

Section 377 and the Dignity of Indian Homosexuals

This paper seeks to determine the extent and manner in which the proscription of “carnal intercourse against the order of nature” under Section 377 of the Indian Penal Code, 1860 makes criminals out of homosexuals. Section 377 is not merely a law about anal sex alone, but applies to homosexuality in general. The lack of a consent-based distinction in the offence has made homosexual sex synonymous to rape and equated homosexuality with sexual perversity. Section 377 is the biggest affront to the dignity and humanity of a substantial minority of Indian citizens. The decriminalisation of sodomy will contribute directly to restoring the dignity of homosexuals and allow the gay movement to emerge from the shadows.

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Is the criminal proscription under Section 377 of the Indian Penal Code, 1860 confined to certain sexual acts or homosexuality in general? This question is inspired by the dismissal of a recent petition challenging the constitutionality of this the anti-sodomy provision of the Indian Penal Code, 1860 (hereafter S 377). The challenge to the law was brought by Naz India, an NGO working on health-related issues of men who have sex with men (MSM).

Owing to the lack of actual prosecutions under the law wherein adults indulging in consensual homosexual sex in private have been arrested and prosecuted, the Delhi High Court stated that: “In this petition we find there is no cause of action as no prosecution is pending against the petitioner”.¹ The issue of cause of action is now moot after the Supreme Court of India directed the Delhi High Court to re-hear the case on merits.² However, the reasons for the Delhi High Court’s dismissal have raised questions that require consideration: Is the actual harm caused by S 377 confined to police and judicial records? And secondly, is the meaning of S 377 confined only to anal sex?

The principal quest of this paper is to determine the extent and the manner in which the proscription of “carnal intercourse against the order of nature” under S 377 makes criminals out of homosexuals. Part I of the paper argues that S 377 is not a law about anal sex alone. The scope and application of S 377 through an increasing identification by the courts of the sexual acts with specific persons, and the inclusion of different sexual acts between men within the scope of S 377, applies it to homosexuality in general. Part II highlights that the lack of a consent-based distinction in the offence has made homosexual sex synonymous to rape and equated homosexuality with sexual perversity. Part III of the paper substantiates this broader meaning of 377 with the increasingly creative ways in which 377 is being implemented. A recent example arose where four gay men were arrested in Lucknow on the basis that they were meeting other men on the internet – in the absence of any sexual act.

Prosecutions based on consensual sex between adults in private would require the prosecutorial powers of the state to have access to the bedrooms of gay people in this country, which, both as an impracticality and abomination under Indian law, is next to

impossible. Part III of the paper further argues that the mere presence of a law like 377 in its current form, creates apprehensions of arrest and fear among gays, bisexuals, and transgender people in India – evident through an overwhelming evidence of blackmail, sufficient to constitute a “cause of action” by itself.

Part IV of the paper finally concludes that decriminalisation of sodomy, a private right, has an immediate and concurrent effect of restoring the dignity of homosexuals and providing enormous public benefits of expression and openness.

I

Meaning of Section 377

Similar but Different

The Indian Penal Code was an important experiment in the larger colonial project along with exercises in codification like the Civil Procedure Code and Criminal Procedure Code to apply the collective principles of common law in British India. Thomas Babbington Macaulay, the president of the Indian Law Commission in 1835, was charged with the testing task of drafting the Indian Penal Code also as a unifying effort to consolidate and rationalise the “splintered systems prevailing in the Indian Subcontinent”.³

S 377’s predecessor in Macaulay’s first draft of the Penal Code was clause 361, which defined a severe punishment for touching another for the purpose of unnatural lust.⁴ Macaulay abhorred the idea of any debate or discussion on this “heinous crime”, and in the Introductory Report to the proposed draft Bill (dated 1837) stated that:

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said [... we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.⁵

The lack of any debate or discussion, suggesting the creation of this definition purely out of the discretion of Macaulay, also explains the sheer vagueness and ineffectiveness of the language of the proposed anti-sodomy section. Narrain notes that the concept of an unnatural touch was too vague to be an effective penal stature, and the final draft was a substantial improvement on the initial draft.⁶ S 377 in its final draft is still shrouded with euphemisms. The final outcome to prevent this “revolting” and injurious activity evolved in the form of the following text:

Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

S 377 is both very similar to sodomy statutes around the world in that it re-instates and codifies the common law offence of sodomy, and at the same time, it is very different from a lot of the sodomy statutes:

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

(b) It applies to both heterosexuals and homosexuals. Over the years, the general offence of sodomy became a specific offence of homosexual sodomy,⁷ a significant distinction although never reflected in the Indian law has subsequently been read through in certain later cases by the Indian courts.

There has been a tendency in Indian courts to create an association between the sexual acts and certain kinds of persons, who are more likely to commit the act – thereby giving a character and face to sodomy in the form of a homosexual.

Marked Bodies

The objective of S 377 has remained unclear and unsubstantiated. The offence was introduced into British India with a presumption of a shared Biblical morality. Historians have speculated that “there were concerns that not having wives would encourage the Imperial Army to become ‘replicas of Sodom and Gomorrah’ or to pick up ‘special Oriental vices’”.⁸ Whether this oriental vice is a sexual activity, or also the person associated with the sexual activity, is a puzzle that begins with the 1884 case of *Queen-Empress vs Khairati*⁹. Here a “eunuch”,¹⁰ was kept under constant “supervision” by the police and arrested upon being “found singing dressed as a woman”. The only incriminating evidence was the distortion of the orifice of the anus into the shape of a trumpet¹¹ – a mark of a habitual sodomite. Here we were confronted with the crux in the enforcement of 377 – is this offence meant to criminalise the act of sodomy or people who appear to be likely to commit this offence?¹²

However, the association of the act with the person does not cease with *Khairati*. In the case of *Noshirwan vs Emperor*¹³ having seen two young men, both adults, walking into the house of one of them, Solomon, the neighbour, peeped “through a chink

in the door panels” and noticed that the two were attempting to commit sodomy. He walked into the house and forced them both to the police station. The two accused were released and their conviction set aside as the act of the sodomy was never completed, although the judge did reprimand one of the men, Ratansi, as a “despicable”¹⁴ specimen of humanity for being addicted to the “vice of a catamite”¹⁵ on his own admission. Here once again we come to association of the person – a catamite, with the act, rather than the act in isolation. But the relevance of the association of the act with the person is never explained.

In the case of *DP Minwalla vs Emperor*,¹⁶ Minwalla was caught in the act of oral sex with another man in the back of a truck, in a semi-public space. Minwalla, in a desperate attempt to redeem himself, submitted to a medical examination to convince the court that his anal orifice was not shaped like a “funnel”, which is a sign of a habitual sodomite. The court confirmed the conviction of Minwalla with a reduced sentence, mindful of the importance of the physical attribute.

Khairati, Noshirwan and Minwalla all deal with the idea of bodies marked with signs and appearances that indicate the possibility of committing sodomy. S 377 could therefore be used against not only men who are actually caught in the act, but also those who give the appearance of being homosexual and therefore likely to commit the act. This has legitimised the manner of police harassment and abuse of homosexual men that is discussed subsequently.

Meaning of Sodomy

The result of the “reticence”¹⁷ of the law-makers to define loathsome¹⁸ offences like anti-sodomy has resulted in the use of euphemisms from “touching another with unnatural lust” to “carnal intercourse”. This ambiguity in 377 has left it purely to the imagination¹⁹ of the judges to apply it to specific cases and also, in that process, determine what kinds of sexual acts qualify as unnatural offences. There are two simultaneous trends:

(a) At one level the definition of sodomy is being broadened to include sexual activities apart from anal sex to oral sex, thigh sex, mutual masturbation, etc. Simultaneously the use of euphemisms continues from the “Sin of Sodom” to the “Sin of Gomorrah”, and from “carnal intercourse” we move beyond sodomy to more modern definitions of “gross indecency” and “sexual perversity”. (b) Simultaneously, the target of 377, and the criminal law, is not this “grossly indecent” act anymore, but the person himself, the sodomite, the sexually depraved and perverse – the consenting homosexual.

From Sodom to Gomorrah

In *Bapoji Bhatt*²⁰ the appellant was charged with S 377 on allegations of oral sex with a minor. In the absence of any other law to deal more appropriately with cases of child sex abuse, the case was charged and tried under S 377, as the section does not distinguish between consensual and non-consensual sex. The courts found that the definition of “carnal intercourse against the order of nature” could not be extended to include acts of oral sex and therefore dismissed the case as “the act must be in that part where sodomy is usually committed”.²¹

In *Bapoji*, “sodomy” became the defining feature of 377, even though the very word is absent in the provision and restricted

the scope of 377 to anal intercourse. However, it was the decision in *Khanu vs Emperor*²² that demarcated a wider scope for S 377, which could then continuously be altered. The case involved a minor who was forcefully locked up and coerced into performing oral sex on an older man in the province of Sindh, in the erstwhile undivided British India. Khanu was important as 40 years after *Bapoji* the court held that the scope of S 377 is not limited to 'coitus per anum' and can also be extended to 'coitus per os' and therefore concluded that "the sin of Gomorrah is no less carnal intercourse than the sin of Sodom".²³

Sodomy became a constitutive element of S 377 along with the possibility of other sexual acts. The basis for determining what these other acts could be was not a simple process, but involved an elaborate interpretation of carnal intercourse, penetration, and the order of nature. The courts used two essential parameters under S 377:

- (a) Existence of penetrative intercourse with an orifice.²⁴
- (b) Impossibility of conception, thus against the order of nature.

To determine whether there could have been penetration, the judges defined intercourse as, "a temporary visitation to one organism by another... The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis"²⁵ (circa). Thus as long as there is an orifice (in this instance, the mouth) which can envelop the "penis" and provide sexual climax, it qualifies as carnal intercourse. As a side note, on the requirement of penetration with an orifice, the case of *Khandu vs Emperor* redefines the limits of absurdity. *Khandu* was seen inserting his penis inside the nostril of the bullock, and sentenced to five years of rigorous imprisonment for setting a "highly depraved...example of sexual immorality".²⁶

The order of nature was a simpler quest for the *Khanu* court, where the "conception of human beings" became "the natural object of carnal intercourse".²⁷ Therefore any form of oral or anal sex is criminal as it does not lead to procreation, and worse is akin to bestiality. However, no thought was or has been given to the fact that other forms of penetrative sex, for example peno-vaginal sex with contraception, squarely falls within the same logic, and distributing of condoms should therefore also be an offence. However, *Lohana Vasantlal vs The State*²⁸ distinguished sex for procreation as an outdated theory, but still considered oral sex to be a criminal offence because of the sheer inappropriateness of the act.

The extension of the scope of 377 to oral sex in *Khanu* is linked to a wider international move to apply anti-sodomy laws also to oral sex. Thus under the proscription of sodomy, courts and legislators are gradually criminalising sex between men in general and not just certain sexual acts men engage in either with men.

From Gross Indecency to Sexual Perversity

In his brilliant analysis of the jurisprudence on the anti-sodomy in Zimbabwe, Oliver Philips has argued that the need for labels to fit different possibilities of sex has led to a "continual process of definition, denigration and capitulation".²⁹ The discussion into the scope and application of 377 has continued in independent India way into the 1960s and 1980s. In *Lohana Vasantlal* the Gujarat High Court was dealing with an appeal against a conviction for performing oral sex with an underage boy. The court devised the test of "imitative" sexual intercourse, that oral

sex was imitative of anal sex in terms of penetration, orifice, enclosure and sexual pleasure therefore similar to anal sex and worthy of the punishment under S 377.

The "imitative" test was further applied in *State of Kerala vs K Govindan*³⁰ wherein thigh sex was also added to the laundry list of unnatural offences. The court applied the imitative test "the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence".³¹ The important thing here is not the coercive element of the sexual activity, which would do justice to the facts of the case, but the ability of the act to be accommodated within the meaning of "carnal intercourse against the order of nature".

However the notable contribution of *Lohana* was the evolution of the sexually perverse in Indian law. The *Lohana* court, instead of following *Khanu* blindly, embarked on a discussion of "sexual perversity" borrowing heavily from American law. With aid from the writings of Havelock Ellis and *Corpus Juris Secundum*, the *Lohana* court cited a definition for "sexual perversity" as an "unnatural conduct performed for the purpose of sexual satisfaction both of the active and passive partners".³²

Perversity became a synonym for homosexuality in *Fazal Rab Choudhary vs State of Bihar*³³ while dealing with an application for mitigating the sentence for a conviction, the Supreme Court of India held that an offence under 377 implies "sexual perversity".³⁴ The growing linkage between sodomy, perversity and homosexuality sans a discussion on a private space for consensual sexual acts was solidified in the case of *Pooran Ram vs State of Rajasthan*³⁵ where a homosexual was equated with a rapist. The court in *Pooran Ram* held that "perversity" that leads to sexual offences may result either in "homosexuality or in the commission of rape".³⁶

In many cases³⁷ dealing with prison conditions in India, the judges have recorded the presence of homosexuals and the impending (and almost unavoidable) possibility of homosexual sex as a serious aggravating factor to the dismal prison condition. The loquacious justice Krishna Iyer, in the case of *Lingala Vijaykumar vs Public Prosecutor, Andhra Pradesh* while reflecting on the conditions of prison stated that "these adolescents, when ushered into jail with sex-starved 'Lepers' sprinkled about, become homosexual offerings with nocturnal dog-fights".³⁸ The quote, consistent with justice Iyer's unique style, is extremely reflective of how homosexuals are perceived by the Indian judiciary. Homosexuals thus become acknowledged figures as predators and necessarily coercive sexual partners. And homosexuality has become the face of the general discourse on perversity.

I Consent

Ignoring the Possibility of Consent

The failure of the courts to distinguish between "two very different situations", of non-consensual sex and consensual sexual relations, as Philips has argued, implies that "male adult seducers or abusers of young boys, men who forcibly rape other men, and male homosexuals (who indulge in consensual sexual activities) are all one and the same thing".³⁹ Homosexual acts become abominable activities lacking the equivalent of "consensual heterosexuality" and therefore incomparable. And we see the rise

of the homosexual itself as a sexual pervert, pre-disposed to indulging in non-consensual sexual activities.

Most strikingly all the above cases deal with non-consensual activities. S 377 does not exclude consensual activities, however the use of the term “voluntary” in the language of 377 makes consent irrelevant. Therefore the acts of oral, anal, thigh sex along with mutual masturbation, are punishable even when two consenting adults may indulge into the acts within a private sphere. In fact in the case of *Mihir vs State of Orissa*,⁴⁰ Pasayat J has clarified that “consent of the victim is immaterial” in S 377 as “unnatural carnal intercourse is abhorred by civilised society”. Justice Pasayat unabashedly equates consensual homosexuality with rape.

The utility of sodomy laws is limited to prosecuting cases of non-consensual sex. However, this cannot be a defence for retaining the anti-sodomy laws nor does it legitimise the common law offence of sodomy. Justice Ackermann in his opinion decriminalising consensual sodomy in South Africa stated that “the fact that the ambit of the offence was extensive enough to include ‘male rape’ was really coincidental”.⁴¹

In fact prosecuting non-consensual sexual acts through sodomy laws belittles the coercive elements of the sexual offence as “...the focus of the charge is on the a priori ‘unnaturalness’ of male-male sex”.⁴² In *Lohana Vasantlal*, the case on facts involved three men who forced a fourth underage boy to have anal and oral sex with them. The judgment is so caught up with the inclusion of oral sex under 377, in a conceptual framework of “sexual perversity” wider than *Khanu* that it completely forgets and belittles the actual injury and harm caused to the boy who was forced to undergo the sexual act. There is no discussion, on the use of force and coercion. The ratio of the judgment would apply equally to consensual acts as it completely negates the coercive elements of the offence.

Brother John Antony vs state⁴³ was a 1992 case that arose from complaints by students of a boarding school against a teacher who forced the children to perform oral sex on him and also masturbated them. In this case once again the “unnaturalness” of the act becomes of prime importance. The fact that “an assault (possibly violent) has taken place is of secondary importance”.⁴⁴ The judgment delves deep into the meaning of the sexually perverse and discusses other forms of sexually deviant practices like “tribadism”,⁴⁵ “bestiality”,⁴⁶ “masochism”,⁴⁷ “fetishism”,⁴⁸ exhibitionism⁴⁹ and “sadism”⁵⁰ and concludes, using the imitative test, that mutual masturbation falls within 377 as “the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal”.⁵¹ This has a serious effect on the concept (or lack) of consent in cases of 377, as the decisions dealing with non-consensual sexual activities by undermining “the creation of the victim” also make “the non-existence of a victim”⁵² in cases of consensual sexual activities irrelevant.

Consent from Backdoor

“Appellate judges are not entitled to say what they do not mean or to mean what they do not say. For what they say and mean has a community-wide acceptance”.⁵³ I am seeking some legitimacy from this quote by Upendra Baxi, in introducing a discussion on consensual sexual activity that the courts have

engaged in almost as exceptions, and arguably as obiters as they were completely irrelevant to the cases of non-consensual activity that they were dealing with.

Grace Jeyaramani vs E P Peter⁵⁴ filed an application for divorce on the principal ground that her husband forced her to have “sexual intercourse in an unnatural way” against her wish. The judge held that “the husband could be guilty of sodomy if the wife was not a consenting party”. This was one of the first cases where consent became relevant within the meaning of sodomy, even though it was not a case under S 377. This legitimacy of consensual sodomy within marriage is criticised by Bhaskaran as the “...wife’s lack of consent serves to release her from a marriage but an adult male’s consent lands him in prison.”⁵⁵

Grace substantiates the point that even though S 377 applies to both heterosexuals and homosexuals, by allowing for consensual sex between heterosexual married couples it focuses the application of 377 – as far as consensual sex is concerned – to homosexuality. Therefore the conception of sodomy in Indian law, even though pervasive enough in letter to apply to both heterosexuals and homosexuals, in practice is actually to proscribe sexual activities between men, including those committed consensually. I therefore, argue that 377 is inter alia meant to prevent, what we understand in the contemporary world as consensual homosexuality.

Public and Private Immoralities

The *Wolfenden Committee Report on Homosexuality and Prostitution* in September 1957 was pioneering as it set out to rectify the English criminal law by implementing rationalising views of John Stuart Mill who argued passionately for a private space, free from state interference, even if it involves activities that members of a society don’t like, as long as they don’t harm anyone – popularly known as the Harm test. Wolfenden report had famously argued that:⁵⁶

There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.

Indian courts have never had the opportunity to decide the question of state enforcement of private morality.⁵⁷ However lawyers, trying every trick in the book to create mitigating factors, often plead that their client, a man who has sexually assaulted an underage child or an adult woman charged under S 377 should be offered some leniency as consensual sodomy is no more an offence in England. The judges have recorded these submissions and even gone onto defend the societies role in regulating consensual homosexual behaviour, referring to the famous Hart-Devlin debates. In *Anil Kumar Sheel vs The Principal, Madan Mohan Malvia Engg College*, the judge stated that:

...Lord Devlin...maintained that the law should continue to support a minimum morality...However, in my opinion, the problem would always be as to how far laws should uphold morality and it depends upon the facts and circumstances of the case. A judge is to keep his finger on the pulse of the society. ... The law cannot undertake not to interfere.⁵⁸

The court in *Anil Kumar* and subsequently followed by *Calvin* even while indicating their disapproval for decriminalising consensual homosexual sex, have been very vague about the role of the courts and the state to determine public and

private morality. The real support for Lord Devlin comes in the case of *Kailash vs State of Haryana* that goes a few steps further:

...Extreme limits of logic sometime expose the perversity of a doctrine and fail to promote public good. ...The practice of adopting English Laws is not always conducive to our own society and, therefore, we must rely on our own laws best suitable to our society and needs. Various fundamental differences in both the societies must be realised by all concern especially in the area of sexual offences. Naturally if laws are according to the temperament of a society to which it caters to and it is only then that society could be run smoothly according to laws because such a society would then readily comply with those laws.⁵⁹

The court while defending S 377's application to consensual sexual activities, speaks with a sense of deep amnesia. According to *Kailash* the issue is no more about public versus private morality. It is about England vs India, reeking of similar sentiments expressed by African leaders like Robert Mugabe, Olesung Obsanjo, Yoweri Museveni and Sam Nujoma⁶⁰ where there is no recognition of the fact that these anti-sodomy laws were actually conceived, legislated and enforced by the British – even without any kind of public discussion. The court treads on precarious ground when it talks about the “temperament of a society” even when we have never had an opportunity to determine whether the Indian society wants to see consenting homosexual adults behind bars.⁶¹ The judges have considered and dismissed the Harm Test, without considering the possible distinction between: a certain majority's disapproval of homosexuality, like there is of inter-caste marriage in this country, and the need to actually criminalise it merely based on a social disapproval.

However, Anil Kumar and *Kailash* even though vague and unsuited as cases to rule on the decriminalisation of consensual homosexuality, have helped resolve the puzzle that began with *Khairati*, *Noshirwan* and *Minwalla*. S 377 is not merely about certain sexual acts committed between men but also about an identity that derives from the courts understanding of marked bodies, appearances and an analysis of perversity. It is in fact about all sexual acts committed between men, with consent – which would be tantamount to a criminalisation of homosexuality in general and even its associated expressions.

III Difficulty of Prosecuting Consensual Conduct under S 377

Having demystified S 377 to the extent of almost the obvious, that it does in fact stand to criminalise homosexual conduct and homosexuality in toto, I move to my next query on how because of the difficulty in arresting people for sexual conduct in private, the enforcement of S 377 has also become pervasive and is being used against homosexuals in a more general and arbitrary manner.

By the lack of a “cause of action” the Delhi High Court was referring to government records of actual prosecution, arrest, conviction and sentence under 377 of consenting adults who were caught for having sex in private. Even when S 377 applies to any “voluntary” act, it is almost impossible to find a single reported case in the last 50 years where two adults have been punished in the courts for consensual homosexual sex in private. Several

studies⁶² focusing on the actual application of S 377 of the IPC show that most cases that actually come under it deal with non-consensual and coercive sexual activities. Out of over 50 reported judgments under S 377 that I have looked at more than 30 per cent deal with cases of sexual assault or abuse of minors, the rest deal with non-consensual sexual activities between men and with women. Only two cases from the 1920s and 1930s, conclusively, deal with consenting sexual activities between adult males, which are discussed below.

So in a way the Delhi High Court was right that S 377, at least in independent India, does not appear to be enforced against consenting homosexual persons. But there is a huge fallacy in this sort of conclusion. Reliance on reported judgments of the courts of appeal are limiting as trial court proceedings are not similarly archived. So we have no data on cases under S 377 that went to trial, and were never appealed and therefore remain unreported. To fully understand the impact of anti-sodomy laws our own benchmarks of what constitutes evidence and record of harm, cause and injury need to be revised and re-looked – away from the old requirement of government records.

Invading the Bedroom

The very requirement of proving actual prosecution under 377 goes into the heart of the complex nature in which this provision operates. A criminal case, we all know, begins by instituting or lodging of the FIR, a first information report. A likely case in the enforcement of 377, would be, the police as law enforcement agents of the state actually catch two men having sex in the privacy of their bedroom, to the extent that the Naz petition is concerned.

To start with this would require that “the reach of the prosecutory powers of the law go into the previously sacred sphere of the home”. Hart has argued that the “right to undisturbed performance of private consenting acts is more important than the immorality of the act”.⁶³ Indian courts have never recognised an absolute space for “private immorality” which does not harm others, but they have scorned on unnecessary and unjustified police access to people's homes.⁶⁴

Therefore any police intervention into the houses of homosexual men must establish legitimate grounds of suspicion that certain homosexual activity is taking place, before entering the house of that person. Essentially this would require that the police leave the everyday work of providing safety to citizens from crimes that actually cause harm, to continuously establishing an espionage network to inform them where homosexual men reside, and to master their libido cycles to determine exactly when they may indulge in sex.

The reason I am saying this is because the Delhi High Court is not entirely wrong in its dismissal. It is common practice for courts to strike unconstitutional, arbitrary and discriminatory laws on the basis of test cases that conclusively show how people are actually harmed by the operation of that law. But the elements of improbabilities involved in actually catching two consenting adults having sex in private are so rare and far apart that it compels us to think out of the box. The classic example of actually prosecuting consensual adult homosexual sex, in the private realm can be found in two leading American cases on this subject: *Bowers vs Hardwick*⁶⁵ and *Lawrence vs Texas*.⁶⁶ The

first one upheld the sodomy statute of the State of Georgia, and the second one more than 15 years later struck down the Texas sodomy statute. In both these cases an unsuspecting police officer barged into the house of some one, looking for something else, and found two men indulging in the act of oral sex and anal sex respectively.⁶⁷ What are the odds of that happening again?

In a recent case *Leung TC William Roy vs Secretary of Justice* the High Court of First Instance at Hong Kong struck down the unequal age of consent for homosexuals as unconstitutional on a case brought by a 16-year-old gay man. The court accepted the locus of the petitioner, as for an actual cause of action to appear “the applicant would have to break the law – risking imprisonment – in order to challenge it”.⁶⁸ Do we really want and wait for people to be incarcerated under an unjust law before they can challenge it?

Appearance and Likelihood of Committing Sodomy

In *Khairati, Noshirwan and Minwalla* the appearance or likelihood of the defendants to commit sodomy habitually, rather than the specificity of the particular act was a substantive consideration – increasingly generating an association between the act of sodomy with specific kinds of “people” – who are now known as homosexuals, gay or bisexual. These decisions along with *Anil Kumar Sheel and Kailash* criminalising consensual homosexuality provide a certainty of legitimacy to police actions. This connects me to the current reality of the use of S 377, where because it is not possible to catch homosexuals in the act of the offence, the police are catching homosexual men and transgender persons all the time, merely on the suspicion that because of their appearance they are indulging in homosexual sex.

The Indian police often catch homosexuals in a public park, or a quiet corner in a dark street socialising with friends, looking to meet lovers or potential sexual partners, or showing some degree of same sex affection in public – just as is common with heterosexuals. However, the police are faced with a deep confusion on how to apply S 377. The police would often begin by making threats under S 377, only to realise that is too difficult to make out a case. The minimum requirement in terms of medical evidence to prove a sexual offence would need the couple to be rushed to a hospital, examination to be conducted of their private parts to record any physical signs indicating that “carnal intercourse” took place.

That does not always mean that the police just let you go off with a friendly warning. Mostly the police, aware of the difficulties in prosecution either: (a) Ask the men for sexual favours (ironically committing the same crime they want to stop);⁶⁹ (b) Or get some money out of them.⁷⁰ This extremely prevalent form of harassment under S 377, but absent from the record books, is the most debilitating reality facing the gay community in fighting this law in a legal environment that only believes in proof that can sourced to government records. *Katyal* has appropriately argued that it renders invisible “the myriad ways” in which “extortion, corruption, rape, and threatened arrest” of males with same sex desires occurs.⁷¹ The Delhi high court failed to recognise the need to think more creatively about the levels and forms of harassment that occur in such indirect uses of S 377 – constituting

a very serious and concrete injury to hundreds of men in this country with same sex desires.

The Lucknow Incident(s)

Two recent cases under S 377, both in the city of Lucknow, that have received much positive and negative publicity are of relevance to this discussion to the extent that they highlight the new trend in the use of S 377 – the criminalisation of homosexuality on the basis of associated acts such as the distribution of condoms for same-sex relations in 2001 and the attempt to meet other gay men over internet chat rooms in 2006.

In July 2001, police in the city of Lucknow under the provocation that gay men were cruising in a well known public park and that NGOs were running condom distribution campaigns for MSM, raided the offices of two NGOs. They arrested four activists under S 377 along with other charges of criminal conspiracy, abetment, and obscenity. There was no evidence of sodomy.

Yet bail was still denied to the activists on the grounds that they are a “curse to society” because they were encouraging homosexuality. According to *Narrain* the whole issue of releasing the accused on bail became linked to the prejudice of the magistrate towards gay people.⁷² Only after 45 days and a vigorous national and international campaign were the activists freed and charges under S 377 dropped.⁷³

In the second incident on January 3, 2006, once again the police in Lucknow arrested four men under S 377 for allegedly having sex in a public park. News reports revealed pictures of all the four men with their names and home addresses.⁷⁴ According to the FIR the police officer on duty stated:

We got specific information by an informer that four people are involved in obscene condition there in the picnic spot. ...[and] involved in unnatural sex, after few attempts they were arrested at near about 8:30 pm in the evening. ...[and] told us ...that we share same sex relation amongst us.⁷⁵

However, a fact finding team of queer activists, feminists and lawyers who went and conducted an independent investigation found “...that none of the men involved were having public sex... the story put out by the police in the FIR is a completely false one with the entire process being a sex spectacle put on by the police”.⁷⁶

The police had arrested one of the men, *Nihal*, in the night from his house, having learned that he was a homosexual, possibly through an internet website where *Nihal* had submitted his mobile number for other gay men to contact him. By forcefully coercing him into giving contacts of other men, the police staged an entrapment and arrested three other men:

On the following day (January 4) at 10.30 am he was forced to call the other men and request them to meet him at Classic Restaurant, Mahanagar, Lucknow on pretexts such as ill-health and the need to fix up a business appointment.⁷⁷

All the four accused were released on bail after 12 days in jail by the Sessions Judge but the case continues. There is no evidence, including witness statements to indicate that any sex actually took place, either in private or public. The entire case is based on the foundation that these men are gay, and should therefore be punished under S 377.

Even though both the Lucknow incidents can be termed as misapplications of S 377, they speak of the extent that the police force will go to implement this law. In the first Lucknow case,

by the time the courts were convinced that the charge under S 377 was bad in law, the accused had already spent 45 days in jail. S 377 was the only non-bailable charge. The second Lucknow case proves that the police, despite the first Lucknow incident, and the strict and narrow requirement of actual sexual acts under the law, will go to the extent of fabricating false cases, and set up entrapments, just to incarcerate men who they believe are homosexual, due to certain appearance and actions, therefore likely to commit sodomy.

Apprehension as Cause of Action

Considering the context under which anti-sodomy laws are enforced and operate, it is pertinent that courts of law relax their requirements of cause of action. A wide number of international cases have struck down similar anti-sodomy laws doing just that, on the basis of the fear and apprehension of arrest that the presence of anti-sodomy laws creates among homosexual men. The European Court of Human Rights (ECHR) in *Dudgeon vs UK*⁷⁸ in 1986 and in *Norris vs Republic of Ireland*⁷⁹ in 1992 decriminalised sodomy on the basis of cases brought by gay men on the fear and apprehension of arrests. The main case made out by Norris was that he had suffered deep depression and loneliness on realising that he was irreversibly homosexual and that any overt expression of his sexuality would expose him to criminal prosecution. The European Court of Human Rights accepted that as a legitimate challenge to the law.

It is unnecessary and inappropriate to expect someone to be incarcerated under an unfair law before they can actually bring a challenge to it. The real impact of anti-sodomy laws is on the dignity of homosexual men – a reality that cannot be proven through a strict forensic lens of proof, but requires a more complex and creative attempt at understanding. In the subsequent cases *Toonen vs State of Tasmania, Australia*⁸⁰ and *Leung T William vs Secretary of Justice*,⁸¹ the apprehension based on the mere presence of the law in statute books has been held good by the United Nations Human Rights Committee and the High Court of Hong Kong, respectively.

IV Dignity

The Lucknow incidents show that the mere existence of S 377, even if it cannot and is not being enforced in prosecuting sexual acts in private, adds a certain criminality to the daily lives of homosexual men and puts them under the gaze of the law and a constant threat of moral terrorism. Ryan Goodman in a path breaking study on the impact of anti-sodomy law on the daily lives of South African gays and lesbian, despite its actual non-enforcement, argues that:

The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs...a dispersed structure of observation and surveillance. The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants.⁸²

Goodman adapts the Foucauldian model of the state as the "panoptic" watchtower, constantly watching and observing the lives of gays and lesbians causing apprehensions, fears and further proximity to the closet – a life of concealment. The biggest manifestation of this fear is the self-identification as a "criminal".

This is best exemplified in repeated cases of blackmailing that occur in most cities in India.

A local community group in Mumbai called GayBombay for the last couple of years has been receiving numerous stories, experiences and complaints by gay men about their personal experiences with blackmailers. These stories typically involve entrapments by the police, when innocent gay men only hoping to meet another man for a social contact, are duped into giving out a lot of money under threats of disclosure of their homosexuality.

Ironically enough under Sections 388 and 389 of the Indian Penal Code, 1860 if a person extorts money by accusing another of committing sodomy, he can be punished for up to life.⁸³ This enhanced punishment recognises the potential of abuse under S 377. Anti-sodomy laws have been notoriously playgrounds for blackmailers – in the UK the Labouchere Amendment⁸⁴ was famously termed the blackmailer's charter.

However, the psychological and emotionally challenging effects of anti-sodomy laws on the personal lives of gay men can be debilitating. The reality is that most gay people are "under-confident, silent, and completely closeted about the reality of their queer desires".⁸⁵ Blackmailers in the police force are fully aware that gay men are too terrified and consumed by the fear of the law to file a complaint against the erring policemen. A glaring fact that limits all the efforts of GayBombay is that none of the victims of the crime have been able to come out and file a complaint, out of fear that S 377 may, in some manner, become applicable to them.

Justice Ackermann writing in *National Coalition of Gay and Lesbian Equality vs Minister of Justice* has articulated this link between the existence and imposition of anti-sodomy laws and their impact on the dignity of gays and lesbians:

The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity.⁸⁶

Owing to the pervasive meaning of S 377 both in the courts and through its enforcement, as this paper has attempted to illustrate, the benefits of decriminalisation will contribute directly to the very dignity of the homosexual person, as a full human being, and not just allow him a peaceful night with his lover alone in the confines of his bedroom.

The effect of decriminalisation by restoring the dignity of gays and lesbians opens the Pandora's Box of other associated rights for equal recognition of same sex couples. Wintemute⁸⁷ calls this

the move from “sex rights” to “love rights”. The decriminalisation of sodomy in democratic societies creates an opportunity and stronger platform to argue for “love rights”, in terms of partnership benefits.

South Africa has been a great example of this change where decriminalisation of sodomy has led to whole array of litigation in South Africa that have gradually made that journey from sex rights to love rights through cases involving the right to immigration of a same sex partner⁸⁸, equal financial benefits⁸⁹, co-adoption⁹⁰ and now even same sex marriage.⁹¹

V Conclusion

Justice Kennedy referring to the impact of anti-sodomy laws on the lives of gays, lesbians and transgenders in Lawrence stated that:

The state cannot demean their existence or control their destiny by making their private sexual conduct a crime.⁹²

The Indian courts need to recognise that they cannot permit the state to continue to demean the existence of people with same sex desires in this country. S 377 with its broader shadow of criminality is the biggest affront to the dignity and humanity of a substantial minority of Indian citizens. The courts need to acknowledge that by decriminalising sodomy they will not permit a mere sexual activity, but decriminalise the lives of actual citizens who are connected to that sexual act.

The public benefits of this decriminalisation would start with a sense of self-acceptance, comfort, confidence and evolving pride among gays, bisexuals, lesbians, transgenders, hijras – all of whom are in some way or the other caught within the broader meaning of 377. Decriminalisation will prevent another Khairati and other Lucknows, and allow for the opportunities and space for the gay movement to emerge from the shadows out into the open and create a space for itself to interact with the rest of the civil society, in a relatively more equal position. **EW**

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Notes

- 1 The Delhi High Court further stated: “...an academic challenge to the constitutionality of a legislative provision cannot be entertained. Hence, the petition [is] dismissed.” Unreported Order September 2, 2004 of the Delhi High Court in Writ Petition No 7455/2001.
- 2 By an unreported order dated February 2, 2005 in Special Leave Petition (Civil) No 7217/7218 of 2005.
- 3 The different prevailing systems were in the Bombay, Madras and Bengal Presidencies.
- 4 Cl 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 term which may extend to 14 years, and must not be less than two years”.
- 5 Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 3990-91.
- 6 Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, 2004, p 49.
- 7 S 13 of the Sexual Offences Act, 1956 of England for example read as follows “It is an offence for a man to commit an act of gross indecency with another man”.
- 8 Suparna Bhaskaran, ‘The Politics of Penetration: Section 377 of the Indian Penal Code’ in Ruth Vanita (ed) *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society*, Routledge, 2002, p 17.

- 9 Queen-Empress vs Khairati 1884 ILR 6 ALL 204.
- 10 Eunuch here refers to a hijra – a transgender identified person belonging to a traditional community of dancers.
- 11 Ibid at p 602.
- 12 This could be one of the first examples of policing of homosexuality/sexually transgressive behaviour in India. Saleem Kidwai and Ruth Vanita have argued in *Same Sex Love in India: Readings from Literature and History* (St Martin Press, 2000) that prior to British rule there was no aggressive policing of homosexuality.
- 13 Noshirwan vs Emperor AIR 1934 Sind 206.
- 14 Ibid at p 208.
- 15 Ibid at p 208.
- 16 D P Minwalla vs Emperor AIR 1935 Sind 78.
- 17 “Moreover, legislation against sexual vice are usually so vague that what counts as criminal wrong-doing is left to the judgment of the police officer. This may be due in part to the reticence of lawmakers to specify these crimes more precisely, since they are traditionally regarded as crimes not fit to be named.” AR Louch, ‘Sins and Crimes’ in Richard A Wasserstrom, *Morality and the Law*, p 75.
- 18 “The early legislators, in keeping with the delicacy of the early writers on the English Common Law were reluctant to set out in detail the elements of sodomy because of its loathsome nature”. In Grace Jeyramani vs E P Peter AIR 1982 Karnataka 46, para 10, p 48.
- 19 O Phillips (1999) ‘Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion and Individual Autonomy’, unpublished PhD thesis, University of Cambridge, July, p 185.
- 20 Government vs Bapoji Bhatt (1884 (7) Mysore LR 280).
- 21 Ibid, p 282.
- 22 Khanu vs Emperor 1925 Sind 286.
- 23 Ibid, p 286.
- 24 Bhaskaran further argues “what counted as penetration continued to be an ongoing, arbitrary, and unsystematic discussion in several future judgments and commentaries” (fn 8, p 20).
- 25 Fn 22, p 286.
- 26 Khandu vs Emperor AIR 1934 Lahore 261, p 262.
- 27 Fn 2, p 286.
- 28 Lohana Vasantlal and Others vs The State AIR 1968 Gujarat 252.
- 29 Fn 19, p 184.
- 30 State of Kerala vs K Govindan (1969) CriLJ 818.
- 31 Ibid, para 20.
- 32 Fn 28, p 254.
- 33 Fazal Rab Choudhary vs State of Bihar AIR 1983 (SC) 323.
- 34 It went on to say that “neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking” (ibid, p 323).
- 35 Pooran Ram vs State of Rajasthan 2001 CriLJ 91.
- 36 Ibid, para 31.
- 37 Sunil Batra vs Delhi Administration 1978 SCC (4) 494, A Convict Prisoner in the Central Prison vs State of Kerala 1993 CrLJ 3242.
- 38 Lingala Vijaykumar vs Public Prosecutor, Andhra Pradesh 1978 SCC (4) 196, para 11.
- 39 Phillips, op cit, p 193.
- 40 Mihir vs State of Orissa 1992 CriLJ 488.
- 41 National Coalition of Gay and Lesbian Equality vs Minister of Justice 1999 (1) SA 6 (CC), para 69.
- 42 Fn 19, p 193.
- 43 Brother John Antony vs State 1992 CrLJ 1352.
- 44 Phillips, op cit, p 193.
- 45 Fn 43, p 1353, ‘Tibadism: Friction of the External Genital Organs by One Woman on Another by Mutual Bodily Contact for the Gratification of the Sexual Desire’.
- 46 Fn 43, p 1353, ‘Bestiality: Sexual Intercourse by a Human Being with a Lower Animal’.
- 47 Fn 43, p 1354, ‘Masochism: Opposite of Sadism and Sexual Gratification Is Sought from the Desire to be Beaten, Tormented or Humiliated by One’s Sexual Partner’.
- 48 Fn 43, p 1353, ‘Fetishism: Experiencing Sexual Excitement Leading to Orgasm from Some Part of the Body of a Woman or Some Article Belonging to Her’.
- 49 Fn 43, p 1353, ‘Exhibitionism: Exposure of Genital Organs in Public’.

- 50 Fn 43, p 1353, 'Sadism: A Form of Sexual Perversion in Which the Infliction of Pain and Torture Act as Sexual Stimulus'.
- 51 Similarly in cases like *Calvin Francis vs State of Orissa* 1992 (2) Crimes 455 and *State of Gujarat vs Bachmiya Musamiya* 1998 (2) Gujarat L R 2456, the judgments are only concerned with the unnaturalness of the sexual act involved and not the plight of the victim.
- 52 Fn 19, p 193.
- 53 Upendra Baxi, 'The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment' [(1974) 1 Supreme Court Cases 45].
- 54 *Grace Jeyaramani vs E P Peter* AIR 1982 Karnataka 46, p 49.
- 55 Fn 8, p 25.
- 56 Section 61 of the *Wolfenden Committee Report on Homosexuality and Prostitution*.
- 57 In *Gobind vs State of Madhya Pradesh* (1975)2SCC148, where regulations allowing police surveillance and domiciliary visits were challenged, the judges crafted the right to privacy based on US Supreme Court precedents on personal liberty and autonomy but stopped short at the point that:
...if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterisation of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of state.
- 58 *Anil Kumar Sheel vs The Principal, Madan Mohan Malvia Engg College* AIR 1991 ALL 120, para 15.
- 59 *Kailash vs State of Haryana* 2004 CrLJ 310, para 8.
- 60 Edwin Cameron, 'Constitutional Protection of Sexual Orientation and African Conceptions of Humanity', *South African Law Journal* 642; 'African Leaders Denounce Homosexuality', October 1, 1999 www.rainbownetwork.com; 'African Leaders Hide Political Woes behind Homophobia' April 25, 2001 www.monthlyreview.org.
- 61 In the Special Leave Petition (Civil) no 7217/7218 of 2005 in the Supreme Court against the Delhi High Court order, the Government of India stated that: "Public opinion and the current societal context in India does not favour the deletion of the said offence from the status book. ...Even if it is assumed that the rights of sexual minorities emanate from a perceived right to privacy, it is submitted that the right to privacy cannot be extended to defeat public morality, which must prevail over the exercise of any private right. The question of homosexuality, it is submitted, is not a mere question of personal preferences but may involve behavioural sanction of legislative authority of the state, as it tends to affect the social environment."
- 62 Shamona Khanna, 'Gay Rights', *The Lawyers*, June 1992; Alok Gupta, 'The History and Trends in the Application of the Anti-Sodomy Law in the Indian Courts', *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, India Centre for Human Rights and Law, 2002.
- 63 H L A Hart, (1963): *Life, Liberty and Morality*, Oxford University Press.
- 64 *Kharak Singh vs State of UP* AIR 1963 SC 1295 and *Gobind vs State of Madhya Pradesh* (fn 55) were the first two cases to read the right to privacy under the Constitution. Both of these cases partially struck down police regulations that allowed surveillance and domiciliary visits in the houses of convicts, suspects and habitual criminals. The Supreme Court recognised the right to privacy and substantially restricted the scope of police interference with the sanctity of the home within legitimate grounds and interests: "Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing" (para 24).
- 65 *Bowers vs Hardwick* 478 US 186.
- 66 *Lawrence vs Texas* 539 US 558, 560 (2003).
- 67 In *Bowers* police officers entered the bedroom of Michael Hardwick to serve a summons for public drunkenness (Hardwick's roommate gave authorisation for the search), where they found him engaged in oral sex with another man and placed him under arrest for sodomy (*Source*: www.wikipedia.org). In *Lawrence* on the other hand police officers were dispatched to a private residence in response to a reported weapons disturbance. They entered Lawrence's apartment and found him engaged in anal sex with another man and arrested and charged the two under sodomy (*Lawrence vs Texas*).
- 68 *Leung T William vs Secretary of Justice* HCAL 160/2004, decided on August 24, 2005, para 57.
- 69 *Human Rights Violations against the Transgender Community*, People's Union of Civil Liberties, Karnataka, 2003.
- 70 Several stories of blackmail and extortion of gay and bisexual men have been archived by a community group at www.gaybombay.org.
- 71 Sonia Katyal, 'Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence' (unpublished).
- 72 Fn 6, p 70.
- 73 The case still continues under the other remaining charges.
- 74 News headlines from local newspapers on January 3 and 4, 2006. 'Homosexual Gangs' (*Pioneer*), '...Gay Club Was Busted' (*Rashtriya Sahara*), '...N Was Used to Homosexual Sex since 1986' (*Dainik Jagran*) and then began the distortion of facts – 'Four Persons Were Having Unnatural Sex at the Picnic Spot' (*Swatantra Chetna*), 'Caught Red Handed' (*Jansatta*).
- 75 English translation of the FIR 194337 of Police Station Gudama, Lucknow January 3, 2006.
- 76 'Preliminary Report of the Fact Finding Team on the Arrest of Four Men in Lucknow under IPC 377', January 2006.
- 77 *Ibid*.
- 78 All judgments and admissibility decisions of the European Court of Human Rights are available at <http://www.echr.coe.int> (HUDOC, Case Title = name of applicant; tick 'Decisions' at left if applicable).
- 79 *Ibid*.
- 80 Communication No 488/1992, April 4, 1994 (views adopted on March 31, 1994), <http://www.unhcr.ch/tbs/doc.nsf> (Search the Database, 'Toonen').
- 81 Fn 68.
- 82 Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics', *California Law Review*, Vol 89, No 3, May 2001.
- 83 S 389 of the Indian Penal Code: 'Putting person in fear of accusation of offence, in order to commit extortion. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit an offence punishable with death or with [imprisonment for life], or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with "imprisonment for life".'
- 84 The Criminal Law Amendment Act of 1885, whose Labouchere Amendment (Clause 11), outlawed sexual relations between men (but not women) is given Royal Assent by Queen Victoria of the UK. Clause 11 reads: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour." Also see <http://www.gayhistory.com/rev2/events/1885.htm>.
- 85 Arvind Narain, 'The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva', *Health and Human Rights*, Vol 7, No 2.
- 86 Fn 41, para 28.
- 87 Robert Wintemute, 'From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights' in Nicholas Bamforth (ed), *Sex Rights: The Oxford Amnesty Lectures 2002*, Oxford University Press (2005).
- 88 *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs* (1999), 1 All SA 643(C).
- 89 *Satchwell vs President of the Republic of South Africa and Another* 2002, (9) BCLR 986 (CC).
- 90 *Du Toit and Another vs Minister for Welfare and Population Development and Others*, 2002 (10) BCLR 1006 (CC).
- 91 *Minister of Home Affairs and Others vs Marie Adriana Fourie*, CCT 60/04, Decided on December 1, 2005.
- 92 Fn 66, p 18.