

# DISGUST OR EQUALITY? SEXUAL ORIENTATION AND INDIAN LAW

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*“Come you Outcaste, dispelled be  
the burden of all insults,...*

*With holy water made sacred by  
the touch of everybody*

*On the shore of this Bharat’s ocean of  
the great Humanity.”*

—Rabindranath Tagore, song composed June 1910<sup>1</sup>

## I. SAME-SEX LAW: A TIME OF ASTONISHING CHANGE

The landscape of same-sex laws around the world has been changing rapidly. In the U.S., although sodomy laws were not thrown out until 2003<sup>2</sup>, marriage equality recently became the national norm.<sup>3</sup> In the Republic of Ireland, a referendum conducted on May 22, 2015, legalised same-sex marriage, despite the opposition of the Catholic Church. In Luxembourg, where same-sex marriage became legal on January 1, 2015, Prime Minister Xavier Bettel became the first EU leader to celebrate a same-sex marriage by marrying his partner Gauthier Destenay in May 2015. In Korea, by contrast, although

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<sup>1</sup> English translation by Kalpana Bardhan.

<sup>2</sup> *Lawrence v. Texas*, 539 US 558 (2003), overruling *Bowers v. Hardwick*, 92 L Ed 2d 140 : 478 US 186 (1986).

<sup>3</sup> *Obergefell v. Hodges*, 2015 SCC OnLine US SC 6 : 576 US \_\_\_\_ (2015).

sodomy has never been illegal, gays and lesbians encounter great stigma and hostility and same-sex marriage is not likely in the near future, largely on account of the influence of conservative Christian churches.<sup>4</sup> In India, despite the decriminalisation of sodomy in 2009 by the Delhi High Court, the criminal statute has recently been reinstated by the Supreme Court. Each country, in short, has its own story. Because of my longstanding focus as a legal scholar on Indian constitutional law, as well as my long association with The Lawyer's Collective, I am delighted by the opportunity to assess these Indian developments and their history – several years after having published a book on sexual orientation and constitutional law in the United States.<sup>5</sup>

I have long argued, as a legal theorist, for a theory of stigma and group discrimination that makes the operations of disgust central. I developed it in *Hiding From Humanity* (2004)<sup>6</sup> using results in cognitive psychology to show how disgust operates in a wide range of types of discrimination, including anti-Semitism, racism, sexism and homophobia. I then made the normative argument that disgust is never a sufficient condition to make an act illegal when it causes no harm to non-consenting parties. That general argument had been made by the great British legal philosopher Herbert Hart, responding to the conservative jurist Lord Devlin, who opposed the decriminalisation of sodomy, saying that the disgust of the average person was a sufficient condition to make an act illegal, even if it caused no harm to others.<sup>7</sup> (Their debate continued the nineteenth-century exchange between conservative James Fitzjames Stephen and liberal John Stuart Mill).<sup>8</sup> I argued, however, that a close analysis

<sup>4</sup> See my new preface to the Korean translation of my book, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (New York: Oxford University Press, 2010), forthcoming from Puriwa Ipari Publishers.

<sup>5</sup> *Id.* (At the time of publication of that book, only five states – Massachusetts, Connecticut, Iowa, Vermont, and California – had legalized same-sex marriage and in California, Proposition 8 had undone what the courts had done. By January 2015, however, same-sex marriage had been legalised by referendum in three states, by legislation in six, by a complicated combination of litigation and government action in two, and by state court action in six. State-imposed bans on same-sex marriage have been struck down by a long list of federal court actions; particularly notable and interesting is *Baskin v. Bogan*, 766 F 3d 648 (7<sup>th</sup> Cir 2014), where the majority opinion by Richard Posner has attracted world-wide attention. The net result as of January 2015 is that same-sex marriage is legal in thirty-five states, the District of Columbia, some jurisdictions in Missouri, and twenty-one Native American tribal jurisdictions. Furthermore, the Defense of Marriage Act (DOMA) was struck down in 2013 in *United States v. Windsor*, 2013 SCC OnLine US SC 86 : 570 US \_\_\_ (2013). The outlier was the Sixth Circuit, which in *De Boer v. Snyder*, currently on appeal to the U.S. Supreme Court, upheld state bans on majoritarian grounds).

<sup>6</sup> MARTHA NUSSBAUM, HIDING FROM HUMANITY (Princeton University Press, 2004).

<sup>7</sup> PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford University Press, 1970) (1959), passim (see my analysis of his argument in *id.*). HART, LAW, LIBERTY AND MORALITY 51 (Stanford University Press, 1963), (attacking Devlin's position). See also Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY, FACULTY SCHOLARSHIP SERIES, (Jan. 1, 1966).

<sup>8</sup> J.S. MILL, ON LIBERTY (1859) (arguing that harm to non-consenting parties is a necessary condition of the legal regulation of conduct); JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY,

of the particular cognitive structure of disgust – which none of these theorists had attempted – was crucial to understanding just why it was so unsuitable as a basis for law. In 2010, in my book on sexual orientation and constitutional law<sup>9</sup>, I developed the theory further and then connected it empirically to recent discrimination against gays and lesbians. I suggested that the legal notion of “animus”, used in both *Lawrence v. Texas* (invalidating the sodomy laws) and *Romer v. Evans* (invalidating a law that prevented gays and lesbians from getting protection from anti-discrimination laws)<sup>10</sup>, was best understood as an allusion to disgust above all. I tried to show how my theory supported the decisions and reasoning in those two cases. I also argued that despite the surface absence of disgust from arguments against same-sex marriage, disgust was a driving force, as with earlier opposition to interracial marriage. I supported this claim by a study of the pamphlet literature that had circulated at the time, in which appeals to disgust were prominent.<sup>11</sup>

Here I propose, first, to summarise my theory of disgust, and then to turn to the recent developments in India, where much of my work as a political and legal theorist has taken place, and where same-sex law is currently the scene of a fascinating struggle. These cases are not only fascinating and of urgent human significance, they are also theoretically significant: they appear to confirm my disgust-based theory.

Because India is a common-law country with a written constitution containing a detailed section of Fundamental Rights, it is easy to compare to the U.S. – and its similarity to the U.S. Constitution reflected a deliberate choice on the part of the Constitution’s primary architect, B.R. Ambedkar, who believed that vulnerable groups needed protection from majority tyranny.<sup>12</sup> Knowing what majorities were capable of, through a childhood of appalling discrimination and brutality, Ambedkar insisted on a Bill of Rights that could not be trumped by majority sentiment, and his views play a central role in the recent debate.

We shall see that what is precisely at issue in the recent struggle over same-sex rights is the tension between fundamental rights and majoritarianism, when disgust enters the picture. To set the stage, let me mention some of the

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FRATERNITY (1874) (arguing for a conservative tradition-based theory of legal intervention).

<sup>9</sup> *Supra* note 4.

<sup>10</sup> 134 L Ed 2d 855 : 517 US 620 (1996).

<sup>11</sup> I also discussed disgust at length in *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* (Cambridge, MA: Harvard University Press, 2013).

<sup>12</sup> I discuss his role and his ideas in detail in an article entitled *Ambedkar’s Constitution: Implementing Inclusion, Opposing Majority Tyranny*, forthcoming in a volume of essays on the implementation of constitutional rights (Tom Ginsburg & Aziz Huq eds., Cambridge University Press) (forthcoming). See also my review of B.R. Ambedkar, *Annihilation of Caste*, published in *THE NEW RAMBLER REVIEW* (online), (Aug. 2015), available at <http://newramblerreview.com/book-reviews/religion/untouchable>.

things that Ambedkar, as he tells us, encountered as a wealthy middle-class dalit child.<sup>13</sup> At school, he was not allowed to sit with the other students; he had to sit in a special corner by himself. Other students sat on communal mats. Ambedkar had to sit on a special mat that could not be touched by any other student and he had to take that mat home at the end of the day. While all other students could drink from the public tap, he could not – unless a servant first turned the handle for him. Travelling to meet his father along with his two sisters, all being well-dressed children with lots of cash, they were not admitted into any lodging.<sup>14</sup>

When I hear this story as an American, I think immediately of our struggle against racism and racial segregation and this is not an inappropriate comparison. It is that denial of basic equality and dignity, inspired by bodily loathing and irrational fears of contamination, that Ambedkar set out to stymie by ensuring that the Constitution had a strong and explicit commitment to fundamental rights and equal protection, even when majority sentiment was beastly, as it was. As we shall see, the memory and to a distressing extent the current reality of these horrible caste practices informs the reasoning of Indian courts concerning same-sex law, just as an analogy to laws against interracial marriage often informs the treatment of sexual orientation in U.S. law.

## II. DISGUST AND CONSTITUTIONAL LAW

Let me now summarise my theory of disgust, drawing (as I did in 2004) on the research of a team of first-rate U.S. experimental psychologists.<sup>15</sup> All humans appear to share an acute discomfort when confronted by their own bodily fluids, excretions, smells and by the decay of the corpse. I use the term “primary disgust” for a shrinking from contamination by such objects and by other objects that closely resemble them in smell or feel (such as insects and animals that are slimy, smelly, etc.). Primary disgust, though not present at birth, is culturally universal and is probably grounded in inherited tendencies. Although this aversive reaction may in some cases protect people from real danger (and perhaps that was its evolutionary origin), Rozin shows that its cognitive content is quite different from that of fear: it is about contamination, not danger, it is a reaction to the animality and decay of the human body, and it is both under-inclusive and over-inclusive of real danger. (Many dangerous things are not disgusting and people feel disgust even when they are rationally convinced that danger is absent.) Rozin concludes that in disgust we are rejecting something about our own animality.

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<sup>13</sup> For all references to his autobiographical writings, see NUSSBAUM, *supra* note 6, at Ch. 11 (discussing Ambedkar’s critique of caste).

<sup>14</sup> See references in NUSSBAUM, *supra* note 6, at 366.

<sup>15</sup> See references to the work of Paul Rozin and his colleagues in NUSSBAUM, *supra* note 6.

All that might be harmless enough, although I would argue that it is always problematic to encourage this sort of self-loathing. In all known societies, however, people do not stop there and we arrive at what I call “projective disgust.” People seek to create a buffer zone between themselves and their own animality, by identifying a group (often a powerless minority) who can be targeted as the quasi-animals and projecting onto that group various animal characteristics, which they have to no greater degree than the ones doing the projecting: bad smell, animal sexuality, etc. The so-called thinking seems to be: if those quasi-animal humans stand between us and our own animal stench and decay, we are that much further from being animal and mortal ourselves. There is no society in which we do not find subgroups, to whom, irrationally, properties of smelliness, hyper-sexuality and in general hyper-animality are imputed.<sup>16</sup>

There are many varieties of disgust-stigma. In European anti-Semitism, Jews were depicted as hyper-bodily, smelly and hyper-sexual, but also as crafty and intelligent.<sup>17</sup> African-Americans, by contrast, were and unfortunately at times still are imagined as hyper-sexual and also smelly, bestial and stupid. Again, African-Americans are imagined as physically powerful and aggressive. To upper Hindu castes who observed untouchability, untouchables were foul, weak and not particularly aggressive. These differences are important and yet a common set of threads runs through them all.

What about the propaganda that links disgust with same-sex acts? I studied a lot of U.S. pamphlet literature that attempts to whip up animosity toward gays and lesbians (though above all gay men) and found prominent use of the tropes of projective disgust. The standard way of doing this is to focus obsessively on anal sex and to describe it in terms apt to elicit revulsion. All sorts of abstract claims are made, for example claims that gays eat faeces and drink raw blood. (I heard Will Perkins, proponent of Colorado’s Amendment 2, testify under oath in Denver, in the bench trial of *Evans v. Romer*, that he had circulated pamphlets making that claim.) A related trope is the idea that gays travel a lot and thence bring germs into America – fascinatingly reminiscent of Nazi propaganda linking Jews to a variety of diseases.<sup>18</sup> India, as we shall see, is no different here.

Projective disgust always leads to some type of avoidance of bodily contact. Again, the type and extent vary. African-Americans were forbidden to use white people’s drinking fountains, swimming pools, lunch counters, hotel beds – and of course sexual contact was strictly forbidden and was considered to be a felony in many states (widely though, white men had sexual relationships

<sup>16</sup> See the longer version of these arguments in NUSSBAUM, *supra* note 6.

<sup>17</sup> See references to the historical literature in NUSSBAUM, *supra* note 6.

<sup>18</sup> See ROBERT N. PROCTER, *THE NAZI WAR ON CANCER* (Princeton University Press, 2000) (1997). Extensive references to the pamphlet literature are given in NUSSBAUM, *supra* note 6.

with, and sexually abused, black women). Yet, an African-American might prepare and serve food for a white family. An Indian untouchable, by contrast, could never serve food in an upper-caste family, and, as noted, dalits also could not share lodging or drinking taps. The crazy irrationalities of these ideas are manifold.

As for gay men in America: given the reality of the closet, no ban on shared restaurants, lodgings, drinking fountains, or even swimming pools could realistically be imposed, but the desire to impose one crops up in weird places, such as the symbolic aversion to shared showers in the military. I say symbolic because it is well known that all gyms have a fairly high proportion of gay members, and yet I know of no attempt to oust gays from the locker room, which, of course, would be both impossible and very bad for business. Still, straight men often fantasise that the very gaze of a gay man could penetrate and thus sully them; where they could use this to exclude gays, they did.

With regard to the legal side of the issue, my general normative conclusion was that close study of the operations of disgust should give us reasons not to base laws upon it – even should we remain skeptical of J.S. Mill's argument that harm to the non-consenting is a necessary condition for the legal regulation of conduct. Of course I agree with Mill, but I think that we can give new support to many of his positions by the study of disgust. (Such a study may convince people who still want to maintain some regulations of what Mill called "self-regarding acts" in areas such as gambling and perhaps hard drugs, where the operations of disgust seem less easy to see, and may even be absent.)<sup>19</sup>

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<sup>19</sup> What reasons, if any, do we have to think that Justice Kennedy had such phenomena in mind when he wrote that laws occasioned by "animus" do not pass the rational basis test? We may begin by noting that it's always a bad idea to impute much theoretical sophistication to Supreme Court Justices in matters outside their domain. Particularly when sex is in question, confusion is apt to reign. (See Tom Grey, *Eros and the Burger Court*, 43 L. & CONTEMPORARY PROB. 83-100, (1980). As Judge Richard Posner noted, judges are selected for their relative lack of sexual experience, so it is not altogether surprising that they are ignorant about sexual variety. (POSNER, *SEX AND REASON* (1992)). Justice Kennedy is surely no careful student of research into sexuality or the political emotions. Still, there are several reasons why we ought to think that disgust, if not the only possible reading of the term "animus," is at least firmly in the background.

First, it is simply there in the facts of *Romer*. Amendment 2 was indeed campaigned for with pamphlets aimed at creating disgust and the trial record showed this. (See my discussion in NUSSBAUM, *supra* note 6, concerning the testimony of Will Perkins, which I heard in person.) This is less obvious but also true of the sodomy laws at issue in *Lawrence*, as my research into the pamphlet literature shows (NUSSBAUM, *supra* note 6.) On that topic, furthermore, we can turn to our next point.

Second, then, disgust is there in the influential legal theory in the history of the question. Every judge knows Lord Devlin's scathing attack on the report of the Wolfenden Commission recommending the decriminalisation of sodomy. Disgust is the emotion on which Devlin most centrally relies for his anti-Millian contention that conduct that harms no non-consenting party can still be criminalised. The disgust of the "man on the Clapham omnibus"

### III. INDIA: BODILY FREEDOM, BODILY DISGUST

To set the stage for the current legal struggle, I must discuss its background in Hinduism – since it is there, and not in India's minority religious

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is a famous legal entity, and here it is the sodomy laws that are at issue. It is difficult to believe that Justice Kennedy was not informed at some level by the debate about Devlin's ideas, which every law student studies. Closer to his time, moreover, the influential U.S. conservative Leon Kass, head of the President's Council for Bioethics starting in 2001, had influentially supported Devlin's line in a 1997 article and later pamphlet, entitled "The Wisdom of Repugnance." Although Kass's argument was actually very different from Devlin's (see references and analysis in NUSSBAUM, *supra* note 6), the differences tended to be ignored, and his influential advocacy gave new life to Devlinism. So disgust was prominent in U.S. public policy at the time of *Romer*.

Third, disgust was at least somewhere in the two precedents most important for the denials of rational basis in *Romer* and *Lawrence*, the two Supreme Court cases that had found laws to lack a rational basis on the ground that they were prompted solely by negative emotion. *City of Cleburne v. Cleburne Living Center*, 87 L Ed 2d 313 : 473 US 432 (1985) denied the rational basis of a zoning ordinance that attempted to screen out a home for people with mental retardation. Although the case spoke of "irrational prejudice," "antipathy," and "invidious discrimination," and did not use the word "disgust," it's easy enough to see it in the way in which people sought to avoid the stigma of contact with people whose bodies so vividly (to the dominant group) emblemize the lowness of animality. Obviously the emotion was not fear and it did not seem to be hatred either. Furthermore, it just seems true that our dealings with people with mental retardation are overwhelmingly infected with disgust. As the concurring opinion says, people with mental retardation are seen as "pariahs" who do not belong in the community.

The other important precedent, *United States Deptt. of Agriculture v. Moreno*, 37 L Ed 2d 782 : 413 US 528 (1973) spoke of the "bare desire to harm a politically unpopular group," and did not allude to disgust. Moreover, since my colleague Geof Stone, who was then clerking for Justice Brennan, wrote the relevant portions of the opinion I know that he did not have concrete thoughts about the sort of negative emotion involved. Still, the group in question, hippie communes, were the objects of a kind of phobic disgust for the allegedly promiscuous sex acts that would transpire there. Hippies were typically portrayed as hyper-animal, associated both with bodily fluids and with unsanitary living conditions. To say that disgust was in fact involved is not to say that Justice Kennedy found it there. But in combination with our first two reasons, it does help us to conclude, very cautiously, that thought about disgust is around somewhere, in the reason in *Romer* and *Lawrence*.

More recent cases make the role of disgust explicit. Discussions of same-sex marriage almost always use the parallel of anti-miscegenation laws, which were obviously based upon disgust and irrational fears of contamination. The Supreme Court of Connecticut engages in a detailed analysis of disgust-prejudice against gays and lesbians in its same-sex marriage opinion:

*Beyond moral disapprobation, gay persons also face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated...Such visceral prejudice is reflected in the large number of hate crimes that are perpetrated against gay persons...The irrational nature of the prejudice directed at gay persons, who "are ridiculed, ostracized, despised, demonized and condemned "merely for being who they are" ...is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi-suspect class status...This fact provides further reason to doubt that such prejudice soon can be eliminated and underscores the reality that gay persons face unique challenges to their political and social integration. (Kerrigan v. Commr. of Public Health, 289 Conn. 135)*

While the court seems quite wrong to say that similar issues of revulsion have not been involved in racial prejudice and misogyny, they are certainly right to find it here.

communities – Muslim, Christian, Parsi, Jain, Sikh, Jewish, and Buddhist – that the struggle over purity and disgust rages – although it gets a lot of help from Victorian Christianity. This summary is unavoidably brief and over-simple, but it provides a useful orientation, especially for international readers.

Among all the world's major religions, Hinduism is the one that most unequivocally celebrates the body and its pleasures. Sexuality has a central and positive place. Thus the three arts that one must know in order to live well are the art of morality (dharma), the art of political/economic management (artha) and the art of pleasure (kama). To each of these arts is devoted a major religious text. Westerners think that Kama Sutra is a type of pornography, but it is actually as solemn as the other two key religious texts. The sexuality that is celebrated is not a narrow type: rather, women are encouraged to take sexual initiative and same-sex relationships are celebrated without stigma.<sup>20</sup> The ancient epics are a little more judgmental, but they too give many examples of the gods and heroes having a wide range of desires and relationships. Traditionally, too, hijras (transgender men who dress as women and have receptive sex with other men) were not stigmatised, but were regarded as auspicious. Since that community played an important role in recent litigation, I shall say more about them later.

On the other hand, Hinduism of a later period ossified into a form in which some bodily functions are heavily stigmatised. As the caste hierarchy developed out of an earlier system of four "varnas," the idea of untouchability became extremely prominent. Untouchability was closely connected with disgust at faeces and corpses, and attached above all to those whose occupations connected them to those matters (including leather-tanners, since they deal with animal corpses). A whole ideology of disgust developed; it was thought to be contaminating to share anything with such people.

Untouchability focused on faeces and decay, and for some time it coexisted with the celebration of sexual pleasure. Stigma was also attached, increasingly, to non-marital sexuality and, to some extent, to sexuality itself. This development, already suggested in some traditional texts, was greatly egged on by Victorian British puritanism. The British had a horror of India's sexual freedom. Clearly they had a fascination too, and an early era saw a lot of inter-marriage.<sup>21</sup> But as the Victorian era arrived, the British in India connected their puritanism to a new shrinking from the overt sexuality and sensuousness of Indian religion. The received British view was that the Hindu religion was filthy. Typical, and giving authority to the received view, was Winston

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<sup>20</sup> See translation and commentary by WENDY DONIGER & SUDHIR KAKAR, *KAMASUTRA* (Oxford University Press, 2009).

<sup>21</sup> See WILLIAM DALRYMPLE, *WHITE MOGULS: THE LAST MOGUL* (2007).

Churchill, who remarked in 1942, “I hate Indians. They are a beastly people with a beastly religion.”<sup>22</sup>

As time went on, reacting to this affront, some Hindus began to internalise the Victorian critique and to ape Victorian puritanism in order to deflect criticism.<sup>23</sup> While emphasising an aggressive conception of masculinity in preference to the sensuousness of earlier traditions, they also emphasised sexual purity more and more, along with the traditional strictures attached to caste.

Thus, Hindus struggled with the body, becoming increasingly anxious about representations of joyful and sensuous bodily life. Some progressive leaders, and of course Gandhi led the way, crusaded vehemently against untouchability, and Gandhi was famous for insisting that his followers perform tasks that were traditionally performed only by dalits, such as cleaning latrines. But Gandhi combined his progressivism with a famous emphasis on dietary and sexual purity that, while it surely had some Hindu roots, was in many ways extremely alien (Gandhi always counted Tolstoy as among his key intellectual influences, and he had by then spent many years in Christian circles, in Britain and elsewhere). Far from urging that all people accept their bodily nature and learn not to feel disgust at bodily functions, he expressed a powerful loathing of sexuality in all its forms, sought to extirpate it in himself, and expressed in harsh terms his moral judgment on the sexual lives of others.

Gandhi loathed all sexual acts, but same-sex acts come in for particular emphasis – perhaps because, unlike opposite-sex acts, they didn’t even have the redeeming virtue of procreation.<sup>24</sup> A student of Rabindranath Tagore once asked Gandhi what he thought of the role of arts in society, and Gandhi immediately replied that artists can be highly immoral, citing the example of Oscar Wilde. The fact that Wilde, who went to prison for same-sex conduct, is the first example of immorality that came to his mind seems significant.<sup>25</sup> So Gandhi, while asking his followers to repudiate bodily disgust in one area, caste, ramped it up in another, sex: and he created a puritanism that, in some respects, reinforced the Victorian critique.

<sup>22</sup> In conversation with Leo Amery, Secretary of State for India, and reported in Amery, *The Leo Amery Diaries* 832 (John Barnes & David Nicholson eds., Vol. 2, London: Hutchinson, 1980).

<sup>23</sup> For one good account, see Wendy Doniger, *India: Censorship by the Batra Brigade*, *THE NEW YORK REVIEW OF BOOKS* (May 8, 2014).

<sup>24</sup> Biographer Joseph Lelyveld has opined that Gandhi felt powerful same-sex desire toward the German architect Herman Kallenbach, with whom he shared a house for some time. (See JOSEPH LELYVELD, *GREAT SOUL: MAHATMA GANDHI AND HIS STRUGGLE WITH INDIA* (New York: Knopf, 2011). Lelyveld’s argument is quite unconvincing; when Gandhi noticed himself feeling desire he always expressed guilt and self-loathing, as he did several times concerning women, but never about Kallenbach. I review Lelyveld’s book very critically in *THE NATION*, October 31, 2011, at 27-32.

<sup>25</sup> See reference and discussion in my *THE CLASH WITHIN: DEMOCRACY RELIGIOUS VIOLENCE, AND INDIA’S FUTURE* Ch. 2 (Cambridge, MA: Harvard University Press, 2007).

One note before we proceed: Someone might opine that the Indian aversion to same-sex acts reflects Muslim influence. This would be utterly wrong. Babur, the first Muslim ruler of India, celebrated his sexual relations with males in his memoirs,<sup>26</sup> and, in general, that group of Muslims was distinguished by its outstanding tolerance in all matters. In more recent times, it has been shown that pertinent variations in gender norms are regional rather than differing between the religions.<sup>27</sup>

Disgust had its determined opponents.<sup>28</sup> Rabindranath Tagore, the great poet, novelist, philosopher, composer, choreographer, dancer and educator, held the view that free and equal citizenship, in the nation of the future, required finding joy and pride in the human body. He set about creating a style of education for the young, in his school at Santiniketan, that aimed at bodily reconciliation and love.<sup>29</sup> Students learned in large part through dance and music – led by the example of Tagore himself, a superb dancer whose techniques as both dancer and choreographer are studied by modern dance leaders all over the world. The message Tagore continually sent, though still in a careful and controlled way, was that there can be no political freedom without bodily freedom and acceptance. His own style of dance, in the many surviving photographs and accounts (especially the wonderful book by Amita Sen, *Joy in All Work*) was androgynous, and sensuously receptive rather than aggressive.

In Tagore's major philosophical work, *The Religion of Man* (1931), he ventures yet further into anti-Victorian terrain, by citing the Bauls of Bengal as his prototype of the sort of love a good society needs at its heart. He gives the example further emphasis by appending to the book a learned (albeit somewhat evasive) essay on the Bauls by K.M. Sen, the great scholar of Hinduism (who was also Amartya Sen's maternal grandfather). The Bauls are countercultural minstrels who have left organised society to form their own marginal society based upon love. Although Tagore does not go into explicit detail for his British audience, they were well known to have countercultural sexual practices, both opposite-sex and same-sex, and to have initiation rituals that required the aspirant to taste all the fluids of the body, thereby repudiating disgust. Their creed was (and is) love of humanity, and they believe that this love requires forming a loving relationship with all the parts and fluids of the

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<sup>26</sup> THE BABURNAMA: MEMOIRS OF BABUR, PRINCE AND EMPEROR, (W.M. Thackston trans., New York: Modern Library Classic, 2002).

<sup>27</sup> See ZOYA HASAN & RITU MENON, UNEQUAL CITIZENS: A STUDY OF MUSLIM WOMEN IN INDIA (Oxford University Press, 2004), describing the results of their extensive and first-rate survey of attitudes and living conditions among Muslim women throughout India.

<sup>28</sup> I discuss Tagore's thought at greater length in NUSSBAUM, *supra* note 6, at Ch. 4.

<sup>29</sup> I discuss Tagore's school in NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES (Princeton University Press, 2011), and with attention to the role of dance and the body, in NUSSBAUM, *supra* note 6, at Ch. 4, here making use of Amita Sen's memoir.

body.<sup>30</sup> Tagore's own poetry and musical compositions are closely inspired by Baul lyrics, and one of his most famous dance-dramas was *Rituranga*, in which he himself danced the role of a blind Baul who breaks the fetters with which an uncomprehending society has shackled him. Here is Amita Sen's description:<sup>31</sup>

*"Entering the stage, he sang as he walked:*

*My fetters will be broken, will be broken, at the time of departure/I am free, who can imprison me behind locked doors!/I go in the dark as the evening bell rings).*

*What a wonderful movement of strong hands breaking fetters! The free wayfarer advances, the joy of freedom ringing in his steps, and fearlessness in his clear voice. Even after he had left the stage, the sound of the evening bell echoed in the spectators' ears."*

Here a young woman sees in Tagore's body a powerful image of citizenship, in the not-yet-created Indian nation of the future. The image is drawn from a sexual counter-culture.

Tagore, moreover, strongly connected the struggle against sexual disgust with the struggle against caste-based and race-based disgust. In his great novel *Gora* (1909), the young hero (whose name means "pale-face") decides that a rededication to traditional caste norms is the core of a renewed Hinduism, and the best basis for Indian citizenship in the future nation. *Gora* accordingly refuses food his own mother has prepared, because she is not willing to ostracise a Christian maid-servant who cooks for the family (Christians typically were converts from the lowest castes, so the idea of untouchability, not just Christianity, is clearly operative). But the reader knows early on that *Gora*'s project is doomed, because, as his name suggests, he is actually not a Hindu at all, but the adopted child of an Irish mother who died in 1857 during the First War of Independence. His mother's liberal attitudes led her to adopt this baby and bring it up as her own. By the end of the novel, *Gora* has realised that the new nation must be based on the repudiation of caste disgust and the embrace of humanity in all people.

Where are same-sex relationships in Tagore? In many ways he is a spiritual cousin of Walt Whitman, and gestures toward the conclusion that India must also accept same-sex relationships even as it accepts the equality of all castes and the equality of women. This message is sent pretty clearly to

<sup>30</sup> I discuss the Baul tradition, with references to modern scholarship, in NUSSBAUM, *supra* note 6, at Ch. 4.

<sup>31</sup> AMITA SEN & PRONOTI SINHA, *JOY IN ALL WORK* (English translation of her Bengali original, Kolkata: Bookfront Publications, 1999).

those in the know, since the Bauls practice same-sex conduct. But he never makes the idea explicit; he really couldn't at the time. Nor did he have any such relationships. But his style of dance does return to the older androgynous and sensuous idea of Hindu masculinity, part and parcel of which, originally, was openness to receptive sexuality and perhaps to same-sex desire. Gandhi's Oscar Wilde remark may have been an allusion to this.

Today's India, in some quarters at least, has forgotten the joyful message of inclusion sent by Tagore. There is still a lot of puritanism, and it targets both women's freedom and same-sex relationships.<sup>32</sup> The Hindu right has been around since the turn of the century, but it now dominates the cultural scene, and it continues the post-Victorian emphasis on bodily purity. It has campaigned ceaselessly for years against the scholarly portrayal of Hinduism as a religion that prominently includes sensuousness and bodily delight. Many books have been targeted under a law that makes it a crime to "outrage the feelings of Hindus," but especially virulent has been the assault on my colleague Wendy Doniger, the great historian of Hindu religion, for her two recent books<sup>33</sup> portraying, in a very positive light, the sexual aspects of early Hindu religion. Indeed the lawsuit against Doniger's *The Hindus* makes it clear that one of the main objections is to the zest and humour with which Doniger portrays the sexuality of the gods and heroes. The plaintiff, Dinanath Batra, a proud member of the Hindu-right social organisation RSS, describes Doniger in the brief itself as "a woman hungry of sex." Although the lawsuit was ludicrously weak, and the case eminently winnable, Penguin India, fearing violence against its employees, agreed to settle and get rid of all copies of the book.

As for same-sex relations, the Gandhi biography by Lelyveld was banned in Narendra Modi's home state of Gujarat, and was denounced by Modi and other leading Hindu-Right politicians, none of whom seemed to have read it.<sup>34</sup> A national ban was considered, but the law minister decided not to go ahead – only because he discovered by actually reading the book that Lelyveld had not actually imputed homosexual acts to Gandhi.

So there is a sex panic at large in the some parts of the nation, and, as we shall see shortly, the Hindu right and the Victorian past are once again joining hands to oppress and stigmatise.<sup>35</sup>

<sup>32</sup> For an acute discussion of the cultural landscape, see Ratna Kapur, *Out of the Colonial Closet, But Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns*, 2 NUJS L. REV. 381-96 (July-Sept., 2009).

<sup>33</sup> *The Hindus* and *On Hinduism*, the former a general introduction, the latter a collection of essays. On the lawsuit see Martha Nussbaum, *Law for Bad Behaviour*, THE INDIAN EXPRESS, February 22, 2014, <http://indianexpress.com/article/opinion/columns/law-for-bad-behaviour/>.

<sup>34</sup> See my review of Lelyveld, *supra* note 24, for details of this campaign

<sup>35</sup> As for miscegenation, only five percent of Indians say that they have married someone of a different caste. See Rukmini S., *Just 5 percent of Indian Marriages are Intercaste*, THE HINDU,

#### IV. INDIAN PENAL CODE – SECTION 377 AND THE NAZ FOUNDATION CASE

The British believed that they could govern best if both commercial and criminal law were uniform for all of India, while they strongly encouraged civil law, including property and family law, to be managed by the four major religions. This set-up continues. Thus the criminal law of India and the related parts of Hindu family law, codified by the British and rarely updated, are, not surprisingly, Victorian and not particularly Indian. They contain some odd British artefacts: for example, the remedy (in the Hindu Marriage Act) of “restitution of conjugal rights,” – intelligible in the context of nineteenth century British divorce litigation, and long-since abandoned. Today, the remedy is used by Indian males to curb an independent spouse and get her income. The remedy was rightly declared unconstitutional by an appellate court on grounds of sex equality – until the Supreme Court reinstated it.<sup>36</sup>

Another anachronistic Britishism is the criminal offense of “outraging the modesty of a woman,” which has been a very uneasy fulcrum for Indian feminists seeking redress against sexual harassment; it has proven divisive, advantaging “modest” women of upper class and caste, and disadvantaging those who are thought not to have “modesty” in the first place, for example because they perform manual labor.<sup>37</sup> “Modesty” was defined in a 1998 Indian Supreme Court case (via several British dictionaries) as “womanly propriety of behaviour; scrupulous chastity of thought, speech, and conduct.”<sup>38</sup> These Victorian ideas are not very helpful, if what is wanted is gender equality.

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November 13, 2014, <http://www.thehindu.com/data/just-5-per-cent-of-indian-marriages-are-intercaste/article6591502.ece>. Given the very large number of castes, this is a pretty amazing result. (Because caste is to a great extent regional, it would be very difficult to get a precise number. Even when mandatory quotas are concerned, as with the OBC's (Other Backward Castes), state lists often differ from national lists. The national list of “scheduled castes” recognises 1108 castes, and the list of “scheduled tribes” recognises 744 such tribes. As for OBC's, the Central list recognises 99 in West Bengal alone, and other states are similar.)

<sup>36</sup> *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356. Sareetha was married at age sixteen and later became a famous movie star in the Telugu film industry. Her husband, who had left her only a few months after the marriage, claimed restitution five years later when she was independently wealthy. See my discussion in the introduction and the first chapter of my book *SEX AND SOCIAL JUSTICE* (New York: Oxford University Press, 1999).

<sup>37</sup> See my *The Modesty of Mrs. Bajaj: India's Problematic Route to Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 633-54 (Catharine A. MacKinnon & Reva B. Siegel, eds., New Haven: Yale University Press, 2004). The plaintiff, a high ranking civil servant, pronounced to the press that she was not a mere manual laborer, as if that meant that she could be harassed while other women could not.

<sup>38</sup> *Id.* Much debate ensued about who might be said to have modesty: in one case in which a man exposed himself in the presence of a young infant, it was held that modesty is innate, thus an infant can have it. But the fact that modesty doesn't have to be acquired never meant that it could not be lost.

Of course the culture that has historically been Europe's most intensely homophobic, the culture that sentenced Oscar Wilde to three years at hard labor for oral sex with consenting partners, did not hesitate to insert its strictures on same-sex acts into the Indian criminal law as well. Section 377 of the Indian Penal Code reads as follows:

*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 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.*

Even more than my other examples, this law bears the unmistakable stamp of antiquated Victorian piety.

It is crystal clear that this law is utterly foreign to India. India surely does have its disputes over marital property, hence interests in "restitution"; it also has some ideas related to the Victorian ideas of modesty and chastity. But the idea of "the order of nature" and of certain sex acts as offenses against that "order" is utterly Western and Christian in origin, with no foundation in (non-Christian) Indian traditions, as subsequent legal arguments rightly insist. Nor do (non-Christian) Indian traditions seek the legal regulation of same-sex conduct. India, indeed, was long a haven for British gay men seeking a greater liberty: E.M. Forster is just one of these.

This is not to say that Indian society in the twentieth century has been tolerant of same-sex conduct. It has not, and I have suggested that the reasons for this derive in part from the pain of British stigmatisation and critique, and the desire of elites to emulate Victorian propriety – although they derive no doubt, as well, from some aspects or versions of indigenous traditions. But it is to say that the law itself, with all its Christian framing, is a very problematic one for any court in independent India to uphold. Moreover, like many sodomy laws in the U.S., it is both under-and over-inclusive so far as same-sex conduct is concerned: it apparently applies to opposite-sex anal penetration as well as to same-sex, and it says nothing clear about oral sex or mutual masturbation. Case law had long grappled with these problems.

It was long felt that Section 377 was an anachronism, and by late in the twentieth century, pressure began building to seek its repeal. This campaign gained momentum from the battle against HIV/AIDS. Groups grappling with the disease understood that criminal laws against gay sex were a strong deterrent to seeking testing, counselling, and treatment. Even many who had

no particular sympathy with the lesbian and gay community joined the repeal campaign as a clear public health issue.

One part of the repeal strategy was protest, as a variety of intellectuals, activists, and literary figures spoke up against the law. Another arm was a legal challenge to the law's constitutionality. The Naz Foundation, an activist group working with same-sex issues, joined forces with The Lawyer's Collective, India's premier legal NGO.<sup>39</sup> Founded by Indira Jaising and her husband Anand Grover, the Collective has two arms, one dealing with sex equality and the other with HIV/AIDS. Jaising's distinction as a lawyer led to her appointment as the first woman Additional Solicitor General, under the recent Congress government, as well as other recognitions. Meanwhile, Grover's distinction was recognised worldwide when he was named Special Rapporteur for HIV/AIDS by the United Nations. So the case could not have found a more prestigious team of advocates.

The challenge to Section 377 was initially filed in 2001, but in 2003 the Delhi High Court refused to consider it, concluding that the petitioners lacked standing because the law was rarely enforced. Petitioners appealed to the Supreme Court to reinstate the case, and the Court agreed, sending it back to the Delhi High Court to consider it on its merits. The case was finally considered in 2008. The government was divided – as the High Court later said, a “rather peculiar feature of this case.” The Health Ministry supported the petitioners on the ground that Section 377 was counterproductive in the fight against HIV/AIDS; the Home Ministry supported the law. The new Law Minister, Veerappa Moily (the same man who later refused to ban Lelyveld's Gandhi book because he actually read it) conceded that the law might be outdated. In July, 2009, the Delhi High Court struck down Section 377, holding that it violates Article 14 of the Fundamental Rights section of the Indian Constitution, which guarantees all citizens equality before the laws and the equal protection of the laws, as well as Articles 15 (non-discrimination), and 21 (due process, right to life with dignity).<sup>40</sup> (The law was invalidated only in its application to consenting acts between adults, and it remained in force as regards non-consensual acts and acts involving minors). The case was heard by two of the High Court's most respected judges, Justice A.P. Shah and Justice

<sup>39</sup> The Collective has argued many important gender-equality cases, including *Bajaj case - Rupan Deol Bajaj v. Kanwar Pal Singh Gill*, (1995) 6 SCC 194.

<sup>40</sup> See Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in *INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES*, Volume from conference on 50<sup>th</sup> anniversary of the Indian Constitution 242-83 (E. Sridharan, Z. Hasan, & R. Sudarshan, eds., New Delhi: Permanent Black, 2002). A shortened version published under the title *What's Privacy Got to Do With It? A Comparative Approach to the Feminist Critique*, in *WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, PRACTICE* 153-75 (Sibyl A. Schwarzenbach & Patricia Smith eds., New York: Columbia University Press, 2003). The history of substantive due process and the privacy right is extensively discussed by the Court in *Naz Foundation*.

Muralidhar, both known for the quality and the progressive character of their opinions.

The Naz Foundation opinion is very long and unusually complex, given the number of distinct legal and factual issues involved. Because the later reversal fails to confront these intricate details, we must now do so. In general, what is particularly impressive about the opinion is its thoroughness: it cites many social-science findings and a huge number of legal judgments, both from Indian courts and from courts abroad, as well as a wide range of international treaties. This aspect of the opinion cannot be reproduced (the opinion is over a hundred pages long), but should be imagined. A succinct analysis of its major arguments is consequently useful.

Throughout the opinion, the acronym MSM is used for men who have sex with men, thus bypassing irrelevant debates about orientations and acts; the opinion is written as if the targeted group is male, and nothing at all is said about lesbians, or whether Section 377 has ever been used to burden their rights. (In Britain, lesbian acts were never illegal.) I shall follow the logic of the opinion, though I note its narrowness. (It is also worth noting that bisexuality is completely ignored.)

*History:* The court repeatedly delves into the history of Section 377, insisting, correctly, that its foundation is Victorian and Christian, with no basis in Indian traditions. Because India was more liberal than Britain in matters of sexual orientation, the court notes, many people came to India to take advantage of this liberal atmosphere. Therefore, in 1860, when Lord Macaulay drafted the Indian Penal Code, he felt a need to be harsh, introducing the idea of sexual offences “against the order of nature” (70). But the concept of an offense against the order of nature was simply absent from Indian society; it is essentially a Western concept (70), “based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness” (75). In particular it embeds an idea that sex is sinful unless its goal is procreation within marriage (5), and has been so interpreted in a 1925 opinion applying Section 377 to oral sex (5). At this point the court cites an Australian opinion by the distinguished Justice Michael Kirby, noting that a similar law in Australia was “imposed on colonial people” (70). This history is not legally relevant without further argument, but it does prepare the reader to see a dissonance between India’s own self-imposed Constitution and the vestiges of Empire that remain in the Penal Code. As the court said: “There is no presumption of constitutionality of a colonial legislation” (105).

*Facts:* Since the Supreme Court will subsequently overrule the Delhi High Court on the findings of fact, an unusual thing for a higher appellate court to do, we might expect to see sloppiness in the factual record. Nothing could be further from the truth. Buttressing its argument with wide-ranging

citations from empirical and scientific studies (some of which were made available to the court in amicus briefs and some of which it apparently found on its own), the court draws three important conclusions:

1. The illegality of consensual same-sex acts harms public health efforts to curb the spread of HIV/AIDS by discouraging MSM from seeking treatment or testing. This is the primary emphasis of the factual argument, and detailed factual analysis was presented to the court in an affidavit from the National AIDS Control Organisation, affirmed by the government's Ministry of Health and Family Welfare. Further data were presented in an amicus brief from the Lawyer's Collective (12-17). The court notes an opposing argument by the Home Office to the effect that criminalising gay sex will help the struggle against HIV/AIDS by deterring homosexual acts, but it concludes, correctly, that there is no evidence for this contention and a great deal of evidence against it (59).
2. The illegality of same-sex acts has led to violence against gay men, including violence by the police. This section of the opinion draws on a wide range of affidavits, involving gang rape, police violence, custodial torture, and other offences (18-19).
3. The illegality of same-sex acts is associated with feelings of low self-esteem and humiliation (39). This argument, buttressed by studies from many nations, lies on the border of fact and norm, but the fact of such feelings will later prove relevant in reaching the normative conclusion that dignity has been violated, so I include it here.

*Constitutional Argument:* The court makes three constitutional arguments. I begin with the two brief arguments that actually come later in the opinion, in order to dwell on the pivotal Article 21 argument. Addressing Article 14 (equality before the law), the court reviews the history of the requirement that a law's classification be founded upon an intelligible differentia, and one that has a rational relation to the objectives of the law. Arbitrariness is excluded, as is an objective that is itself "illogical, unfair, and unjust" (74). But, argues the court, Section 377 does not take account of relevant factors such as consent, and its classification is based upon "disgust toward a particular social group" or "animus." Its classification is therefore "both arbitrary and unreasonable" (76).

As to Article 15 (discrimination), what needs to be argued is that discrimination on the basis of sexual orientation amounts to discrimination on the basis of sex, since sex, and not sexual orientation, is mentioned in the text. The view that sexual orientation discrimination is a form of sex discrimination

has frequently been urged in the legal literature.<sup>41</sup> After all, to criminalise a consensual act because its participants are two men rather than a man and a woman is in the most straightforward sense to discriminate on the basis of sex. U.S. Courts have typically been reluctant to accept this argument, but the Delhi court does accept it (81-85). The court mentions that the Canadian Supreme Court agrees with this reasoning, but it then proceed to offer an independent argument for the conclusion. First, a primary purpose of anti-discrimination norms is to prevent individuals from being judged by gender stereotypes; but that is exactly what Section 377 does. Furthermore, a series of prior cases, dealing with discrimination against women, contain language implying that all cases dealing with gender stereotypes must be subject to strict scrutiny (which Section 377 will not pass, as we shall see). (86-90).<sup>42</sup>

Article 21 provides the court with its central line of argument. The basic idea is that if it is established that a law burdens a fundamental right, the law can only survive if the state can demonstrate a compelling government interest. (This basic tenet of Indian constitutional law was set forth very clearly in a series of cases that the court extensively cites.) There are two fundamental rights at stake: the right to privacy and the closely related right of life with dignity. (Much is said about the intimate relationship between privacy, especially sexual privacy, and full human dignity.) These rights are not explicit in the constitutional text, but they have been recognised over the years through interpretation of Article 21.

Now we must provide some history, since Article 21, as written, says only this: “No person may be deprived of his life or personal liberty except according to procedure established by law.” No mention of privacy, and none of dignity. At the time of the framing, India deliberately sought to limit due process to the procedural, since Ambedkar had learned from his study of the U.S. that substantive due process, as in the *Lochner* era, could be used against laws friendly to labour. So, in place of the words “due process of law,” the document reads “procedure established by law.”

However, as time went on the need for substantive due process began to be felt in three areas: (1) limits on police behaviour, since India’s Constitution lacks an analogue of our Fourth Amendment; (2) limits on criminal punishment, since it also lacks any analogue of our Eighth Amendment; and, finally, (3) sexual privacy. India has gradually followed the U.S. in using due process

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<sup>41</sup> See Andrew Koppelman, *Why Discrimination Against Gay Men and Lesbians is Sex Discrimination*, 69 NYU L. REV. 197 (1994); Leslie Green, *Sex-Neutral Marriage*, 64 CURRENT LEGAL PROBLEMS 1-21 (2011). (Both authors argue that discrimination on grounds of sexual orientation is sex discrimination.)

<sup>42</sup> For an illuminating argument that Article 15 incorporates a principle of *swaraj*, see Tarunabh Khaitan, *Reading Swaraj into Article 15*, 2 NUJS L. REV. 2 419-32 (July-Sept., 2009).

to craft a privacy right that is used in all of these areas<sup>43</sup>, including the defence of some areas of sexual privacy – though with a somewhat uneven record.<sup>44</sup> The court in *Naz Foundation* goes into the details of this gradual recognition of a privacy right (28-35). They then argue more briefly that Section 377 burdens this right, which they root in the word “liberty” in Article 21. As for dignity, the word “life” in Article 21 had long since been interpreted to mean “life commensurate with human dignity”<sup>45</sup> – and the court gives this history as well. Then, by alluding to the factual record of stigma and discrimination, they argue that this right as well is burdened by Section 377 (44-50). They mention that both the right to equality and the rights to privacy and dignity belong to all – just in virtue of their humanity (97).<sup>46</sup>

A compelling state interest must therefore be found. Since the court has already disposed of the flimsy claim by the Home Office that Section 377 helps public health (which the Health Ministry denied) the only remaining interest is supplied by popular feeling. So the Court now argues that a compelling governmental interest cannot be supplied by a majority moralism that subordinates a class of persons. Popular morality, they note, is distinct from the morality embodied in the Constitution (63), and the Constitution makes the courts guardians of Fundamental Rights, including, and especially, “the fundamental rights of those who may dissent or deviate from the majoritarian view” (99). At this point the court quoted the well-known words of Dr. Ambedkar, against majoritarianism. Thus, the court reminds its audience of the way in which the heinous practice of untouchability was held in place by majority sentiment.

*Disgust and stigma:* The legal situation in *Naz Foundation* is thus somewhat different from that in the U.S. cases in which “animus” played a leading role. In both *Romer v. Evans* and *Lawrence v. Texas*, the appeal to negative emotion was used to show that the laws in question lacked even a rational basis. As we have seen, that is what the court does with the notion of disgust in its Article 14 argument. But, as to Article 21, given that strict scrutiny has been held to be the appropriate level of review, the legal role of disgust could be expected to be less prominent: all the court needs to do is to knock

<sup>43</sup> The punishment area gives rise to some oddities: as when the solitary confinement of death row prisoners is held to be a violation of the “right to privacy” and “privacy” is understood to involve a right to conversation with others – See Nussbaum, *supra* note 40.

<sup>44</sup> Nussbaum, *supra* note 40.

<sup>45</sup> See Martha Nussbaum, *India, Sex Equality, and Constitutional Law*, in *CONSTITUTING WOMEN: THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 174-204 (Beverly Baines & Ruth Rubio Marin eds., Cambridge and New York: Cambridge University Press, 2004). Key cases are *Francis Coralie Mullin v. UT of Delhi*, (1981) 1 SCC 608 : AIR 1981 SC 746, cited in *Naz* and *Olga Tellis v. Bombay Municipal Corpn.*, (1985) 3 SCC 545 : AIR 1986 SC 180.

<sup>46</sup> On these aspects of the case, see the detailed analysis in Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 NUJS L. REV. 504-24 (July-September 2009).

down each claim of compelling state interest. However, given that the claim of public morality is the central claim, showing that the interest in criminalising consensual gay sex acts is actually motivated by disgust and stigma helps to establish the constitutional unsuitability of the interest, in a nation committed to equality. At the same time, it helps show precisely how the dignity of a minority has been violated, a key part of showing that Section 377 violates Article 21. For both of these reasons, and perhaps just understanding the importance of the issue, the court devotes a lot of attention to disgust and revulsion as putative justifications for maintaining the law. The term “animus” is used once in the opinion, but “disgust,” “revulsion,” and “repugnance” frequently.

I have already mentioned the court’s indirect allusion to the caste hierarchy through its attention to Dr. Ambedkar’s criticism of public sentiment. One of the most interesting sections of the opinion is a very explicit reference to caste, in the form of a discussion of India’s hijras, a group targeted by public disgust and revulsion, and treated at times as untouchable (pp. 41-42).<sup>47</sup> No brief account can do justice to the complexity of this community, but, simply: hijras are a very ancient community of transgender people, most of them male at birth, who identify as neither male nor female, and who often take a receptive role in sex with men, often also dressing in female dress. They are mentioned in Kama Sutra, and it appears that in ancient Indian traditions they were respected and not found disgusting. They are blessed by Rama in Ramayana and given special functions at occasions such as childbirth and weddings. Now, however, forced by public stigma to live on the margins of society, hijras are subject in an extreme form to harassment and violence, to denials of employment, and also to refusals of medical treatment (almost 30 percent are HIV positive). The court discusses the history of this community, noting that the British displayed obsessive hostility to this group, and even defined it as a “criminal tribe,” i.e. as outlaws by nature, in 1871 (41). Indeed, the persecution of this community was British in origin. The court then reports that although Nehru called this stigmatisation “monstrous” in 1936, the classification as “criminal” was not repealed until much later, and contemporary studies show that its ill effects have barely abated at all, as police feel free to mistreat members of the group and even torture them.

Now, of course, hijras are not the topic of Section 377, which sweeps much more broadly. But the court’s intention is clear: this case, which most Indians will very likely agree to be “monstrous,” for the way in which human beings are singled out by public disgust and then subjected to extreme forms of violence and discrimination, is really the situation of MSM in India much

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<sup>47</sup> On this aspect of the opinion, see Siddarth Narain, *Crystallising Queer Politics: The Naz Foundation Case and its Implications for India’s Transgender Communities*, 2 NUJS L. REV. 455-70 (July-Sept., 2009).

more generally. It just is the same case. There is ultimately no difference but one of degree. Section 377 classifies all MSM as a criminal tribe. That is what the court clearly wants the reader to understand.

The court thus makes disgust and untouchability or quasi-untouchability central in its analysis, showing the depth of tension between Section 377 and the spirit of the Indian democracy, with its commitments to equality, dignity, and inclusiveness.

The court summarises:

*“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 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. 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.”*

In short: using public disgust as a weapon to pillory individuals was the way of the Raj. India has a different set of commitments and a different history.

This, I believe, is the deep insight *Naz Foundation* offers to the U.S. and other nations: rationalise “animus” however you will, laws discriminating against gays and lesbians express a fear of contamination whose infamous prototype and core example is untouchability and whose damages to equal dignity are profound. If we think the practice of untouchability is heinous – and a U.S. reader could quickly add the practices of the Jim Crow era regarding drinking fountains, swimming pools, lunch counters, and (of course) miscegenation – then we should think the same thing about our laws and practices where they discriminate on grounds of sexual orientation.

We are not at the end of the road. I must now turn to a sad recent development: the reversal of the Delhi High Court decision by the Indian Supreme Court.

## V. THE SUPREME COURT CASE: IDEOLOGY AND CARELESSNESS

On December 11, 2013, the Supreme Court of India reinstated Section 377, in the case of *Suresh Kumar Koushal v. Naz Foundation*<sup>48</sup>. The Attorney General had refused to appeal. (The Central Government later filed a review petition against the Supreme Court, arguing that their reasoning was full of errors.) The appeal was therefore filed by Suresh Kumar Koushal, a private individual who runs an astrology center in Delhi.<sup>49</sup> (The belief that Vedic astrology is a science is a cardinal tenet of India's Hindu Right, who want it to be taught in university science faculties.) The case was heard by a two-judge panel, as is the normal practice.<sup>50</sup> Thus, the judgment cannot be taken to represent the view of the Court as a whole. There is no provision for en banc rehearing, however. There is a corrective mechanism known as a "curative petition," and the Naz Foundation filed such a petition on 31 March, 2014, asking for an oral hearing of the petition and an interim stay on the Koushal decision. This matter is still pending.

The Koushal opinion is also very long, but at that point all resemblance to the Delhi opinion ceases. In terms of history, it bizarrely cites statements by Macaulay and other Victorian legal authorities as if they were 100 percent suitable for independent India, not even addressing the historical contentions of the Delhi court.

As to facts, the major reason given for reversing is that the Delhi court erred in its findings of fact. To overrule a lower court on findings of fact is highly unusual, and typically occurs only when the lower court's factual findings have been egregious. And yet, the Supreme Court simply asserts with no argument that the factual record concerning HIV/AIDS and the other burdens Section 377 places upon the gay community and upon public health workers is deficient. As we saw, that record was very detailed, and from recognised authorities, including the National AIDS Commission and the Ministry of Health, with no factual evidence on the other side. Moreover, the Supreme Court itself extensively cites from Anand Grover's amicus brief, apparently granting him the status of a reliable authority. (At the time of the 2013 case he had assumed his post as UN Special Rapporteur.) No discussion of violence against the gay minority is offered.

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<sup>48</sup> (2014) 1 SCC 1.

<sup>49</sup> For his bio and his views, see Sangeeta Barooah Pisharoty, *It is like reversing the motion of the Earth*, THE HINDU, December 20, 2013, <http://www.thehindu.com/features/metroplus/society/it-is-like-reversing-the-motion-of-the-earth/article5483306.ece>. There would appear to be a grave standing issue here, but when law gives a hearing to majority feelings, treating them as a real and legally cognizable harm, those issues tend to get lost.

<sup>50</sup> See Nick Robinson, *The Indian Supreme Court and Its Benches*, SEMINAR, (2013), [http://india-seminar.com/2013/642/642\\_nick\\_robinson.htm](http://india-seminar.com/2013/642/642_nick_robinson.htm).

As for law, there is almost nothing there. First, there is an obvious standing issue that is not addressed at all. The case is similar to *Hollingsworth v. Perry* in the U.S.<sup>51</sup>, where private individuals brought appeal of the same-sex marriage decision, since the state of California refused to appeal. It should clearly have had a similar outcome, denying standing to the plaintiff, since the plaintiff had not suffered a legally cognizable harm. But this extremely important issue is not discussed at all. The key contention of the Delhi court, that majority preferences cannot trump fundamental rights, receives no reply. Indeed, the sloppiness of the entire text gives an impression of haste and pressure.

What happened? Of course the practice of hearing Supreme Court cases in panels of two or three, with twenty-eight justices total, means that anything can happen.<sup>52</sup> But India itself had been changing, and on the eve of the landslide election of Narendra Modi, one would be hard pressed to find evidence that India as such stands for inclusiveness and equal rights. One way or another, these two justices simply did not do their job, and the opinion does not compel respect. As mentioned, the Central Government filed a petition against it. Many influential intellectuals and artists have protested the ruling.<sup>53</sup> So have prominent world leaders, including UN Secretary-General Ban Ki-moon. If things are to change, the Parliament must act, which seems most unlikely. The best hope is the curative petition that has been filed by the Lawyer's Collective, and which the Supreme Court has agreed to hear. Since both the justices who originally heard the case have retired, the panel will be different, and very likely larger. Still, however, Section 377 remains law.

One gleam of light can, however, be found. In the wake of the 2013 judgment, violence against the hijra community dramatically increased, including violence by the police. It was reported, as well, that the police were refusing to investigate reported instances of such violence. In a landmark ruling on April 15, 2014, in *National Legal Services Authority v. Union of India*<sup>54</sup>, the Supreme Court ruled that hijras and other transgenders should be treated legally as a third category, neither male nor female, and should also be entitled to affirmative action in education and employment. (Nepal has recently ruled similarly.) The case was heard by two Justices neither of whom was involved in the reversal of *Naz Foundation*. They have a very different mindset from their colleagues in *Naz*.

<sup>51</sup> 570 US \_\_\_ (2013) : 133 SCt 2652.

<sup>52</sup> See my discussion of the pros and cons of this structure in Nussbaum *supra* note 6.

<sup>53</sup> Sen's statement is available on YouTube. For an open letter signed by Seth, Soli Sorabjee et. al., *Section 377 violates Fundamental Human Rights*, OUTLOOK INDIA, (Sep. 16, 2006), <http://www.outlookindia.com/article/Section-377-Violates-Fundamental-Human-Rights/232514>. My own critique of the judgment was published in the Indian Express on December 20, 2013, see Martha Nussbaum, *A law against Dignity*, THE INDIAN EXPRESS, (Dec 27, 2013), <http://www.indianexpress.com/news/a-law-against-dignity/1212167/o>.

<sup>54</sup> (2014) 5 SCC 438.

The judgment opens with a stern and eloquent repudiation of disgust and stigma:

*Seldom, our society realises or cares to realise the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.*

Whether this inclusive and tolerant view will dominate, or, instead, the narrow, zealously Victorian mindset of the Hindu right, is anyone's guess. I used to take comfort in thoughts about what the "real India" is. Now I no longer have any confident view.<sup>55</sup>

## VI. WHITHER DISGUST?

Disgust is a powerful force in human life, and it creates tough obstacles to a politics of equal respect. I'm with Tagore and Walt Whitman: it would be a great thing if we could bring up young people to be free of bodily disgust. It would improve relations with others and especially the all-important relationship with oneself. But even more important is inhibiting projective disgust, a primary force underlying discrimination.

If societies prove powerless to stop projective disgust entirely, however – since that would require a degree of control over religion and the family that most of us would reject – they can still refuse to listen to its voice when laws are made. The Delhi High Court has it right: laws against same-sex conduct are forms of caste hierarchy that identify a group as untouchable and stigmatise them as criminals by nature. Such laws have no place in any nation that pursues equality before the law. This wise opinion, together with the recent Supreme Court opinion about hijras, can enlighten and guide us, even while those of us who love India must remain deeply distressed and alienated by the defeat of such humane ideas in the current climate of punitive Victorianism.

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<sup>55</sup> A positive step is the recent passage in the Rajya Sabha of a private member's bill promoting transgender rights (April 2015).