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NATIONAL LEGAL SER.AUTH V. UNION OF INDIA &ORS- A CRITICAL APPRAISAL[*]

Gender identity and Sexual Orientation

The court drew in the definitions of gender identity and sexual orientation and stated that *Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person.*

Sexual orientation, on the other *hand refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc.* The court says that these two concepts are completely different and it is the gender identity and not the sexual orientation that is dealt with under the case. *Gender identity and sexual orientation, as already indicated, are different concepts.*

Of course, the concepts are different in that, one relates to '*who I consider myself to be'* and the other relates to' *what sort of person I am sexually attracted to'*. But the problem here is that, gender identity and sexual orientation are two aspects of the same coin. These are the limbs that define a person's personality.[1] What the court has done in effect, is to legalise one and criminalise another[2]. Where the court legalises gender identity and gives certain rights to the transgenders, it on the other hand has, by upholding the constitutional validity of section 377 impliedly stated that the right of expressing themselves sexually in so far it is in contravention with section 377 is an offence. This is highly paradoxical. To give an example, if X feels identifies herself as a woman, though she is born as a male, whether she undergoes a surgical sex change or not, she has the right to identify herself as a female, and she has certain

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[1]ElizebethIkhaxas et al ,*Beyond Identity Politics : Building a moment for Sexual Autonomy and Choice* (HBS International Conference : Sexual orientation, Gender Identity & Human Rights, Nov 2010).

[2] *Suresh Kumar Kaushal* (cited in note 3).

economic and social rights such right to education, employment and opportunities. But on the other hand, since she is psychologically a female with male sex organs, even though she has an affinity towards other men, she is to be sexually inactive for the reason that she may be prosecuted under section 377.

Again, the mere fact that they recognise themselves as *Hijras,* or the fact that cross dress necessitate apprehension by the police on the assumption that they involve in sexual activities against the order of nature. This illogical, and controversial.

The Appearance and Likelihood of Committing Sodomy as sufficient grounds for apprehension by police

There is all this debate going on about the fact that there are only a maximum of three actual cases that have been recorded where homosexual activity has been penalised. The supporters of the section feel that since they have not been punished they are not under any actual threat or there is no discrimination of them as a class. This suggestion is preposterous because of the following reasons.

Firstly, the government records of actual prosecution, arrest, conviction and sentence under 377 of consenting adults who were caught for having sex in private is minimal . 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[3]. Several studies[4] 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. In the words of Alok Gupta[5], "*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."* Similarly the Supreme Court in *Suresh Kumar Kaushal's* case[6] stated that " *While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or*

[3] Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 1 no 46 Eco. &. Pol. Weekly 4815, 4818 (Nov.2006).
[4] 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*, 16 no.7 Lawyers Collective, 9 (2002); Fernandez, *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India, India Centre for Human Rights and Law* at 25 (cited in note 12).
[5] Gupta, 1 no 46 Eco. &. Pol. Weekly at 4822 (cited in note 33).
[6] *Suresh Kumar Kaushal* (cited in note 4).

transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."

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 it is suggested[7] that 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.

Secondly, In *Khairati*[8], *Noshirwan*[9] *and Minwalla*[10] 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*[11] and *Kailash*[12] criminalising consensual homosexuality provide a certainty of legitimacy to police actions[13]. This is where the problem starts. When such a power is assumed by the police, unlike other offences covered under the section, the police can apprehend homosexuals on the mere suspicion of seeing them together. This is issue is summarised beautifully by Alok Gupta[14]. He says,"

"..This connects me to the current reality of the use of 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 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,

[7] Oishik Sircar &. Dipika Jain, *New Intimacies /Old Desires: Law Culture and Queer Politics in Neoliberal Times*, 4 no.1 Jindal Global L. Rev 1, 3 (Aug 2012).
[8] *Queen Empress* v. *Khairati* 1884 ILR 6 ALL 204.
[9] *Noshirwan* v. *Emperor* AIR 1934 Sind 206.
[10] *Minwalla* v. *Emperor* AIR 1935 Sind 206.
[11] *Anil Kumar Sheel v The Principal, Madan Mohan Malvia Engg College* AIR 1991 ALL 120
[12] *Kailash vs State of Haryana* 2004 CrLJ 310.
[13] Brief for respondents *Suresh Kumar Kaushal* (cited in note 4), Dr. Shehka Seshadri and Ors, Mental Professionals Written Submission (available at http://orinam.net/377/supreme-court-case-background-material/).
[14] Gupta, 1 no 46 Eco. &. Pol. Weekly at 4822 (cited in note 33).

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);[15]
(b) Or get some money out of them.[16]

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.[17] Thus the Supreme Court has 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.

Thirdly, two cases under S 377, both in the city of Lucknow, 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.[18] In both these situations, there were no evidence, including witness statements to indicate that any sex actually took place, either in private or public. The entire case was based on the foundation that these men were 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. It is true that section 377 does not expressly distinguish between LGBTs and other heterosexuals, but its practical application and enforcement has led them to lead a life of misery under constant fear of being apprehended if they are to express themselves.

[15]People's Union of Civil Liberties- Karnataka (PUCL-K), *Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore*, (Sept 2003).
[16] Online at www.gaybombay.org (visited Mar 31, 2014). (Several stories of blackmail and extortion of gay and bisexual men have been archived by a community group).
[17] Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 William and Mary Bill of Rights L. J. 1429 (2006).
[18] Arvind Narrain, *Queer: "Despised Sexuality", Law, and Social Change* (Books for Change 2004).

This shows the plight of these sexual minorities in India, and the atrocities that they face daily in the hands of the executive merely because they wish to portray themselves as they are. This blurs the line of distinction between what the court calls' gender identity' and 'sexual orientation', as what happens in reality is as mentioned above.

Then again, elsewhere the court states that *"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, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity."* Thus it is unclear as to the true reasoning of the court. The court does not want to get into the *Suresh Kaushal* judgment, but at the same time feel the gripping need to protect these sexual minorities in India, in the light of the abuse, harassment and traumas that they face on a daily basis on account of their sexuality.

Transgenders and *Hijras*

The second problem is with regard to the definitions attributed to transgenders and *hijras.* The Court has made it clear that they are not adopting the transgender definition which relates to the umbrella term so as to include *Gay men, Lesbians, bisexuals, and cross dressers within its scope*[19]. It held that the present judgment will affect the rights of only those persons who are traditionally called as *Hijras* in India. "*We make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. Hijra*[20]*."* To define this term, they state the following;

"*In Indian community transgender are referred as Hizra or the third gendered people. There exists wide range of transgender-related identities, cultures, or experience including Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis.*

Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or not men.

Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of feminity.[21]*."*

[19] *National Legal Ser.Auth* (cited in note 1) at 32.
[20] *Id* at 33.
[21] *Id* at 32.

It is hard to abandon the impression that the court had formulated a preconceived policy of non-interference with the judgment of the *Suresh Kaushal* bench[22] and adopted the best definition of transgender that suited their cause.

The above definition gives rise to two fundamental issues that are so ironical that it seems that the court has left its mind someplace else when deciding this case:

(1) The transgenders/ *Hijras* (as defined by the Court) have no freedom with respect to sexual activities, but they have all the freedom to explore themselves in educational and employment areas and they also have the right to health facilities. The controversy here is that as mentioned earlier, these people are usually apprehended on the mere grounds of being a *Hijra*s since their sexual activity is assumed to be unnatural by the police. So far as their sexual activities are concerned, it is safe to assume that they might have sexual intercourse with the person of the same sex, because of their sexual queerness[23]. The problem here is not in the assumption, but in the fact that since it is a criminal offense for which they can be punished, even if they are not caught in the 'actual sexual act.' So, on one hand by revealing that 'you' are a *Hijra*, living in the Hijra community and dressing differently will draw penal attention towards 'you', where on the other hand the court has emphatically stated that by 'coming out of the closet', 'you' will not be discriminated against.

(2)The second problem is the following definition to the term *hijra,* attributed by the Court*: Hijras are not men by virtue of anatomy, appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional 'third gender' Among Hijras, there are emasculated (castrated, nirvana) men, non- emasculated men (not castrated/akva/akka) and inter-sexed persons (hermaphrodites).*[24] This means that eunuchs, hermaphrodites, and men with no physical disorders but who are feminine in nature, though they do not have a female sex organ, are considered as *Hijras.* They are not classified as such because of their sexual orientation, but on their physical appearance. The term 'gay' relates to a homosexual, especially a man[25] .This means that men who are gay (homosexual) may also be covered under the term *Hijras*. Similarly the term bisexual means sexually attracted to both men and women. This may also be covered under the term *Hijra*, in the sense that a man dressed as woman,

[22]*Suresh Kaushal* (cited in note 3).
[23] (I use this word to denote a difference, not in the discriminatory negative sense).
[24]*National Legal Ser.Auth* (cited in note 1) at 3.
[25] 'Gay', Oxford Dictionary (2 ed 1989).

having a male sex organ, may have intercourse with another man or with another woman. When such a person sexually involves herself with a woman, will that be considered as a lesbian activity, since she has the right to identify herself in any gender as she pleases, after this decision of the Supreme Court? Then, it is a wonder how the court can blindly exclude 'gay', 'lesbians' and 'bisexuals' and even 'cross dressers' from the category of transgenders upon whom these rights are conferred. What the court wanted to exclude, probably, were persons who, in their physical appearance represent the sex they are born in, but because of their sexual inclination to the same sex have 'chosen' to be and remain homosexual. In other words the court is questioning the 'choice' of the individual who according to them behaves and dresses 'normally' but has an abnormal sexual inclination. Such a distinction is unquestionably the most absurd and irrational one that I have ever come across due to several factors:

(a) Homosexuality is a natural variant of human sexuality: Scientific evidence shows that homosexuality, defined as erotic, emotional and romantic attraction principally to one's own sex, is a natural variant of human sexuality and is not a mental disorder or disease. It is submitted that homosexuality is innate and intrinsic to human sexuality. There is a strong evidence to suggest a genetic link to homosexuality[26], The latest scientific data which have been peer-reviewed and approved by scientists across the world support the notion that homosexuality is caused by a combination of genetic and prenatal environmental factors[27], and thus cannot 'spread' from one to another. These studies conclude that there is a heritable (and hence genetic, DNA-based) component to homosexual behaviour. Homosexuality is a characteristic of an individual mostly caused by 'innate' factors beyond the control of that individual.

(b)Homosexuals have no choice in their attraction to the same sex: The amicus brief[28] filed in 2002 by the American Psychiatric Association and the American Psychological Association before the United States Supreme Court in the case *of Lawrence v. Texas*[29] where the U.S. Supreme Court struck down the anti sodomy law in the state of Texas states "*According to current scientific and professional understanding, the core feelings and*

[26] Brian S Mustanski et al, *A Genomewide Scan of Male Sexual Orientation,* 116 Hum Genet 272,278 (2005); NiklasLangstroem et al, *Genetic and Environmental Factor on Same Sex Sexual Behaviour: A Population Study of Twins in Sweden*, 39 Arch Sex Behav 75, 80 (2010); Francesca Lemmola and Andria CamperioCiani, *New Evidence of Genetic Factors Influencing Sexual Orientation in Men: Female Fecundity Increase in the Maternal Line*, 38 Arch Sex Behav 393,399 (2009).
[27] Anthony F. Bogaert, *Biological and Non-Biological Older Brothers and Men's Sexual Orientation*, 103 no. 28 PNAS 10771, 10774 (July 2006).
[28]Medical Brief as Amicus Curae American Psychological Association, American Psychiatric Association et al, *Lawrence* (cited in note), No 2-102, *3-12 (Jan 2003).
[29]*Lawrence v. Texas*539 US 558 (2003).

attractions that form the basis of adult sexual orientation typically emerge between middle childhood and early adolescence. These patterns typically arise without any prior sexual experience and the recent studies have shown that most homosexuals have little or no choice in their attraction to members of the same sex"

The only conclusion that could be drawn from such an interpretation is the court was completely against the decision in *Suresh Kaushal*[30], but did not want to put it in black and white. They acknowledged and understood the agony and plight of the transgender community and wanted to remedy it at some level, as far as may be possible without intervention into its earlier decision. And it is for this purpose alone they brought out the distinction in definition and applied it only to the *Hijras*. Like mentioned earlier, even on such an application, it is difficult to deliberate on the status of the *Hijras*as they are on one hand harassed by the executive and on the other hand provided with certain rights.

We are in the age of democracy, that too substantive and liberal democracy. Such a democracy is not based solely on the rule of people through their representative namely formal democracy. It also has other percepts like Rule of Law, human rights, independence of judiciary, separation of powers etc.[31] If the statement was true, it is impossible to reach an understanding as to why the judiciary did not consider India as a liberal and substantive democracy in upholding the constitutional validity of the archaic anti sodomy laws under section 377 of IPC which had an effect of discriminating against sexual minorities.

Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders.

Isn't the right to express one's sexual orientation a part of right to live with human dignity under Article 21 of the Constitution? Isn't discrimination on the basis of sexual orientation violative of Article 14, 15, and 16 of the Indian Constitution?[32] The court has recognised these rights of the transgender community only to the extent of gender identity (in employment, health, education etc.), and not with respect to their sexual orientation. It is impossible to

[30] *Suresh Kumar Kaushal*(cited in note 3).
[31] *National Legal Ser.Auth* (cited in note 1) at 30.
[32] Constitution of India, Art 14, 15 &. 21, Part III.

understand such an uncanny distinction brought about by the court. These two terms are generally clubbed together in most international law documents and even the court recognises it as follows[33]:

"Sexual orientation and gender identity: Other status as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."

The court has also gone throw a plethora of cases recognising the gender identity of such persons.[34] What must be noted is that in all these countries[35], the provision criminalising homosexual activities between two consenting adults in private has been discarded. It is only after this, that these secondary socio-economic, cultural rights of transgenders have been recognised. Thus the Court is trying desperately to uphold the rights of transgenders while at the same time trying not to upset the verdict of the previous constitutional bench decision.[36]

[33] United Nations Committee on Economic, Social and Cultural Rights (Jan 19th 2010), E/C.12/POL/CO/5 ("report on sexual orientation and gender identity"); also refer the Committee against Torture, (2007) **U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 ("**General Comment No.2 on Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"); Committee on Elimination of Discrimination against Woman (2010), ("Comment No.20, implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979").

[34] *Corbett v. Corbett* (1970) 2 All ER 33; *Attorney-General v. Otahuhu* Family Court (1995) 1 NZLR 603; *In Re Kevin* (Validity of Marriage of Transsexual) (2001) Fam CA 1074; *A.B. v. Western Australia* (2011) HCA 42; *Bellinger v. Bellinger* (2003) 2 All ER 593.

[35] England – Sexual Offences Act 1967, 1967 Ch.60; (New Zealand- Homosexual Law Reform Act 1986, No36 of 1986; Australia- *Toonen v. State of Tasmania, Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 at 1 (1994).

[36] *Suresh Kumar Kaushal*(cited in note 3).