

[97]*Madhavi Ramesh Dudani v. Ramesh K., Dudani, AIR 2006 Bom 93.*

[98]Diwan, P., op. cit., pp. 2–3.

Ancient Hindu marriage was a sacramental marriage. Justice Muthuswami Ayyar in *Venkatacharyulu v. Rangacharyulu*, *1891 (14) Mad. 316*, has rightly expressed the nature of Hindu marriage: "There can be no doubt that Hindu marriage is a religious ceremony. According to all the texts it is a Samskara or Sacrament. The marriage rite creates a religious tie. It is not a mere contract in which a consenting mind is indispensable."[99] However, in the later decisions of the courts, the sacramental nature of Hindu marriage came to be considered as a contract between two parties. For instance, in *Malla Reddy v. Subbamma*, *AIR 1956 Andhra 237*, the Court held that "marriage also partakes of a civil contract made by the spouses or by their parents if they are minors."

A comprehensive interpretation of Indian family law pertaining to marriage reveals some ambiguities. First and foremost, the law relating to marriage applicable to Hindus, the Hindu Marriage Law, 1955, is gender neutral. It recognizes "marriage between two Hindus" as a valid marriage. It does not use the expression, "marriage between opposite sexes." Hence, this comprehensive legislation can be interpreted to include marriage between two men or two women. According to Section 7 of the Hindu Marriage Act, 1955, "The performance of marriage in accordance with the customary rites and ceremonies of either party can solemnise the marriage." Religious marriage between two males or two females can therefore be considered as a valid marriage.

A few gay marriages have taken place publicly in India and the media has reported such marriages. Hindu law recognizes marriage by mutual consent as valid. Hence, it can be argued that when two persons go through the ceremony of marriage, consent is implied. But consent is not an essential part of Hindu marriage: the Hindu Marriage Act, 1955 does not provide that marriage without the consent of the parties is void, though it does provide that if consent of the party to marriage is obtained by fraud or force, the marriage is voidable.[100] In Section 12 (1) (c) of the Hindu Marriage Act, 1955, "Fraud should relate to the nature of the ceremony or as to any material fact or circumstances concerning the respondent and not merely as to his or her identity." For instance, in *Anurag Anand v. Sunita Anand*, *AIR 1997 Del. 94*, the Court held that "false particulars in bio data based upon which the marriage was solemnised amounts to fraud and the aggrieved party may annul the marriage. But when there is fraud in the religious ceremony, marriage becomes void." Hence, in *Sakuntala v. Nilkantha*, *1972 Mah LR 31,* marriage between two Hindus by the Buddhist rites was held void. In *Aunjona Dasi v. Prahlad Chandra*, *6 BLR 243,* a minor girl was abducted forcibly and her marriage was performed without the knowledge of her guardians. It was held that there was a fraud upon the policy underlying religious ceremony and so it was as if there was no valid marriage at all. Also, in *Rajathi v. Selliah*, *(1966) 2 MLJ 40,* it was held that no one can innovate new ceremonies, and that marriage performed with the innovated ceremonies and rites is invalid. According to Paras Diwan, "In modern Hindu law under

[99]Subha Rao, op. cit., p. 147.

[100]Diwan, P., *Family Law*, p. 25.

which only adults can marry, *kanyadan* or gift of the bride cannot be regarded as an essential ceremony. Marriage is no longer viewed as a gift by the bride's father to the bridegroom. In fact, in modern Hindu law, a marriage can be performed in less than 5 min, since what is required is to take seven steps together by the bride and bridegroom before the sacred fire."[101] In *Shahji v. Gopinath, AIR 1995 Mad. 161*, a court held that "mere registration is no proof of marriage." However, the Court in 2006 held "that the marriages of all persons who are citizens of India whether belonging to any religion should be made compulsorily registerable in their respective states."[102]

Another important fact is that, although restrained, a child marriage[103] can also be performed in India. According to Paras Diwan, "The Acts do not affect the validity of child marriage, which is governed by the personal laws of the parties to marriage."[104] A child marriage is thus neither void nor voidable and continues to be valid even though punishable,[105] yet the issue of validating gay marriage in India seems unthinkable.

In contrast to Hindu marriage, Muslim marriage is a civil contract and not a sacrament. This is mainly because Muslim law does not prescribe any religious service as essential for its solemnization.[106] Paras Diwan writes, "Since Muslim marriage is a contract, Muslim law requires that consent of parties if adults, or of their guardians if minors, must be expressed clearly and unequivocally. There is no Union law for registration of Muslim marriages." But, in *Adam v. Mohammad, (1990) 1 KLT 705*, it was held that if the guardian consents but the minor withholds the consent, no valid marriage can takes place. Christian marriage in India also involves a civil contract, which is solemnized by the minister of the church.[107] Marriage is also a civil contract under the Special Marriage Act, 1954:[108] This Act provides civil ceremony as a performance of marriage and non-age or no consent renders the marriage void.[109]

In the West, a marriage is valid only when it is performed by someone with a state license, whereas in India a religious marriage is legally valid even if it is not

[101] Ibid., p. 51.

[102] See *Seema v. Ashwani Kumar, (2006) 2 SCC 578*.

[103] The Child Marriage Restraint Acts, 1929–1978 apply to all the communities.

[104] Diwan, *Family Law*, p. 44.

[105] *V. Mallikarjunaiah v. H.C. Gowramma AIR 1997 Kant. 77; Gajara Naran v. Kanbi Kunverbai, AIR 1997 Guj. 185; Harvinder Kaur v. Gursewak Singh, 1998 AIHC 1013 (P&H).*

[106] Fyzee, A.A., *Outlines of Muhammdan Law*, 1964, p. 84; see also Diwan, P., *Family Law*, p. 26.

[107] As per Section 5 of the Christian Marriage Act, 1872.

[108] Any two persons belonging to any community, religion, nationality or domicile in India or abroad may opt to marry under the provisions of the Special Marriage Act, 1954, and if they do so, whichever community, religion or nationality anyone of them (or both of them) may belong to, or wherever they may be domiciled, they will be governed by the provisions of the Act and not by any other personal law, see Diwan, P., op. cit.

[109] Shastri, M.R., *Family Laws*, pp. 908–909.

registered. In other words, a Hindu priest in any temple or home can marry two Hindus and a Muslim can marry two Muslims anywhere.[110] A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.[111] Marriage solemnized in accordance with the customary rites and ceremonies is recognized by the State and the Court if there is sufficient evidence to that effect.[112] Similarly, Indian Muslim marriage need not be registered with the State nor does it require a State permission. Further, individuals of any religion can enter into a civil marriage under the Special Marriage Act, 1954 without a licence. However, the Court in 2006 held that the marriages of all persons who are citizens of India, regardless of religious affiliation, should be made compulsorily registerable in their respective states. Nevertheless, even today, several Indian married couples have not registered their marriages, separations or remarriages with the State, yet they are legally married in customary ceremonies.

Many couples have undergone religious marriage ceremonies performed according to their community customs which are indeed recognized by some Indian communities as valid, even though the State does not recognize them, e.g., those who have married blood relations when marriage is prohibited on the ground of blood relationship or affinity. Their relations are treated by the community members with or without opposition. Another instance of marriage recognized by communities yet disapproved of by the State and courts is Hindu bigamous marriages, which became illegal after the Hindu Law was changed in 1955. However, even today some bigamous marriages do take place with the consent of the consent of the first wife, but the second wife enjoys limited legal protection.

Thus, ceremonies of marriage, divorce and customs are allowed to override the statutory law.[113] If custom permits marriage between two people within the degrees of prohibited relationship, marriage between the two will be valid. Hence, the customary law of India is extremely valuable because it helps to maintain a balance between a centralized state and localized communities. It does not give exclusive power to the State to define marriage or to declare it as void.[114] But there are cases in India where couples have married even in opposition to customs, that is, when custom did not permit a marriage. There are also tribes in which no marriage ceremony is required.[115] Similarly, among some tribes mere cohabitation between parties is sufficient to conclude a marriage and no marriage ceremony is required.[116] Therefore, one can rightfully conclude that law and custom could

[110]Vanita, R., *Democratising Marriage: Consent, Custom and the law*, p. 340.

[111]Section 7 of the Hindu Marriage Act, 1955.

[112]Photographs, witnesses and testimonies of priests officiating the marriage serve as evidence of marriage.

[113]Diwan, P., *Family Law*, (2013) Chapter I, p. 3.

[114]Vanita, R., *Democratising Marriage: Consent, Custom and the Law*, p. 341; see also Mitra, S. K., *Hindu Law,* p. 645.

[115]Jats of Punjab; see also, Diwan, P., *Family Law*, p. 51.

[116]Jats, lower castes of Punjab, Haryana and in some parts of Northern India. Same is also true among Buddhists; see *Sohan Singh v. Kabla Singh, AIR 1928 Lah. 706; Charan Singh v. Gurdial Singh, AIR 1961 Punjab 301(FB);* see Diwan, P., *Family Law*, p. 51.

have the same sanction in the form of social pressure. If a particular custom is approved by a certain social group, it should be considered as valid regardless of the group's status as a minority or majority.

This idea can be easily applied to the repeated occurrence of same-sex weddings in a certain region in a Hindu community, for instance. As Ruth Vanita brings out in her historical overview of the evolution of custom and customary law in India, "If a group that defines itself as a community performs a ritual repeatedly over a period of time, it may convince the courts that this ritual has become a custom."[117] She writes in more detail:

> The role of custom is more clearly apparent today in Hindu law. This is because Hindus still retain a vast diversity that most religions have lost. All ancient Hindu law books state that custom is powerful and overrides texts … The British attempted to make Indian law uniform by dividing it on the basis of religion, so that Hindus were governed by Hindu law, Muslims by Muslim law and Christians by Christian law, erased the eclectic mix that actually exists in the practices of many communities … But even the British were forced to recognise the importance of custom in Hindu law because Hinduism has no holy book that overrules other holy books … [T]he Indian government continued the process of making laws uniform by passing laws to regulate and reform Hindu marriage, divorce and other family matters. There was opposition to this codification, mainly because it would erase the diversity of customary practices that had the force of law among different Hindu communities. In deference to this diversity the government built limited recognition of custom into family law … If a group that defines itself as a community performs a ritual repeatedly over a period of time, it may convince the courts that this ritual has become a custom … If several same-sex marriages take place in a Hindu community or alternatively, if gay people who are Hindus conduce several same-sex weddings over a period of time in a particular region, same-sex marriage could come to be legally defined as customary in that region.

7.7.2 Significance of Mutual Consent and Companionship

From the provisions discussed above, consent appears to be a main element of marriage emphasized by Muslim law and the Christian Marriage Act, but not necessarily by Hindu law, though in practice asking the bride whether she accepts the bridegroom as her husband is a significant part of the marriage ceremony. Although marriage laws in India validate marriage only between the opposite sex, the marriage acts use terms such as "marriage between any two Hindus," "a marriage between any two persons," "every marriage between persons, one or both of whom is or are a Christian or Christians." These constructions could also be said to validate same-sex marriages, as none of the above acts expressly declare same-sex marriage as void. Another such example is the Indian Foreign Marriage Act, 1969, which governs marriages entered into outside India: it requires at least one partner to be a citizen of India, but it neither defines marriage nor expressly

[117] Vanita, R., *Democratising Marriage: Consent, Custom and the Law*, pp. 342–346.

insists upon opposite sex union.[118] Hence, same-sex marriage validly entered into in a foreign country should be recognized in India where at least one partner is Indian.

The importance of mutual consent in India is indisputable. Ruth Vanita mentions a popular Urdu saying, "*Miya biwi razi, toh kya karega qazi*?" This means, "When husband and wife consent, what can the judge do?" She affirms that the ancient Hindu law listed 8 to 12 forms of marriages. Among these, *gandharva vivah*, or love marriage or marriage by mutual consent, is popular to date.[119] In case of *gandharva vivah*, a bride is always asked whether she accepts the bridegroom as her husband in the marriage ceremony.[120] Hence it is evident that marriage, whether arranged by family or a love marriage, has to do with a person's individual choice or preference.

During my research fieldwork, I came across gay couples and transgender persons who considered themselves as married couples and lived together in private. This is evidence for why marriage between two consenting adults should not be considered as valid. In *Barmaswami v. Somathamneal*,[121] for instance, the Madras High Court regarded marriage with a eunuch as voidable. In this case, the wife was a eunuch, and the question of validity of marriage came after the death of the husband. However, the Court held that this kind of marriage was not void: marriage is not merely voidable in this case, as marriage is not all about sex. Marriage is voidable if the spouse has an objection to it, but if the spouse is happy to marry a eunuch, then the Court cannot invalidate the marriage. In other words, the Court in India felt that marriage is also about companionship—supporting the other in good and bad times regardless of procreation.

In conclusion, it can be stated that in India no marriage acts specify that same-sex marriages are prohibited. Additionally, as brought out by Ruth Vanita, the repeated ritual of a group can become a custom, and custom in family law is largely recognized by the State. Thus, the claim that Indian laws have no provision of marriage between same-sexes is unfounded, as same-sex marriages are consenting and cultivate one of the most significant societal values associated with marriage: companionship.

[118] John, T., *Liberating Marriage*, pp. 368–369.

[119] This ancient marriage tradition from the Indian subcontinent was based on mutual attraction between a man and a woman, with no rituals, witnesses or family participation.

[120] Vanita, R., "Democratising Marriage: Consent, Custom and the law," in eds. Narrain, A. and Gupta, A., *Law like Love*, pp. 338–339.

[121] *AIR 1969 Mad 124*.

7.8 Under Attack: Same-Sex Marriage and Gay Family Formation

It is the basic need of a human being to stay connected in an intense relationship with another. The law cannot stop people from establishing personal relationships or from loving each other. People will form families and relationships regardless of legal approval.

Gay men are already fathering children in India. In my fieldwork, I came across gay men who were heterosexually married at one time but are now separated and single parents; even widowed men of heterosexual marriage are responsible fathers and single parents. Some of these men are gay.[122] A few gay men have managed to adopt children by surrogacy and are now acting as single parents; others have unofficially adopted children from their own siblings who are part of heteronormative families. Such gay men as single parents take full responsibility for their children, yet they are usually unable to legally father or adopt them. This statement must be expounded: Although new adoption guidelines were recently established in which all adults irrespective of religion and gender are able to adopt children as single parents, men are only allowed to adopt boys, whereas women are allowed to adopt both boys and girls.[123]

Muslim law and Christian Law do not provide for adoption. According to Paras Diwan, "Before the Shariat Act, 1937, adoption among some Muslims was recognised by custom. But it seems, to a very great extent, the custom of adoption stands abrogated."[124] On the contrary, under Section 7 of the Hindu Adoption and Maintenance Act, 1956:

> Any male Hindu, who is not married, or if married, who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if a Hindu male has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.[125]

Further, Section 8 of the Hindu Adoption and Maintenance Act, 1956 provides: "Any female Hindu, who is of sound mind, who is not a minor, and who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take son or daughter in adoption." This in other words would mean that a married female can adopt even without her husband's consent. In *Brajendra*

[122] As per the 2011 report of India's NDTV Channel, 80 % percent of homosexual men in India are heterosexually married, see http://www.ndtv.com/news/blogs/opinion/married_gay_men_and_their_social_implications.php (accessed on March 14, 2015).

[123] Ministry of Women and Child Development, Government of India, http://www.wcd.nic.in/adoption%20guidelines2015.pdf (accessed on December 12, 2015).

[124] Diwan, P., *Family law*, p. 7.

[125] *Smt. Vijayashamma v. B.T. Shankar, AIR 2001 SC 1424*.

Singh v. State of M.P. and Others, *AIR 2008 SC 1056*, the Court held that the Hindu wife could not adopt a son or daughter by herself even with the consent of husband because the section expressly provides for cases in which she can adopt a son or daughter by herself during the lifetime of the husband.

The above sections are discriminatory on the grounds of gender and marital status. The sections do not require sexual orientation as a requisite to deprive individuals of their adoption rights. Applying this logic, the sections can be applicable even to gay people. Sexual orientation of a person cannot be a ground for deciding the eligibility for marriage or even for parenting a child. Through its landmark judgement in *Shabnam Hashmi v. Union of India*, *(2014) 4SCC 1,* the Court recently observed "that any person can adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2000 irrespective of his or her religion and even if the personal laws of that particular religion does not allow it." The adoption right which was previously restricted to Hindus, Buddhists and Jains now extends to all the religious communities. This would mean that all persons, whether gay or straight, are now legally entitled to adopt children.

Since it is obvious that such alternative family forms exist whether the law recognizes them or not, the law requiring marriage and a particular sexual orientation as criteria to form a family therefore becomes fluid—it is weak or has no fixed shape. Why should only heterosexuals be able to decide whether to marry or to form a family? This decision should not be a criterion for depriving people of their civil rights. Hence, sexual orientation should not be a ground for determining marriage or parenting eligibility. Legal provisions conferring rights on the basis of gender and on the basis of marital status should be struck down with the changing times and circumstances. For instance, under Hindu Law, a married woman can adopt a child without the husband's consent, but such a right is denied to the husband. This provision is obviously discriminatory against men in general, whether gay or straight. Although it might have been introduced to protect the interests of children, it appears to be biased and unsuitable nowadays.

In this regard, Ehrlich's theory of living law is also applicable here. Law is not static but should take account of the changing social circumstances. While it is not the focus of this work, it must also be stated that changes in law can also obviously help to change treatment of nonheterosexuals. In the words of Anjali Gopalan,[126] "Law and ethics or values, rarely go hand in hand. Usually one happens and then the other follows or vice versa. They do not go in tandem. But changing the law could be a bit easier than changing the mind-sets of people, because it would then mean that we are asking people to change their thinking on something that they do not really understand."

[126] Anjali Gopalan, Director of the NAZ Foundation, talks in an interview about human rights and homosexuality in the context of Indian society and politics on Aug 12, 2009, see https://www.youtube.com/watch?v=uj57mNwcGPY (accessed on March 15, 2015).

7.9 Lack of Studies on the Discourse of Gay Men and Gay Families

Family is an essential part of any code of human rights; it wishes to preserve personal and ethical values against the omnipotence of the State.[127] Although family is normally defined by marriage, blood and adoption, it is also characterized by other elements such as giving and sharing love, sympathy, protection and recreation.[128] Thus, family emerged not only for the need of sexual satisfaction, reproduction and economy, but also to satisfy other human desires and needs, to have a companion in life, to share life's joys and sorrows with others, to give and gain love and affection, tenderness and devotion.[129]

The patrilineal family unit, which passes on property and lineage through men,[130] is ideal in Indian families.[131] Any other form of the family is unacceptable. The discourse of the family has always been a discourse of heterosexuality itself, simply because of the misconception that there cannot be a homosexual "family." The studies pertaining to family and gender in India, ironically, place little emphasis on the families and relationships of gay men. However, there have been reports of lesbian love and relationships.[132]

Due to limited number of studies on the families and relationships of gay men in India, a deeper understanding of the families and relationships of gay men must be sought in studies from other countries. In the US, for example, Weston has supplied ethnographic descriptions of lesbian and gay nonmarital kinship relations that emerged outside of heterosexually-based family ties and that only partially approximate the family form.[133] Weston focuses on the families of friends and lovers that challenge the sanctity of blood and marriage as the sole determinants of legitimate kin ties. Furthermore, Weeks can also be consulted, who refers to this new social form as the "family of choice" or "alternative family," and sometimes as the "elective family."[134] An active definition of "gay family" has been expanded to include persons who are neither kith nor kin.

Why is it the case in India—even with the well-known religiously motivated *male to female transsexual* community called *hijras* (transgender) challenging

[127]Friedmann, W., *Law in a Changing Society*, p. 172.

[128]Myneni, S.R., *Sociology,* pp. 240–244.

[129]Ibid., p. 247.

[130]Pernau, M., I. Ahmad, and H. Reifeld, *Family and Gender: Changing values in India and Germany*, 2003.

[131]Das, V., *The Oxford India Companion to Sociology and Social Anthropology*, 2003. See Uberoi, P., *Family, Kinship and Marriage in India,* 1998.

[132]Vanita, R. & Saleem, K. (Eds.), *Same-sex love in India: Readings from literature and history*, 2000; Vanita, R., *Queering India: Same-Sex love and eroticism in Indian culture and Society*, 2000; Vanita, R., *Love's Rite: Same-Sex Marriage in India and the West*, 2005.

[133]Weston, K., *Families We Choose*, 1991.

[134]Weeks, J., *Making Sexual History*, pp. 212, 213, 219.

masculinity and the patriarchal norms of society—that the concept of family remains much more heteronormative, i.e., not extending to homosexuals?

7.10 A Narrow View of Gay Relationships

As mentioned, Indian instances of lesbian love have been reported, but studies on the families and relationships of gay men are scarcely reported. And when gay men are the object, their relations are not considered in terms of family and kinship, but in terms of promiscuity and kinship. In an influential article written by the late Gay rights activist Shivananda Khan, "Culture, sexualities, and identities: men who have sex with men in India," he cites examples of heterosexually married gay men "cruising for sex in a park," who go home and return to their lives as good Hindu men with a family.[135] Since the focus of his article is on the males affected by HIV/AIDS, he ignores the possibility of serious intimate relationships among gay men: "gay family and kinship" are of no interest to him. The few studies published on gay men thus follow this tendency of Khan's, representing no emphasis on gay families or even serious intimate gay relationships. But as Khan himself asserts in his article, in India it can be generally stated that the focus of the self is not on the individual but on kinship, making "procreation" a "social compulsion and familial duty."[136] Though he notices this prevailing Indian orientation towards procreation and family among heterosexuals—even among the gay heterosexually married men who "cruise in the park" but faithfully return to their families later—he fails to take into account that gay men in India also generally feel such a duty.

7.11 A Comparison of Heterosexual and Gay Relationships

The most problematic aspect of Khan's article is its limited scope, his superficial portrayal of the quality of relationships among gay partners. By contrast my anthropological findings show that gay men engage in meaningful and deep intimate relations, secret kinships and families among themselves. In the following the shared ideals among gay men and heterosexuals in relationships are portrayed: their common values governing the establishment of friendships or relationships. Such a comparison calls for accurate descriptions of these realities in the form of an ethnographic narrative.

Most gays I met lived a hidden life and did not wish to pursue a family life as gay couples for several reasons. A 35 year old man said to me:

[135]Menon, N. (ed.), *Sexualities,* pp. 3–50.

[136]Khan, S., "Culture, sexualities, and identities: men who have sex with men in India," pp. 99–115; see also Menon, N., op. cit.

> Homosexuality being a crime in India, I can only satisfy myself discretely without indulging into any relationship or commitment. Sex is easily available but relationship invites complications. Therefore, I prefer to go for a hook up without hassle. I don't prefer to fight against the societal norms, and those who can fight and withstand pressures always try to bring out their own story, which cannot be applied as a precedent to other guys. Most activists speak out their experiences, and this does not give much scope for ordinary gay men to express their mind. A large gay population, therefore, remains hidden and never appears before the media or public. Unless gay men and gay couples express their life style, whatever the mind speaks becomes ultimate, thereby creating a general bad impression about gays in the society. (Conversation with interlocutor, April 12, 2014)

A gay couple from Mumbai who had been together for 5 years narrated to me their opinion about the Supreme Court verdict:

> Until 2009, the Delhi High Court judgment had changed our status and life because we felt that now we were legally accepted. Even though societal acceptance was not there, it did not bother us much. With the Supreme Court verdict we have been placed into the Victorian era. Now, everybody could go angry with us. When we go to restaurants etc., we face problems being open. After the Delhi High Court verdict we got confidence in life, but still we faced people's criticism, like people looking at us and laughing; many keep staring at us in restaurants, waiters and managers make fun of us. After the Supreme Court verdict everything is spoilt and wrong message is conveyed. If my partner falls sick, I am helpless. Nobody will acknowledge our relationship. Government will not help. Living as a gay couple in India has become extremely difficult for us. Social acceptance is more important than legal acceptance to us. There were times when practices like child marriage, sati, dowry, widow remarriage existed and were considered as normal. People who opposed these practices were considered as perverse then. So people need to change their mind set. (Conversion with interlocutor, April 9, 2014)

When I connected with a gay couple having a vast age gap of around 25 years, I noticed they seemed quite compatible with each other. Some were open as friends to members of their families but could not disclose much on account of fear of non-acceptance and of being ridiculed. To them, the concept of family and kinship was akin to what it is to heterosexual couples, but it seemed to be a secret family, a kinship known only to them and not to others. For others they were just good friends, either for personal or business purposes.

I interviewed some open gay couples as well. For these couples, family and kinship meant to be accepted by each other's families. They wanted such acceptance desperately. They even expressed their wish to adopt kids. A very few had been accepted by their blood relations and families. However, most still were in the closet. There were gay couples who abandoned their homes and lived separately away from their families. They considered themselves as out-castes. However, being out-casted did not bother them much, as they were their own family and kin's.

Long distance relations are also intense and deep among gay men. A very few long distance relations have culminated into live-in-relationships. But a traditional family—like in the heterosexual conception—was very rare in India among gay men. I had come across one such interracial gay couple who lived in the United States for nearly 20 years and then migrated to India in 2012. They had adopted two kids, a boy and a girl. However, these families were extremely high class. They

lived an openly gay life. Their relatives had accepted them as they were—in contrast to what I witnessed later.

A 42 years guy whom I met at Sahodari's office narrated to me about his family and relatives:

> Till today, I have not seen my uncle and cousins. I do not know them and I will not be able to recognize them at this age. When I was a baby around 1 or 2 years, my parents were forced to leave the house and hence they had to seek refuge in another state. After that incident we never stepped into our ancestral home and never participated in any of the family functions. Nor did we receive any invitations from our relatives. This was all because of a non-approved love marriage of my parents mainly for reasons of class disparities. My mother came from a high class and my father was not so rich. Hence I never saw any of my blood relations. (Conversation with interlocutor, April 9, 2014)

The father is considered as a role model for children. His presence is considered desirable. If adoption rights are given to gay couples, they could serve the need of a fatherly figure in a family. In fact, it would mean something extra i.e., having two daddies. Even the ritual of *kanyadan* ("gift of a maiden" from the bride's father to the household of the groom) is performed by the father at the time of daughter's marriage. In that case, children of gay parents can have the privilege of having two fathers at the time of *kanyadan*. It is also a known fact among most Indians that daughters are close to their fathers and sons look at fathers as their role models. The father is a natural guardian of the child as per law. The father's surname is usually taken by children in India. As single or divorced heterosexual men are eligible to adopt children in India, gay couples should also be allowed to adopt.

Further, gays who were disowned by their family and friends were working with different NGOs and considered these NGO members as family members. These relations were as intense as blood relations. Those kinships were formed by hearts and upon consensus between the two individuals.

In addition to the above, I found a unique form of kinship among gay men in India. I address it as a 'rainbow kinship' or 'invisible kinship' or 'secret kinship' among gay men. Following are the diverse forms of secret kinships which I discovered among Indian gay men:

1. Husband-Wife Kinship
2. Friendly Kinship
3. Lovers as Kins
4. Daddy/Grandpa and Son/Grandson Kinship
5. Uncle/Nephew Kinship
6. Husband seeking Cross dresser or Transgender

Even though the models listed here are flexible and may not be literally adhered to, as the specifics of needs and desires are individual, all these kinships involve both sex and deep emotions, love, care, understanding and respect. Since the partners cannot reveal their relationship to the public, it remains in the closet. In the absence of legal and societal acceptance, they seek security in their relationships. They participate in each other's personal lives and support each other in times

of need, whether morally or financially. Thus, the intensity of such a relationship is very strong.

Such kinships with heteronormative tags among gay men are totally different from that what we see in the heteronormative society. For instance, it is not the same stereotype daddy-son or grandpa-grandson relation where the daddy or grandpa acts as a dominating figure to the son or grandson. There are feelings of respect and understanding towards each other in spite of the age gap. Relations are formed not merely on the basis of sexual contacts, but through understanding, respect and concern towards each other. However, among gay men there are divergent views on such type of relationships or kinships. Some embrace it and some dislike it. Nevertheless, I observed that this invisible kinship among gay men challenged the misconception that people of two different generations usually could not effectively gel with each other. For instance, a gay man who had problems in communicating with his 50 years old biological father was quite friendly, free and comfortable in sharing every part of his life with his 55 years old partner. Prevailing laws and social norms did not break their bond, but the love which they had discovered between themselves helped them to deal with the complications of their lives.

Hence, it was clear to me that people form their own families and kinship structures as per their own needs and convenience. There are no strict rules or definitions for these concepts. One need not even cohabit together for long to form a family. It is only social and legal norms which have imposed cohabitation rules on humans. Families have existed even without cohabitation. For instance, prostitutes in India having regular customers from whom they might have begotten children who are now treated as a part of family. Such prostitutes have, in recent years, gained the status of wives, and their children are eligible to the right to inheritance. Inheritance rights are also conferred upon illegitimate children. Cohabitation is legalized by court if there is proper evidence. Although registration of marriage and performance of religious marriage ceremony is a legal requirement, cohabitation for several years without registration or religious marriage ceremony have been legally approved by courts in the recent judgments giving equal rights to women just as married spouses.[137] Thus, the concept of family, marriage, kinship is never static.

Weston in her work notes the ways in which chosen families challenge the traditional notions of blood and love. She states, "Familial ties between persons of the same sex that may be erotic but are not grounded in biology or procreation do not fit any tidy division of kinship into relations of blood and marriage."[138] In India, I found the family bond established by gay men and other persons coincided with this notion of familial ties. These ties or bonds exist parallel to the procreative and biological ties.[139] They constitute a distinctive form of kinship, contrastive rather than analogous to straight kinship.[140] There is positive power in all these relations,

[137] http://timesofindia.indiatimes.com/india/Couple-living-together-will-be-presumed-married-Supreme-Court-rules/articleshow/46901198.cms (accessed on July 17, 2016).

[138] Ibid., p. 3.

[139] See Weston, op. cit., p. 35.

[140] Ibid., p. 211.

which provides ample possibilities. Varied choices, personal freedom, liberty and pleasure can be derived from such relationships.[141] Hence, the proposition that marriage, monogamy and procreation should become the only way to approve a relationship becomes conservative and unacceptable.[142] In fact, monogamy is more about the union of hearts than the union of bodies.

During fieldwork, I was introduced to a heterosexual couple who was outcasted by their parents, siblings and relatives because they had married against the wishes of their parents. This couple had no family. They had been living an isolated life for the last 20 years. Not a single blood relation had visited them since they married. They were not invited to any family functions. They also did not participate in any family festivals; they were not even informed about the deaths of one of their siblings and parents. It was a total boycott. However, over the last 20 years, though childless, they have managed to create their own family comprised of their friends from the workplace or of people whom they first knew as acquaintances and who later became close friends. They explored family and kinship in their own way.[143]

7.12 Relations to Biological Family

Among some of the traditional heterosexual families, I came across people who have no regard towards their own brothers, sisters or parents. The family ties are broken drastically with no possibility of unification. They are not even on talking terms. Due to various reasons they have now created their own lives. They have formed their own family of sisters and brothers either by associating with people at their work place or friends or acquaintances or merely by socializing. They celebrate all functions together and participate in each other's happiness and sorrows: *maanlela bhau* or *maanleli tai* (in Marathi language) refers to brothers and sisters who are not related by blood or non-biological siblings who act as substitutes. Such kinship tags are also very common in India with respect to uncles, aunts, mothers and fathers. However, the depth of such a relationship might not be the same as in the case of blood relations. Again, the intensity of such relationships depends on the individual, as it is quite subjective. For that matter, how a person perceives "family" or "kin" depends on each individual. For instance, some nurture these ties intensively, whereas others did not take them seriously.

Moreover, at the time of certain ceremonies, like marriage or thread ceremonies,[144] sister/brother/uncle/aunt plays a role in the performance of rituals. When

[141] Weeks, J., *Sexuality*, p. 81–82.

[142] Butler, J., "Is Kinship Always Already Heterosexual," p. 21.

[143] Conversation with interlocutor, March 14, 2014.

[144] It is one of the traditional rites of passage marking the acceptance of student by a *guru* (teacher) and an individual's entrance into a school in Hinduism. The tradition is widely discussed in the ancient Sanskrit texts of India and varies regionally, see P.V. Kane on *samskaras* in *History of Dharmasastras*, pp. 268–287.

biological or marriage relations are strained, the "substitutes" replace the blood relations in these ceremonies. They are then regarded as part of their family and respected in the same manner as in the case of biological relations. In India, there is also the festival of Raksha Bandhan[145] in which brother-sister bonds or relationships are celebrated. Many gay men have come out of the closet to their non-biological *Rakhi*[146] sisters, yet not to their biological sisters. There are also people who have never attended the various events or funerals of their own blood relations. The following case studies demonstrate this further:

Case One:

A 42 year-old man whom I met at the SCHOD office told me about his family relations:

> O: "Till today, I have not seen my uncle and cousins. I do not know them and I will not be able to recognize them at this age. When I was a baby around 1 or 2 years my parents were forced to leave the house and hence they had to seek refuge in another state. After that incident we never stepped into our ancestral home and never participated in any of the family functions. Nor did we receive any invitations from our relatives. This was all because of the non-approved love marriage of my parents mainly for reasons of caste and class disparities. My mother came from a high class and my father was not so rich. Hence I never saw any of my so-called blood relations." (Conversation with interlocutor, February 17, 2014)

Case Two:

A 33 year-old woman who was brought up in an orphanage told me her opinion about family:

> P: "I don't understand what it is to be in a family comprising of father and mother. I had none. I grew up in a different environment. For me warden was the only mother and father and people/kids around me were the only siblings and family. I miss them all. I am married but we still stay connected via telephone. Even today I attend all their functions. For me the orphanage was my family and home. I do not regret not having parents. Now since from the time of my marriage in 2002, I live in Pondicherry. What is the use of having a large family with ten kids when no one can love you genuinely or cannot be at your side in times of need?" (Conversation with interlocutor, February 17, 2014)

Case Three:

A maid servant at the NGO Center considered a neighbor as her brother. She participated in all his family functions to the extent that she even prepared food, washed clothes and started doing all his household work like helping his wife, etc. They addressed each other with deep respect.[147]

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[145]It is a Hindu festival that celebrates the love and duty between brothers and sisters; the festival is also popularly used to celebrate any brother-sister like relationship between men and women who are relatives or biologically unrelated. The festival is also called Rakhi Purnima, or simply Rakhi, in many parts of India.

[146]Rakhi is a sacred thread which the sister ties on her brother's wrist.

[147]Observation made at the SCHOD office during the month of February 2014.

Case Four:

In another case, I came across cases of men who live and work in the Middle East and cannot migrate with their wives and children. Their wives live alone. Husbands visit their families once every 2 or 3 years. During the husband's absence, several such women develop secret intimate relations with other men in their neighborhood or elsewhere. Most of the husbands living abroad are very much aware of this situation on account of their unavailability. The wife's boyfriend takes care of all the day to day needs. He is like a member of the family. He acts as a close friend, extending support and helping her. For instance, he drops the children at school, does the shopping, and helps in household matters, etc.[148] Legally in India, this type of relationship is adulterous; but in such a case, the husband's knowledge of the relationship followed by his silence make the charge of adultery unlikely. Children regard the mother's boyfriend as their uncle. He is like an extended family member to them. They somehow get accustomed to this lifestyle. These boyfriends at times even participate in family functions like birthday parties, weddings, etc. Such instances are common all over and are not particular to India.

Case Five:

In some families, children are kept with uncles and aunts on account of the death of parents or work purposes. Under such circumstances, the uncle or aunt assumes a parental role. A similar example in this regard is the unique family system of the Kibbutz, in which the family as a unit is not responsible for child rearing. Instead, the socialization of children is the responsibility of nurses and the peer group rather than that of their parents. Children sometimes live with non-family members or are schooled apart from their parents, but none of these groups have developed programs of collective child rearing.[149]

Hence, it is evident that people can create families and kinship ties according to their own needs and convenience. There are no strict rules or definitions for such concepts. In fact, one need not cohabit for a long period of time to form a family. It is only the patriarchal societal norms which have imposed cohabitation rules on humans. Families have existed even without cohabitation.

7.13 Diverse Families and Kinship

Family is an essential part of any code of human rights, and wishes to preserve personal and ethical values against the omnipotence of the State.[150] According to Ishwara Bhat, "The ethical considerations of familial responsibilities and the

[148]Observation made in Goa during the month starting from January, 2013 till February, 2013.

[149]See Daner, F.J., *The American Children of Krishna: A Study of the Hare Krishna Movement*, p. 11; Berger, B.M., *The Survival of a Counterculture: Ideological Work and Everyday life among Rural Communards*, p. 264; Weisner, T.S., "The American dependency conflict: continuities and discontinuities in behaviour and values of countercultural parents and their children," pp. 271–295.

[150]Friedman, W., *Law in Changing Society,* p. 172.

overtones of equality, liberty and justice in family life arising out of the guaranteed human rights have common ground and aim at promoting social happiness."[151]

Although family is defined by marriage, blood and adoption, it is also characterized by other elements, such as giving and sharing love, sympathy, protection and recreation.[152] Modern anthropological evidence supports the view of Lowie that family has no origin and that there was a stage in society from which family was entirely absent and it emerged only at a later stage.[153] Thus, family emerged not only because of the need of sexual satisfaction, reproduction and economy, but also to satisfy other human desires and needs, such as love, affection, tenderness and devotion.[154]

The early historical period family system—patriarchal and matriarchal system—became weak after the Renaissance. The new era of science, technology and democracy undermined the pillars of family system. This in turn changed the picture of the modern family. Marriage was followed by divorce, women became economically freer and were no longer under the dictate of man. This changed the relationship between man and woman. Additionally, sexual relations became fragile. Large families diminished into smaller families. Religious control became less dominant, which made the modern family instable. Nevertheless, family still exists and will exist even in the future. But the change in the nature of family has changed its functions. To quote Burgess and Locke: "It seems safe to predict that the family will survive, both because of its long history of adaptability to changing conditions and because of the importance of its functions of affection-giving and receiving in personal satisfaction and in personality development."[155] Thus, it is evident that the family has transitioned from "institution to companionship."[156] The only reason why the State should exercise control over the family is in the interest of society. The welfare of children, who are the future of tomorrow, forms the prime concern of the State. Otherwise, the State has no reason to control family or even family relations.

Most gay men aspire to be a part of the heterosexual population. When it comes to developing or maintaining social relationships including family, parenting and kinship ties, gay men are as competent as heterosexuals. In the words of the American Psychological Association regarding lesbian and gay parenting, "There is no scientific basis for concluding that gay and lesbian parents are any less fit or

[151]Bhat, P.I., "Directive Principles of State Policy and Social Change with Reference to Uniform Civil Code," p. 75; see Bhat, P.I., *Law and Social Transformation*, p. 705.

[152]Myeni, S.R., *Sociology,* pp. 240–244.

[153]Bhushan, V. and Sachdeva, D.R., *An Introduction to Sociology,* p. 297.

[154]Ibid., p. 247.

[155]Burgess, E.W. and Locke, H.J., *The Family,* p. 175, see Bhushan, V. and Sachdeva, D.R., op. cit., p. 319.

[156]Bhushan, V. and Sachdeva, D.R., op. cit.

capable than heterosexual parents, or that their children are any less psychologically healthy and well adjusted."[157]

Also, they do endure monogamous relationships, and hence deserve access to marry the person of their choice. In that sense, marriage and family cannot be the assets of heterosexual people, nor can monogamy be a criterion to confer marriage-like rights on gay people.

One of my interlocutors expressed his opinion to me in the following words when I asked him how he felt as a gay man in India:

> N: "I would not say that to be homosexual is a choice or preference. It is just that I love men, or I like men, or I am interested in men physically, mentally and emotionally. I like to be with men but not with women. I can imagine a man as my life partner but a woman can only be my good friend. My sexual inclination is only towards men and not towards women. I have no erotic feelings when I am with a woman, but I have intense feelings when I am with a man, even when I imagine about them. Words like "Community" are no proper terms. We do not live together as a group, and so in this sense we cannot call ourselves a community. Is being heterosexual belonging to a community? A better terminology would be to say, "male homosexual population." Community is like say, Hijra or transgender community. Most gays do not link with each other nor regard each other to that extent. So, community is a wrong word, mainly politicized by media, activists and academicians. When people talk about gay lifestyle I don't understand what this lifestyle is all about. Is it different from heterosexual lifestyle? Is it sex what they mean by lifestyle? If gays have a particular lifestyle, then what lifestyle do heterosexuals have? Childless couples? How different they are? In what way do their lifestyles differ from that of gays? I and my other gay friends do not have a different lifestyle. We live in the same way as every other person in India. Also, our lifestyle cannot be termed as a "choice" or alternate lifestyle. First of all, we have no choice or alternative. One could say we have an alternate lifestyle only when there were two good or better options or simply two possibilities for us. For instance, you have an institutional marriage system with all legal benefits and still you opt to remain single or have multiple partners or just flirt around. In our case, this does not happen. We have no alternative and no choice. We are therefore forced to choose or opt for getting married heterosexually or to have multiple partners for whatever reasons. In that sense, we do not have an alternate lifestyle. Our life is without better alternative and style. Due to the social stigma, suppression, non-acceptance, we are forced to live that way. If we have had an option to form unions, probably the question of alternate lifestyle would not have arose. It is the heterosexual people who feel or have assumed or formed their own interpretations about us and our lifestyle just because they do not understand what is being gay? Or how do we emotionally feel? Hence, the misunderstanding, wrong judgments or ideologies are constructed to look at us as a community with some peculiar lifestyles. A woman becomes a prostitute or opts for prostitution due to forced reasons. Of course, some willingly go for it. But the majority are forced into it. Similarly, we have no alternative or better choice in our lives and therefore we create possibilities through which we could satisfy our physical, mental, emotional desires. In this sense, it would be wrong to tag our life as an alternate lifestyle. Sexual encounters cannot be an alternative lifestyle because that happens even among heterosexuals. Also, heterosexuals flirt around, have multiple partners, marry or get divorced and many are childless couples as well. Even the term "gay" means merry, happy,

[157] American Psychological Association, Lesbian & Gay Parenting, Washington 2005, http://www.apa.org/pi/lgbt/resources/parenting-full.pdf (28.05.2016) and the amicus curiae-opinion of the American Psychological Association et al. in *Perry et al. vs. Schwarzenegger*, United States Court of Appeals for the Ninth Circuit, 10-16696 (10/25/2010), http://www.apa.org/about/offices/ogc/amicus/perry.pdf (28.05.2016). See also Ball, C.A., *Same-Sex Marriage and Children. A Tale of History, Social Science, and Law*, 2014.

> stupid, rubbish, flirty or prostitute. I would say heterosexuals live a more gay life than do gay men. Gay men have to struggle throughout their lives to understand and realize who they are. When they learn about themselves, they are discriminated and outcasted. Moreover, they have to constantly suppress their identity and feelings. They are almost invisible in the heteronormative social setup. Under such circumstances, the word "gay" becomes very unsuitable, absurd, vague and irrelevant to the life which they actually live. Even many heterosexuals have the same gay lifestyle. Applying the same logic, the term "gay" can be attributed even in case of heterosexual people. (Conversation with interlocutor, March 12, 2014)

It is true that gay people live the same life as heterosexual people. By "gay lifestyle" it would only mean the possibilities gay relationships can create. And in this sense, gay relations operate beyond the hegemonic relations. As Foucault has rightly pointed out, "What sort of relations can be established, invented, multiplied, modulated through homosexuality . . . the problem is not to discover in oneself the truth of one's sex but rather to use, from now on, one's sexuality to achieve multiplicity of types relation."[158] Heterosexual relationships, on the other hand, are routine and lack novelty. In the words of Carpenter, "Marriage, monogamy and the family unit have in each 'a life sentence' for 'the immense variety of love', 'the differentiation of needs of the human heart', the 'understanding and tolerance of other loves.'"[159]

Foucault was of the opinion that since gay lifestyle is created by gays on the basis of their relationships lacking the sanction of law, people do not accept it. However, in India, homosexuality being a crime, most people are unaware of the potential that gay relationships can create. Marriage, procreation and monogamy being the rewarding talents, other alternatives remain unthinkable. Multiplicity of relations to them would only mean sex or illicit sexual contacts.

Referring to families, Ann Oakley states: "The family as it has evolved in industrial societies is a triad of inequality and difference, perhaps the least democratic of contemporary institutions, and in this sense a potent dictator of inequality elsewhere."[160] This means that globalization has brought about a radical change in the family system. No doubt, patriarchy and hegemonic masculinity have made men more powerful than women. But, it has also conferred certain amounts of freedom upon women. Modernization and liberalism have also changed how humans live. Today, both men and women who want to be professionally successful have to stay away from family life. They have to abandon family duties. Apart from earning money, at times, they cannot share equal parental responsibilities. Children are forced to spend time either in a child care center or with a maid-servant. In this way, the globalization of masculinity has weakened family and kinship ties. The power of love has been subverted, and money has taken its place.[161] Thus, corporate

[158]Cited in Halperin, D.M., *Saint Foucault: Towards a Gay Hagiography*, p. 78.

[159]Cited in Gandhi, L., "A case of radical kinship: Edward Carpenter and the Politics of Anti-colonial Sexual Dissidence," p. 104; see also Carpenter, E., *Love's Coming of Age,* pp. 95, 122, 164, 174.

[160]Oakley, A., *Sex, Gender and Society,* pp. 206–207.

[161]Connell, R.L., *Arms and the Man,* p. 5; see also Ehrenreich, B. and English, D., *For Her Own Good,* pp. 18–19.

life seems to have had an influence on traditional masculinity. Where inequalities within the heteronormative families have been, and continue to be, a global phenomenon, the emergence of gay families can serves as a challenge to masculinity and patriarchy.

The patrilineal family unit and a wider kinship grouping are deemed ideal in Indian families. Any other form of the family is unacceptable. Ironically, the studies pertaining to family and gender in India place little emphasis on gay families and relationships. However, lesbian love and relationships have been reported.[162] Not much focus has been placed on gay family or even serious intimate gay relationships. There are gay men who are heterosexually married but are now divorced and living together with their gay partners. There are widowed men living together with their partners. Apart from this, there are married men who maintain relationships with other men outside their marital bond. Legally it would amount to an extra marital affair or adultery, but in most cases married gay men have been successful in hiding such relationships and have maintained their marriage only on account of societal conventions and to avoid being ostracized. Further, there are single gay men and gay couples who have unofficially "adopted" children with the consent of the biological parents. In this case, children live with their biological parents but have gay men as their adoptive parents. Gay men as adoptive parents support these children, both emotionally and financially. They visit their adoptive parents during vacation breaks. Some elderly gay men also have young adoptive teenagers as their children. There are also bisexual men who carry on gay relationships while married or after their divorce. Then there are men who have been amicably separated from their wives and are now living with their gay partners without being in any conflict or quarrel with their former wives. In fact, in some cases wives have been supportive towards their relationship and sexuality. Every type of relationship or situation that exists among heterosexual couples also does exist among gay couples, but the absence of legal and societal support and recognition have compelled such relationships and their self-created or self-acclaimed families to remain in the dark. In addition, there are Indian gay men and couples who have relocated to countries outside India and have either legally adopted children or begotten children through surrogacy. Further, several young gay couples have been successful in relocating for jobs in metropolitan cities like Mumbai, Delhi, Bangalore, Chennai, etc. and are now living together as gay couples. Yet, they cannot openly declare or acknowledge their relationship on account of the general stigma attached to homosexuality. For most Indians, such men are only roommates living together or just normal friends. The Indian society is still not matured enough in understanding the depth of such relationships. Even if people are aware about such relationships, there is also an expectation that men sooner or later will get married heterosexually. But for gay couples their bond is more intense than just a normal friendship. Whatever it may

[162]Vanita, R. and Kidwai, S., *Same-sex love in India: Readings from literature and history,* 2000; Vanita, R., *Queering India: Same-sex love and eroticism in Indian culture and Society,* 2000; Vanita, R., *Love's Rite: Same-sex Marriage in India and the West,* 2005.

mean, in all of the above situations both single gay men and gay couples are awaiting legal recognition and social acceptance of their identity, relationships or families thereto. It is high time that society and judiciary stop putting their heads into the proverbial sand and acknowledge the existence of homosexual relationships.

The discourse of the family has always been a discourse of heterosexuality itself, simply because of the misconception that there cannot be a homosexual "family." And this heteronormative family system is about the passing on of property and lineage through men.[163] In contrast to the heteronormative family, there exists a religiously motivated male to female transsexual community, called *hijras* (transgender), who have a kinship and family system commonly known as *Chela-Guru* or teacher-disciple.[164] It is evident that the *hijra* community existing in India does challenge masculinity and patriarchal norms of society, as the identification is from male to female.

7.14 *Hijra* Community

The *hijra* (transgender) community of India is the best illustration of a non-biological family and kinship system, which excludes blood and marriage relations. The *hijra* community is divided into seven houses. The heads of these houses within a particular region form a *jamat* (group) as commonly addressed by the *hijras*. The *jamat* is responsible for decision making about important issues concerning the community and resolving disputes and quarrels between the members.[165] *Hijra* relationship is commonly known as a *guruchela* relationship. The *guru* is usually conceived as a whole and soul, a father, sister, husband, mother, and the *chela* is considered as his junior or dependent. However, this system is more a hierarchy of sisters as they believe that men often come and go in their families.

Joining a *guru* requires a small fee to be paid by the *chela*. Similarly, changing a *guru* is possible by paying a minimal fee and by undergoing a ritual. Very often heteronormative kinship tags are used among the *hijras,* for instance, a *guru's* sister is addressed as 'aunt' and a *guru's guru* is called 'grandmother'. *Hijra* areas are demarcated and nobody can encroach upon the other's jurisdiction. They have framed their own rules and penalties. The violation of rules can attract severe monetary penalties or even physical abuse or assaults. *Hijra* jurisdictions are

[163]Pernau, M., Ahmad, I., and Reifeld, H., *Family and Gender: Changing values in Germany and India,* 2002.

[164]Nanda, S., *Neither Man nor Woman: The Hijra of India,* p. 186.

[165]Nanda S. 1996. Encyclopedia of World Cultures. The Gale Group, Inc. http://www.encyclopedia.com/topic/Hijra.aspx (accessed on July 9, 2016); Nanda, Serena (1990). *Neither Man nor Woman: The Hijras of India*. Belmont, Calif.: Wadsworth Publishers; Bradford, N. J. (1983). "Transgenderism and the Cult of Yellamma: Heat, Sex, and Sickness in South Indian Ritual." *Journal of Anthropological Research* Vol. 39:307–322.

demarcated mostly for the purpose of money collection by the *chelas* for their *gurus*. These rules apply even in cases of other business activities apart from prostitution. Joining the community means getting conferred with a right to work for subsistence. A *chela* who indulges in any business activity without prior approval from his *guru* is subject to serious penalties in the form of abuse, forfeiture of money and right to subsistence in that particular region. A *chela* can separate from *guru* and also from the community, but this is not valued as a good sign among the community members. It brings a bad repute to the *chela* as honesty is a community norm. When a *chela* earns a bad repute, it is very difficult to find an alternative place or location for any business activity which does not fall within the jurisdiction of a *jamat*.[166]

During my research I came across a *hijra* who was not in good terms with the group members on account of which she was thrown out of the community and had to seek refuge in a remote village to make an independent living. However, she could not survive independently for long and finally had to return to her home town. She hates the *hijra* community and its members. In general I noticed that there is lot of hatred and jealousy among the *hijra* members, as there is tough competition in terms of earning more money and to stay in power.

The *chelas* can live with the *gurus,* who provide them accommodation and food for which they are expected to work either as prostitutes or beg or pursue any other trade which could enable them to earn money (i.e., perhaps for a sex change operation, etc.). Being ostracized by society, supported neither by their families nor the law and denied access to regular jobs, their only means of survival is prostitution. Older *hijras* restrict themselves to staying at home and doing household work, whereas younger *hijras* are expected to earn. Also, members of each household have different *gurus*.[167] *Chelas* very often temporarily move or visit different *hijra* houses all over India as per the instructions which they receive from their *gurus*. The *gurus* also own properties and after their death the properties are inherited by their *chelas*.

As mentioned, *chelas* are not allowed to engage in independent business activity without the prior permission of their *gurus*. The collection of money proceeds in the allocated areas as per the instructions given to them by their *gurus*. One *guru* can have as few as 30 and as many as 60 *chelas*, in some cases even more. Some *chelas* stay with their *gurus*, whereas others have their own accommodations. They visit their *gurus* regularly. In addition, *kothis* or *ladyboys* are also a part of the *hijra* family. *Hijras* and *kothis* are invited to dance on special family occasions like weddings, namings and ear-piercing ceremonies. *Hijras* are commonly invited to bless the new-born infant during the naming ceremony. *Hijra* blessings are considered as divine in India. For blessing the infant, *hijras* receive gifts in forms of money, gold, food or clothes. Further, in Tamil Nadu, *hijras* also organize a function called *Pal function*, a celebration that takes place after the sex-change operation of a *hijra*. However, before the Pal function, a *hijra* must rest and recover.

[166] Ibid.

[167] Ibid.

This phase in the life of a *hijra* is similar to a pregnant woman staying at her maternal home at the time of her delivery. During this period the *hijra* consumes a restricted diet. At the same time, preparation takes place for the Pal function which happens 40 days later. The other members of the house assist in this preparation. For instance, a *kothi* or *ladyboy* helps in getting the right Sari and jewellery for the *hijra* to be worn on the day of Pal function. Sending formal invitations to all the *jamat* and other members is also a crucial part of the preparation. On the day of Pal function after performing puja and other rituals in the presence of *jamat* and other *hijras*, a *hijra* becomes *nirvan* which means bliss or liberation. The entire sex change operation process and ceremony serves as an offering to goddess Bahuchara. *Hijras* identify their identity with Bahuchara goddess. I had the opportunity to attend one such function in association with the SCHOD Society; it was similar to a grand and lavish marriage ceremony. The ceremony was performed throughout the day and night time. Similarly, the funeral of a *hijra* is organised by the members of the house or community. There is this belief among the *hijras* that they have to leave this planet as they arrived at the time of their birth. Hence a structure in the form of a penis made from flour is attached to the genitals of a *hijra* corpse. All in all, relationships in the *hijra* community are a perfect example of alternative family formation in India. However, unfortunately the *hijras* are socially ostracised. Instead of acknowledging their unique and creative form of alternative family system, people in India fear them. There is a belief that a curse from them is usually considered as a bad luck or bad omen.

7.15 Conclusion

This chapter focused on the general evolution of the family as a flexible unit among changing social circumstances, making clear that the "traditional" nuclear family ideal merely marginalizes, excludes and discriminates against alternative family formations. It argued that all of these new family forms are equally valid and worthy of concern, respect, consideration and protection under the law. International human rights law should keep its promise to ensure equality for all; it should recognize and protect the rights of gay families. Important judicial rulings concerning such matters by the UN Human Rights Committee and the European Court of Human Rights were considered. In spite of the various international instruments, viz., UDHR, ICCPR, ICESCR, ECHR, EConvHR, etc., the judicial rulings evolved only gradually from non-acceptance to acceptance of same-sex families and their rights. It is evident from the rulings that the courts needed time to realize, acknowledge and duly recognize the seriousness and depth of gay relationships and family life. The Indian Judiciary, to the contrary, has ignored the international approach pertaining to same-sex relationships and family rights. In so doing, it has ignored how a vast number of Indians are leading their lives, thus failing to understand the importance of same-sex relationships in India. Instead, law-makers now carry the burden of repealing the law pertaining to homosexuality.

Chapter 8
Suggestions and Concluding Remarks

8.1 Introduction

The study involved an analysis of the jurisprudence of the Supreme Court (henceforth "the Court") on the legal recognition of homosexuality, same-sex unions and their right to found a family. It examined how this need has or has not been met by the Court. For this purpose, the following research questions were formulated:

- How consistently has the Court acted in its judgments relating to homosexuality and to the perception of homosexuality, same-sex unions and their right to family?
- What is the current level of protection afforded by the Court to sexual minorities?
- Why is the Court's current approach discriminatory?

This concluding chapter hones in on the contradictory approach of the Court, showing that its judgments relating to homosexuality have been anything but consistent. While the Court has liberally stated, "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom,"[1] it has also conservatively stated that India was not yet ready for the "transplanting of Western [homosexual] experience." In other words, the Court asserts that while India is not yet ready to recognize that gay persons are also persons of equal status and deserving of the basic rights as heterosexual persons, India is indeed ready to recognize transgender persons as such. Thus the Court's contradictory approach seems to reach a climax in its treatment of transgender persons in the progressive landmark decision *NALSA v. Union of India* in which transgender persons were conferred all fundamental rights and granted the status of "third gender." Meanwhile, the Court's

[1] *NALSA v. Union of India, WP (Civil) No. 603 of 2013, para. 19.*

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ruling on Section 377 continues to uphold the dominance of heterosexual norms, explicitly discriminating against other forms of sexual orientation.

Why is this the case? The Court's rulings, for one, seem to be colored by local cultural traditions, which makes it easier for the Justices to accept transgenders in contrast to gay persons. There is no equivalent to the *hijra* tradition in Europe or America. The Court has also expressed concern for public health in connection with the prevention of HIV/AIDS as one reason for recriminalizing Section 377, but the attempt to "prevent" homosexual sexual acts only exacerbates the situation by labeling them as shameful. Thus, closeted gay men, afraid of having their sexual identity exposed, avoid this risk by dodging virus tests. All in all, the Court's approach can be fittingly characterized as ambiguous, simultaneously open and closeminded.

Following the examination of the Court's blatant inconsistency, suggestions are made to the Court to protect the rights of the LGBTI community. The Indian Constitution declares, "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to *all its citizens* justice, equality, fraternity and liberty."[2] The expression "all its citizens" includes both heterosexual and gay citizens. The Court should therefore conclude that the rights enshrined under Article 14 (equality), Article 15 (non-discrimination), Article 19 (freedom of speech and expression) and Article 21 (right to life and liberty) are equally applicable to all citizens, irrespective of sexual orientation. Above all, the Court should pay close attention to the changing social circumstances, in which notions of relationship and family are broadening. It should therefore exercise judicial activism in matters pertaining to same-sex couples.

8.2 Consistency of Judgments and the Perception of Homosexuality

The gay rights movement in India began in 2001 with a set of raids conducted in public parks and NGO offices in the city of Lucknow.[3] These raids led to the arrest of a total of ten people. The operation was conducted on the basis of a complaint to the Lucknow Police Station on the offence of sodomy.[4] These events led to the filing of the NAZ Foundation petition challenging Section 377 of the Indian Penal Code as violative of Article 14, Article 19 and Article 21 of the Constitution. At this time, the Union Ministry of Home Affairs justified the retention of Section 377 on the grounds of protecting minors against sexual abuse. The viewpoint adopted by the Ministry was accordingly:

[2]Pandey, J.N., *Indian Constitution*, p. 29.

[3]Lucknow is the capital city of the state of Uttar Pradesh, India.

[4]Narrain, A., "A New Language of Morality," in eds., *Law like Love*, pp. 261–262.

> Legal reforms in a large number of countries so as to decriminalise homosexual conduct is attributed to increased tolerance shown by such societies to new sexual behaviour or sexual preference . . . Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality . . . There is no fundamental right to engage in same-sex activities. In our country, homosexuality is abhorrent and can be criminalised by imposing proportional limits on the citizen's right to privacy and equality . . . Social and sexual mores in foreign countries cannot justify decriminalisation of homosexuality in India . . . since in the western societies the moral standards are not as high as in India . . . Indian society considers homosexuality to be repugnant, immoral and contrary to cultural norms of the country.[5]

Then, in July 2009, the Delhi High Court decriminalized Section 377 and legalized consensual carnal intercourse (anal or oral sex) between adults. The Delhi High Court kept the provisions of Section 377 intact insofar as it applies to non-consensual, non-vaginal intercourse and intercourse with minors. The judgment conferred fundamental rights to gay people.[6] The two bench judge[7] opined as follows:

> If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.[8] Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.[9]

Later, the Court's judgments[10] established a discriminatory double standard of justice to gay and transgender people. The judgment recriminalizing homosexual activity penalizes men and women involved in it, whereas the judgment recognizing a "third gender" extends legal rights and equality exclusively to transgender people. However, in doing so the Court failed to take note of the fact that the rights of transgender people cannot be safeguarded until their gender and sexual identity are legally recognized. For instance, if a transgender woman indulges in sexual activity with a man (either straight or gay), she can be presumed to have violated the law under which homosexual acts are criminalized, because she is anatomically

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[5]*NAZ Foundaton v. Govt*, *para. 12, 23, 24*; see Maureemootoo, K., "Postcolonial Residues: Masculinity and the Indian Nationalist Imaginary," in *Popular Masculine Cultures in India: Critical Essays,* ed. Rohit Dasgupta and Steven Baker, pp. 60–61.

[6]Right to equality, life, freedom, privacy and liberty.

[7]Chief Justice Ajit Prakash Shah and Justice S. Muralidhar.

[8]*NAZ Foundation v. Govt. of NCT of Delhi, para. 130.*

[9]Ibid., para. 131.

[10]*Suresh Kumar Koushal v. Union of India, Civil Appeal No. 10972 of 2013 and NALSA v. Union of India Judgment, Writ Petition (Civil) No 604 of 2013.*

male. Hence, to extend full-fledged protection to its citizens, the Court should overcome binary gender constraints and separate gender identity from sexual orientation.[11] Although *hijra* or transgender identity is known to India, not all transgender persons are *hijras* and not all *hijras* are transgender persons. Gender and sexuality being diverse, the Court needs to legally recognize the plurality of genders and sexualities. This could help in creating a new right, viz., the right to gender identity.

The Court's contradictory judgments convey a strong message, especially to the gay community: it is legal to be gay in India, but it is illegal to have gay sex in India. Specifically, the Court did not state that homosexuality was illegal, but merely opined that a court is not empowered to deem laws passed by the Parliament as illegal merely because they attack current moral sensibilities, unless they are contradictory to the Indian Constitution. It further stated that the Parliament is free to change the law if it wishes to do so, but until that happens, the prevailing law criminalizing homosexual behavior will stand in the statute books. The Court, despite considering affidavits of gay persons concerning incidents of torture and violence, felt that criminalizing gay sex under Section 377 does not have any impact on the lives of LGBTI people.

The NALSA judgment recognized the third gender and rights thereto like marriage and adoption; health benefits like sex reassignment surgery and hormone therapy and reservations in education and employment, etc., in accordance with Articles 14, 15, 16, 19 and 21 of the Constitution. It acknowledged atrocities meted out to the transgender people, but did not take heed of those affecting gay, lesbian and bisexual identities. When commenting on the validity of Section 377 in the NALSA judgment, the Court even adopted an open-minded attitude towards sexual orientation, viewing it as "an individual's enduring physical, romantic and/or emotional attraction to another person,"[12] and gender identity as "each person's deeply felt internal and individual experience of gender." It stated, "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."[13] Yet the Court neglected to provide any such interpretations or explanations in its judgment criminalizing homosexual activity. Therefore, the Court cannot take pride in its conferment of equal rights to transgender people when it simultaneously considers them as criminals under Section 377.

It is noteworthy that both the Court and the State had equal opportunities to legalize homosexuality, as well as equal opportunities to recognize same-sex relations and prohibit discrimination on the grounds of gender identity and sexual

[11] Sampath, R., "India has outlawed homosexuality. But it's better to be transgender there than in the U.S.," *The Washington Post,* https://www.washingtonpost.com/posteverything/wp/2015/01/29/india-has-outlawed-homosexuality-but-its-better-to-be-transgender-there-than-in-the-u-s/ (accessed on August 10, 2015).

[12] *NALSA v. Union of India, para. 20.*

[13] Ibid., *para. 19.*

orientation. It should also not be forgotten that the Court's past jurisprudence is remarkable. The State has also been more lenient with respect to sensitive issues in the past. But, by stigmatizing homosexuality and not repealing Section 377, both the Court and the State have fallen back into the Victorian era. Instead of embracing diversity, both have embraced uniformity.

It would be quite boring if everyone spoke the same language or wore the same dress. Each and every individual is unique and has his own domain. Neither the Court nor the State should impose its ideas on others. Therefore, there cannot and there should not be a pre-defined way to live in the world. The universe is diverse, and one cannot expect others to conform to his or her personal ideas or ideals. Everyone must live according to his or her own consciousness. Hence, we need to harmonize, synthesize, synchronize and combine different identities, providing space for each and showing equal concern and respect towards all.

The Indian Constitution declares, "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to *all its citizens* justice, equality, fraternity and liberty."[14] The expression "all its citizens" includes both straight and gay citizens. The ultimate harmony rests not in identity alone, but in a country or nation in which each citizen is given his or her proper place. In fact, this should be the attitude of the Judiciary and the State towards its citizens. Such an attitude should not only be reflected in the Constitution and law, but it should also be reflected in citizens' actions and behavior. It is clear that a liberal government, which follows the principle of equal respect and concern for the human dignity of its citizens, will feel duty bound to decriminalize homosexuality and same-sex unions.[15] Today many are oppressed based on sexual orientation, but by recollecting history it is evident that people have been oppressed based on caste, gender, religion and race, e.g., the Women's Reservation Bill, which proposes to reserve a set number of political seats for women, has been pending for many years now in the Parliament. It should be recognized that all those belonging to the above categories, though different, are human and equal none the less. Hence live and let live can be the only slogan in attaining equal concern and respect for all.

8.3 Judicial Protection Extended to *Certain* Sexual Minorities

From the NALSA judgment, it is clear that transgender persons as a third gender are accepted, and it was remarked, quite significantly, that they should not be distinguished from other citizens. It conferred all fundamental rights to transgender persons under Articles 14, 15, 16, 19 and 21 of the Constitution. However, the

[14]Pandey, J.N., *Indian Constitution,* p. 29.

[15]Franke, K.M., "The Politics of Same-Sex Marriage Politics," pp. 239–240.

Court disregards, antithetically, gay persons, criminalizes homosexual acts and further states that no discrimination is meted out to LGBTI people by not striking down Section 377. It thus upholds homosexuality to be a crime under Section 377.

The Court agrees, nonetheless, that India is a party to the Universal Declaration of Human Rights and other international treaties that provide equal rights to all, irrespective of gender. It is fully aware that prior governments have failed to implement the ideals placed in the international instruments.[16] Hence, it should have felt obliged to end any discrimination against gay persons, *not just* transgender persons. On the contrary, the Court has recognized the transgender rights to form a family, adopt children and inherit property. It has even directed the Government to provide formal identity to a third gender on passports, licenses and ration cards[17] and to provide them with separate welfare schemes, medical care facilities and public toilets. Also, it calls for the Government to treat them as a separate class, socially and educationally backward (eligible for reservation quotas in matters of education and employment). In doing so, it has also recommended public awareness campaigns to end the social stigma against transgender people.[18]

While consistent in safeguarding the constitutional rights of transgender persons, the Court is obviously inconsistent in the application of constitutional provisions concerning equal treatment towards gays. In one judgment, it acknowledged that transgender persons are discriminated under Section 377, whereas in the other it refuses to admit the misuse or discriminatory nature of Section 377 towards LGBTI people. Finally, the Court opined in regard to Section 377 that it is entirely up to the Parliament to decide when they want to amend the provision criminalizing homosexual acts, and that the Court will not reproach them for not striking down Section 377.

The Court has referred to expert evidence pertaining to the prevalence of HIV/AIDS in men who have sex with men which emphasizes their status as a high risk group. Also, the Court does not seem to be tolerant towards anal or oral sex, calling both "unnatural." It has clearly expressed that the dividing line between "sex in the ordinary course" and "sex against the order of nature" is just and reasonable. Such an approach reflects the Court's so-called neutrality and diplomacy, which is infected by the virus of homophobia.

The Court during the month of July 2016 provided a clarification concerning its NALSA order passed in 2014.[19] As per this order only transgender persons will be treated as "third gender," while the gay, lesbian, bisexual persons will not fall under this category. The order still does not elaborate on the exact interpretation and meaning of "third gender." In practice, the interpretation of third gender is attributed only to *hijras*.

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[16]*NALSA v. Union of India, WP (Civil) No. 604 of 2013*.

[17]Ibid.

[18]Ibid.

[19]http://www.dnaindia.com/india/report-sc-clarifies-2014-order-on-transgenders-says-lesbian-gay-and-bisexual-people-are-not-third-gender-2229641 (accessed on July 9, 2016).

However, the Court is unaware of the menace of fraud or fake *hijras* in India. There are many criminals who are involved in collection of money by claiming to be *hijras*. The *hijra* community is very much aware of this problem and has often raised its voice denouncing the fraud or fake *hijras*.[20] There is a high probability that criminals could take the defense of being a *hijra* for availing the reservation benefits meant for the "third gender." In fact, these are the issues and concerns which the Judiciary and Government will have to tackle in the years to come.

Based on the above submissions, it can be concluded that gay persons are currently not afforded an equal level of protection. This situation will prevail until the Court decriminalizes Section 377 or until Parliament amends it. While the BJP[21] Government has scrapped 1159 obsolete laws[22] that do not fit in the modern Indian set up, they are still silent on Section 377. In other words, even though "The Repealing and Amending (Fourth) Bill, 2015" was passed on August 6, 2015 to scrap a set of obsolete laws, Section 377 has not been scrapped by the Government.[23]

8.4 Reasons for the Court's Current Approach

Finding an exact reason for the Court's current approach is not an easy task, since the main problem lies in its illogical reasoning. The fundamental rights jurisprudence is distorted in the Court's judgment recriminalizing homosexual acts. But the same Court has been judicially active in safeguarding the rights of transgender persons and has categorized them as a separate gender, a "third gender." In contrast to transgender persons, the Court disregards or ignores discrimination meted out to gay, lesbian and bisexual people. It could be said that the Court is even "pretending" that hardly no homosexuals in India exist, which is reflected in their statement that "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders."[24]

According to a survey of about 1200 self-identified homosexual men conducted about a decade ago, the majority from South Asia (largely India) were heterosexually married and lived with their wives, which is reflective of a culture that dictates people to marry the opposite sex, irrespective of their sexual orientation.[25] The

[20]Nanda S. 1996. Encyclopaedia of World Cultures. The Gale Group, Inc. http://www.encyclopedia.com/topic/Hijra.aspx (accessed on July 9, 2016).

[21]Bharatiya Janata Party, ruling political party in India.

[22]http://timesofindia.indiatimes.com/india/1159-obsolete-laws-scrapped-by-Modi-govt-1301-junked-in-previous-64-years/articleshow/52333875.cms (accessed on May 21, 2016).

[23]http://www.gaylaxmag.com/articles/entertainment/watch-member-of-parliament-tathagata-satpathy-asks-govt-to-repeal-sec-377-in-lok-sabha/ (accessed on March 14, 2016).

[24]*NAZ Foundation v. Union of India, para. 43.*

[25]Khan, S., "Cultural context of sexual behavior and identities and their impact upon HIV prevention models: an overview of South Asian men who have sex with men," pp. 633–64.

Court has failed to take note of the fact that the majority of gay men in India are heterosexually married and leading a dual life, which most likely contributes to increasing HIV/AIDS infections, since closeted gay men fear coming forward to test.[26] By criminalizing homosexuality, the Court has therefore overlooked the health aspect.

The Court has on several occasions expressly departed from the intentions of the Constitution's Framers[27] by resorting to an evolutionary and innovative reading of the Constitution. Under Article 21[28] and 32[29] of the Constitution, for instance, the Court's judicial activism has set right a number of wrongs[30] committed by States, proving a boon for the common men.[31] Although the Constitution does not mention the right to marry, in *Mr. X v. Hospital 'Z'*,[32] the Court interpreted "the right to marry" as an essential element of the right to life under Article 21. In addition, it held that the right to marry also includes the right to privacy. However, the Court's interpretation of the "right to marry" does not include persons of same-sex marriage. Although Hindu law recognizes marriage between two Hindus[33] no matter their respective gender, the Court has given a blindfold acceptance only to the traditional concept of marriage and family. It has never questioned the heteronormative social interpretation of marriage and family or made an attempt to include same-sex marriage and family. In other words, the law does not discriminate against persons on the grounds of gender or sexual orientation, but the Court does. But since homosexuality is criminalized, the issue of the legal recognition of same-sex unions or families has not yet emerged before the Court. If gay identity itself is not accepted, the acceptance of gay unions or gay family lies far beyond Court's reach. Even the Court's interpretation of "discrimination on the ground of sex" under Article 15[34] of the Constitution largely excludes sexual orientation. It includes only male and female identity. It was only through the NALSA judgment that the Court recognized transgender as the "third gender."

[26]Agoramoorthy, G., and M. J. Hsu, "India's homosexual discrimination and health consequences," 2007, http://www.scielo.br/pdf/rsp/v41n4/6380.pdf (accessed on August 11, 2015).

[27]It was impossible for the Framers of the Indian Constitution to foresee the problems of LGBTI people.

[28]Concerns the right to life.

[29]Concerns the right to move to the Supreme Court for the enforcement of fundamental and constitutional rights.

[30]Wrongs such as untouchability, immoral traffic in women, child abuse and child labor, protection of environment, inhuman treatment, custodial death, etc.

[31]Pandey, J.N., *Constitutional Law of India*, pp. 191, 308.

[32]*A.I.R. 1995 S.C. 495,* the Court held: A person suffering from venereal disease, even prior to the marriage, cannot be said to have any right to marry so long as he is not fully cured of disease.

[33]Section 5 of the Hindu Marriage Act, 1955 states: A marriage may be solemnized between any two Hindus. The Hindu Marriage Act is gender neutral.

[34]No person shall be discriminated against on the grounds of religion, caste, creed, race, sex or place of birth.

Concerning homosexuality, the Court is of the opinion that Indian society is not yet ready for the law to be repealed and hence it decided to hand the issue back over to lawmakers. The Court observed: "We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level."[35] It is true that the majority of Indians are uncomfortable with the concept of homosexuality. Gay men sometimes shift their base from small villages to big cities in search of acceptance and to lead a free liberal life. Nevertheless, even in cities, people are still largely intolerant towards the concept of homosexuality. Gay marriage is still far beyond reach. India recently voted in favor of the anti-gay resolution, thus choosing to go hand-in-gloves with nations known for their rigid anti-LGBTI stance.[36]

Some support homosexuality but oppose gay sex, questioning whether it will lead to animal sex or even marriage with an animal in the future. But such a view overlooks personal laws, which are applicable only to consenting adults, and animals do not qualify as consenting adults. What two people do inside the privacy of their own home with mutual consent is nobody's business including that of the State or Court. Opponents of same-sex unions, moreover, often link homosexuality with prostitution, failing to realize that same-sex union is about love and companionship, whereas prostitution is a business. Prostitution knows no gender or sexual orientation, only money.

In the context of the above misconceptions and social circumstances, the Court's statement that it needs societal approval or consensus for decriminalizing homosexuality appears to add fuel to the fire. The Court needs to realize that regardless of the political or societal climate it is legally and constitutionally wrong to exclude certain people of their fundamental or human rights merely because they are invisible or in the minority. The Court must also realize that its concern for public health in connection with the prevention of HIV/AIDS is actually exacerbating the situation, as closeted men are much less likely to regularly test for the virus out of fear of being exposed to heterosexual family and friends.

8.5 Suggestions to the Court

In view of the foundational aspect of this thesis, *delege ferenda*, I shall propose some suggestions to the Court for the purpose of safeguarding and protecting the rights of the LGBTI community. The Delhi High Court's approach should be vindicated. The Court should rethink why LGBTI people (sexual minorities) should

[35]*NAZ Foundation v. Union of India,* p. 94.

[36]India chose to extend support to a host of intolerant nations, like China, Egypt, Iran, Iraq, Jordan, Kuwait, Oman, Qatar, Pakistan, UAE, Saudi Arabia and Russia, see http://www.hindustantimes.com/india-news/india-votes-in-favour-of-russian-resolution--against-gay-rights-at--un/article1-1330358.aspx (accessed on August 13, 2015).

be conferred fundamental rights on par with the heterosexual population. The Court should explain that LGBTI people are no different and thus should not be deprived of their basic human right to life, to love and to form unions. In doing so, the Court should conclude that the rights enshrined under Article 14 (equality), Article 15 (non-discrimination), Article 19 (freedom of speech and expression) and Article 21 (right to life and liberty) are equally applicable to all citizens, irrespective of sexual orientation. It should conclude that all people, irrespective of gender and sexual orientation, should possess the right to decide whether to marry and to form a family. The Court should also rethink the incorporation of the right to gender, right to sexuality and the sexual orientation as a part and parcel of the right to life under Article 21 of the Constitution.

Further, in the light of the constitutional provisions and the international conventions ratified by India, the Court should provide reasons for inclusiveness of LGBTI people. This can indeed strengthen the LGBTI rights advocacy in India leading to the formation of laws for legal recognition of gay marriage or same-sex civil unions and same-sex families. The Court's explanations can serve as guidance to Parliament while drafting the relevant legislation concerning LGBTI people. Since India is a conservative nation, as an alternate regime the Court can also propose registered partnership legislation.

With regard to parental rights, the Court should recommend enacting equal parental rights and access to parenthood for same-sex couples. The Court in various judgments has upheld that the welfare of the child is of paramount consideration.[37] As a matter of fact, even the Government recently announced new, simplified guidelines concerning adoption. According to the new guidelines, "[A]ny prospective adoptive parent, irrespective of his marital status and whether or not he has his own biological son or daughter, can adopt a child; single female is eligible to adopt a child of any gender, whereas single male person is not eligible to adopt a girl child."[38] In this situation, even gay people can adopt without disclosing their sexual orientation. The guidelines do not specifically disentitle gay people from adopting children. For gay people, with the aid of the new adoption guidelines they can become legal parents and can even form their own family, but they cannot disclose their sexual orientation. Further, a gay man can father a child but legally cannot have a man as his life-partner. Few bollywood gay celebrities have recently adopted children through surrogacy. Therefore, though these guidelines are heteronormative and do not relate to same-sex couples, same-sex couples willing to adopt children can indirectly take advantage of them.

It is evident that not many situations can be remedied by criminalizing, banning or abandoning them. For even if the State or Judiciary decides to ban abortion, porn or gay sex, people will still find ways to satisfy those needs. It is therefore crucial

[37]*Gaurav Nagpal v. Sumedha Nagpal AIR 2009 SC 557, ABC v. NCT of Delhi, SCC 2015 609,* http://supremecourtofindia.nic.in/FileServer/2015-07-06_1436184974.pdf (accessed on August 12, 2015).

[38]Ministry of Women and Child Development, Government of India, http://www.wcd.nic.in/adoption%20guidelines2015.pdf (accessed on December 15, 2015).

that the Court in deciding matters takes into account new developments and changing social circumstances, lest its judgments lose touch with reality. Regarding the new adoption guidelines, it could also be argued that there can be no reason to exclude gay couples from the "traditional, public, legal institution of marriage or partnership."[39] Thus, the Court in its future cases should broaden the concept of marriage and family so as to include all citizens irrespective of their gender identity or sexual orientation. It should provide a gender neutral interpretation of marriage and family. This will help prohibit discrimination meted out to LGBTI people by treating them as equals to other citizens in terms of marriage equality.

It is noteworthy that the Court in the past has duly recognized the right to marry and form a family.[40] Until now, specific issues pertaining to gay marriage and family have not come up before the Court. But the Court could certainly start exercising judicial activism in its judgments as a preparatory step to accommodating or including same-sex couples in the definition of marriage. This will enable the Court to further broaden its attitude towards the "right to marry," which it has already signaled in the past.[41]

Following the footsteps of the Delhi High Court verdict, the Court has an opportunity to decriminalize homosexuality even at a future date.[42] It can direct the Government to insert a proviso to Section 377 that penal provisions appended thereto would not be applicable to those who are above 18 years of age if they voluntarily indulge in carnal intercourse in private.[43] Besides, in its future judgments it can expressly state that people have the right to marry irrespective of their gender identity and sexual orientation, but that it will not entirely implement this principle until the Parliament supports it.[44] It can also direct the Parliament to implement it directly. For instance, in 1999, the Vermont Supreme Court held that same-sex couples had the right to a treatment equivalent to that afforded to heterosexual couples but left the Legislature the choice to allow marriage or to implement an alternative legal mechanism.[45] The Court can also suggest or recommend for Registered Partnership or Civil Union for gay couples, which offers a potential to obtain a legal status equal or similar to marriage. However, partnership or union would still only mean unequal treatment towards gay people, ultimately compelling the Government to open gay marriage.[46] Furthermore, due to the lack of

[39]Bribosia, E. I., Rorive, I., and Van de L. Eynde, "Same-Sex Marriage – Building an Argument before the European Court of Human Rights in Light of the U.S. Experience," p. 27.

[40]*Mr. X v. Hospital 'Z', A.I.R. 1995 S.C. 495.*

[41]Ibid.

[42]Currently the matter has been submitted to the five judge constitutional bench, who will review the hearing anew.

[43]Magoo, I.K., *Law Relating to Sexual Offences and Homosexuality in India*, p. 323.

[44]See Holning, S. L., "Rewriting Schalk and Kopf: shifting the locus of deference," pp. 243–264; see also Ministry of Women and Child Development, Government of India, op. cit.

[45]*Baker v. Vermont, 744 A. 2d 864 (Vt 1999).*

[46]See Ministry of Women and Child Development, Government of India, op. cit.

Indian consensus, the Court can provide a specific time limit or grace period for its implementation.

The gradual approach of the Court and Government should be towards legalizing gay marriage. Such an approach could mitigate its past regressive judgment. This will also help to erase the Court's prior standpoint on the subject, conveying a strong message that the Court is progressive in safeguarding LGBTI rights. Furthermore, it will shift the locus of the Court's scrutiny not only to whether homosexuality should be decriminalized but also towards the legal recognition of same-sex unions, families and rights thereto.[47] Finally, the Court judgments pertaining to homosexuality can have the greatest marginal effect in countries where public acceptance or tolerance towards LGBTI is low.[48]

To rectify this situation, the Court should look into the Constitution and into its own past judicial activism. Additionally, the Court should gather the strength and support of the significant foreign judgments, foreign legislation and international conventions ratified by India especially for the purpose of safeguarding the human rights of its own citizens.

8.6 Conclusion

In this perspective, the reduction of discrimination against homosexual/LGBTI citizens and life forms and the extension of equal respect to different forms of sexual orientation, gender identity and family life has not only to be understood as an integral part of a larger development in law, but as a litmus test for the state of development of a modern legal order. In this regard, this book on "Legalizing Homosexuality in the Jurisprudence of the Supreme Court of India" intended to be a case study. This book contributes to the Cluster of Excellence "Religion and Politics in Pre-Modern and Modern Cultures" at the University of Muenster, Germany by focusing on "Normative Modernity" in an effort to critique inequalities and legal discrimination against LGBTI in India and India's task to accord equal concern and respect to all of its citizens.

To conclude in the illuminating words of the Delhi High Court verdict, which upheld constitutional goals and human rights ideals:

> The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He 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

[47]Magoo, I.K., op. cit.

[48]Helfer, L., and Voeten, E., "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe," p. 80, see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 (accessed on August 25, 2015).

> tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.'[49]

> If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised.[50]

> Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately … Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.[51]

On the higher planes of existence and consciousness there are no gender or sexual orientation differences. Differentiation by physical sex exists only on the biological level for the purpose of perpetuation of the species.[52] Sex is a universal force and it works on different levels. How one reacts to it depends upon each person, not on his or her sex.[53] The segregation of the sexes should be put to an end and individuals should be allowed to mix more freely,[54] not as men, women, gay or straight but as equals of the same transcendent reality. Our vision should be directed unfalteringly towards the future and the realization of a new humanity without any divisions, one which endures and experiences the joy of diversity.

[49] *NAZ Foundation v. Govt. of NTC Delhi, 160 Delhi Law Times 277, para. 129;* see also the Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pp. 57–65.

[50] *Naz Foundation v. Govt. of NTC Delhi, 160 Delhi Law Times 277, para. 130.*

[51] Ibid. at para. 131.

[52] Pandit, M.P., *Tell us of the Mother,* p. 22.

[53] Ibid., p. 22.

[54] Ibid., p. 22–23.

Chapter 9
Summary and Main Thesis

This book considered the Indian Supreme Court's jurisprudence on the legal recognition of homosexuality, same-sex unions and their right to found a family, asking specifically how the needs of LGBTI persons had been met by the Supreme Court. The study analysed the Court's jurisprudence on homosexuality, the Court's current position on homosexuality and the legal recognition of same-sex unions. In addition, the study also considered how much the Court's position had evolved in the past years.

In light of the present situation in India in which the Supreme Court had displayed a conservative attitude in their ruling on Section 377 of the Indian Penal Code, the book questioned which issues might have influenced the Section 377 ruling. Thus, the central interpretative methods used by the Supreme Court were taken into account to analyze the general implementation and enforcement of the principle of equality and non-discrimination enshrined in international human rights laws to matters pertaining to sexual orientation and gender identity. The book also examined laws on homosexuality under the aspect of the "protection of the family." The relevant articles (Articles 14, 15, 19 and 21) of the Indian Constitution were emphasized alongside their scope in protecting human rights, illuminating the level of agreement between the Indian Constitution and international human rights conventions in the context of the promotion and protection of LGBTI persons.

It examined the jurisprudence of the Supreme Court of India on homosexuality and issues concerning same-sex unions and families in order to determine how their need for protection and legal recognition had been met by the Court. In doing so, it analyzed the implementation and enforcement of the *principle of equality and non-discrimination* enshrined in human rights laws to matters pertaining to sexual orientation and gender identity. Protecting the family is a central concern of international human rights law. In this direction, the research study presented sociological and socio-anthropological findings from India and then made normative recommendations to all states, human rights tribunals and other law and policy makers with regard to an adequately broad notion of the meaning of "family." It

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examined how such recognition had or had not been met by the Court. The present situation and the arguments used by the Court helped to identify the main problems in the Court's current approach, possible reasons for it and to propose some ways or suggestions to move forward.

The subject of this study related to constitutional law and, more precisely, to human rights. In addition, it included other fields of law like the Indian Penal Code, family law and international public law. The study to some extent went beyond traditional legal dogmatics, concerning itself with how the laws were practiced, and focused on the major problems in the Court's current approach and conjectured why the Court had taken this approach in the first place. Through a case law analysis, the study attempted to identify and systematize the current approach of the Court towards homosexuality and related issues. It looked beyond traditional legal dogmatics in order to uncover the reasons and principles behind the Court's current approach. Also, a *de lege ferenda* (making justified recommendations for the lawgiver) aspect was a part of this study, which has helped to formulate suggestions to the Court on how it could better accommodate the needs of gay people. In doing so, the study relied on socio-anthropological findings pertaining to sex, sexuality, contemporary families and intimate relationships among gay men in India.

The book explained the most central interpretative methods used by the Court. As a basic and crucial background to this thesis, a historical account of the Constitution's evolution—including its sources, preamble, features and basic structure—and the powers and scope of the Court as a final binding authority were provided. Other issues relevant to the independence of the Judiciary, interpretative methods, the hierarchy of courts, its composition, qualifications and appointment of judges, powers and jurisdiction of the Court, High court and other subordinate courts were also discussed.

The study threw light on the international jurisprudence of discrimination against LGBTI people and elaborated the relevant Articles (Articles 14, 15, 19 and 21) of the Constitution and their scope in protecting human rights. Agreement among the rights enshrined in the Constitution and the rights stipulated in the Conventions with special reference to the promotion and protection of human rights of gay people were considered. It further reflected on the high level of (legal) discrimination and violence towards LGBTI Indians, and looked into the concrete instances of discriminatory practices affecting the daily lives of homosexuals in India.

The Court's observations in terms of judicial activism and judicial self-restraint were scrutinized. In the past, the Judiciary had given recognition to international conventions and treaties, especially when matters were brought before the Court through Public Interest Litigations (PIL). The study therefore proposed that the Court should adopt an activist approach and should issue directions to the State and concerned authorities for taking positive action in order to secure the effective enforcement of the rights of gay people. An analysis of significant judgments that created a rough sketch of the Court's present day understanding of homosexuality, transsexualism and rights thereto was provided.

As mentioned, on December 11, 2013 the Court overturned a High Court verdict that struck down the 1860 law and decriminalized consensual carnal sex among adults. In justifying the ruling, the Court discussed the value of judicial restraint in a constitutional democracy, only to hold the Legislature responsible for amending Section 377 in case of misuse by police. The Court was of the opinion that there was no clear proof of constitutional violation to invalidate the law and believed that the discrimination alleged by the LGBTI community was exaggerated or somehow inadequate to justify reading down parts of Section 377. It set aside all the foreign sources of law, and it also overlooked the gay rights jurisprudence of other major constitutional democracies, and in doing so, it delivered a bizarre and regressive verdict. However, on February 2, 2016 a three-judge bench headed by the Chief Justice of India decided to constitute a five-judge constitutional bench to reconsider the constitutionality of Section 377. India has no specific law to protect the interests of LGBTI people. It is therefore the responsibility of the Court to prohibit discrimination by safeguarding the fundamental rights of the LGBTI.

The study described the social reality of contemporary "families" and "relationships" in India. The "living law" approach by Eugen Ehrlich was used as it provided all the conceptual principles and tools to the Judiciary necessary for legalizing homosexuality and recognizing same-sex unions in India. Also, the study rightly acknowledged that there is a diversity of sexual preferences and homosexual sexual relations that should be decriminalized and accepted based on the constitutional rights of gay men to privacy, to sexual identity, to personal freedom and to equal treatment, among others.

The ethnographic research conducted in India supplied numerous descriptions of gay relationships and extra-familial kin ties challenging heteronormativity, patriarchy and hegemonic masculinity. It also projected the power of the gay subculture to localize the commercialization of gay sex. It showed the undeniable presence of this subculture in India within the context of stark heterosexual moralities governed by Victorian ideals.

Further, an attempt was made to demonstrate how gay culture, though marginalized, challenged patriarchy and hegemonic masculinity by means of gay masculinity. The study tried to demonstrate how the guise of gay masculinity had persistently enabled gay men to foster secret intimate relationships among themselves, thus challenging hegemonic masculinity.

Hence, the study proposed thinking in terms of "a law beyond the law," that is, legalizing homosexuality and further recognition of gay unions. Legalizing homosexuality, therefore, would mean a further investment in gay marriage law or law for marriage-like unions.

Additionally, the study focused on the family and family law with regard to the rights of LGBTI persons: the various international instruments, viz., UDHR, ICCPR, ICESCR, ECHR, EConvHR, etc., in reference to same-sex families and their rights. The Indian Judiciary has overlooked the provisions enlisted in the International Human Rights Conventions and rulings pertaining to same-sex relationships and family rights. Hence the ethnographic observations put forth in this book depicted the current state of India and its proliferating same-sex unions and alternative forms of family and kinship, which are largely unrecognized by the State.

To achieve deeper insight into this question, an understanding of the significant developments of international human rights law was provided. In particular the following presented an examination of family rights put forth in the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and in the European context the European Convention on Human Rights and the Charter of Fundamental Rights, which give the EU the authority to take further measures to protect LGBTI families.

Important judicial rulings were also given due consideration. The marriage law in India was elaborately described. Through an analysis of Hindu, Christian and Muslim marriage law, it was shown that the primary requisite of marriage in India is consent and the primary value is companionship. Also, marriage was examined in light of customary law of India.

The international human rights instruments related to gay families were considered. And ethnographic research was used to depict the current proliferating forms of families in India and in order to argue for their recognition. An elaborate account on the evolution of family and rights thereto on an international front was provided. Also the discrimination meted out to non-traditional relationships and families was described. The judicial rulings evolved gradually from non-acceptance to acceptance of same-sex families and their rights were enumerated.

The book also brought to light how in contrast to the global judicial approach, the Indian Judiciary has deliberately ignored or overlooked the provisions enlisted in the international human rights conventions and rulings pertaining to same-sex relationships and family rights. Also, it considered how the Judiciary in India failed to analyze and appreciate the importance of same-sex relationships in the light of customs (especially the *Hijra* Culture) and the prevailing gender-neutral personal acts pertaining to marriage. The ethnographic observations were utilized in order to describe the current state of India concerning same-sex unions and alternative forms of family and kinship.

Finally, the current level of protection extended to gay people in India by the Court was described, thereby proposing possible explanations for the Court's current approach and providing suggestions for moving forward. The study thus involved an analysis of the jurisprudence of the Supreme Court on the legal recognition of homosexuality, same-sex unions and their right to found a family. It examined how this need has or has not been met by the Court.

The Court's contradictory approach was elaborately explained through the progressive landmark decision *NALSA v. Union of India* in which transgender persons were conferred all fundamental rights and granted the status of "third gender." All in all, the study examined and analyzed how the Court's approach could be fittingly characterized as ambiguous, simultaneously open and closeminded. In the light of this perspective, the reduction of discrimination against homosexual/LGBTI citizens and life forms and the extension of equal respect to different forms of sexual orientation, gender identity and family life can be understood as a crucial part of a larger development in law and modern legal order.

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