Legal and Cultural Contexts of Gay Rights in India Duncan Brumwell

*Assignment/Background:* SR (identity protected) was a gay man from India applying for political asylum in the United States. We were requested to provide background information to aid the court in evaluating his case. Duncan Brumwell put together legal testimony summarizing such evidence, which I used in providing expert witness to the court in November 2016. SR did earn asylum, setting a precedent for other gay men seeking refuge from India. The assignment demanded a fluency with legal conventions of writing and presentation as well as capabilities in research in a foreign setting. *Cynthia Mahmood*

1. We may note firstly that the U.S. Department of State under Hillary Clinton took the initiative in using all its diplomatic tools “to press for the elimination of violence and discrimination against LGBT people worldwide, particularly those forced to flee their homes or countries” (*The Department of State’s Accomplishments Promoting the Human Rights of Lesbians, Gay, Bisexual and Transgender People*, 2011). In coordination with the Department of Homeland Security, the Department of Health and Human Services, and the UN High Commissioner for Refugees, the State Department continues to work to implement a comprehensive LGBT refugee protection strategy.

2. India underwent a sea change in its treatment of homosexuality in 2009, when Section 377 of the Indian Penal Code was revoked. This Section, titled, “Of Unnatural Offenses,” dated from British colonial times, and punished “carnal intercourse against the order of nature” with up to ten years’ imprisonment (“India’s Historic Ruling on Gay Rights,” *Time*, 2009). However, prominent sections of Indian society did not accept the revocation of this element of the Penal Code. Representatives of both the Hindu nationalist Bharatiya Janata Party and the All-India Muslim Personal Law Board made public statements against the ruling, causing it to come before the Indian High Court which again supported it. Still, this legislation and its support by the High Court did not mean equivalent changes in Indian society. (The ruling did not officially remove the code, because it also criminalizes sex with minors and sex with animals. Instead, it ruled that homosexuality was not an “unnatural offence.” (The court is not able to legislate, and therefore was not able to change the language of the law, leaving Section 377 in place and susceptible to overruling by later courts.)

3. In 2012, three years after this action, a lawyer for the Home Ministry said publicly that gay sex was immoral and “against nature” (“Will India Stand Up For Gay Rights?” *Time*, 2012). The previous year, the Health Minister Ghulam Nabi Azad said during an AIDS conference in Delhi that men having sex with men is “a disease” and “unnatural.” A 2011 survey conducted by CNN-IBN news revealed that 73% of Indians still believed that homosexuality should be illegal. Prominent politician Lalu Prasad Yadav was most outspoken in claiming that gay sex was an obscenity that should not be allowed in the country (“Gay Sex Shoudn’t Be Legalized At Any Cost: Lalu,” *Indian Express*, 2012). Although the law had been changed, this change was not accepted in important venues, nor in society at large.

4. A new law on sexual violence (Criminal Law [Amendment] Ordinance 2013) signed by President Mukherjee in February 2013, was criticized by human rights groups as not living up to international standards (Human Rights Watch, *Human Rights in India: Reject New Sexual Violence Ordinance*, 2013). Among other criticisms was the key failing that the new ordinance did not repeal the infamous Section 377 criminalizing consensual same-sex relationships among adults – despite the Delhi High Court’s affirmation of the original 2009 revocation. This key non-support by the President’s new Ordinance opened up the dispute over gay rights once again. It must also be understood in the context of wider non-support for human rights efforts by the Indian government.

5. In December 2013 a two-member Indian Supreme Court, responding to the petitions of several religious and political groups, reversed the ruling from 2009, recriminalizing the act of homosexual intercourse (“India Top Court Reinstates Gay Sex Ban,” *BBC News*, 2013). It issued a statement suggesting it was up to the Indian Parliament to legislate on the issue, but this was particularly unlikely given that parliamentary elections would be held the following year. Furthermore, the past four years had allowed thousands of gay men to be legally open. This ruling now forced them into hiding to avoid persecution. In January 2014 a two-member bench of the Indian Supreme Court denied petitions from several gay activists, indicating that it was up to Parliament to initiate legislation on the matter (“Apex Court Refuses to Review Verdict Criminalizing Gay Sex,” *The Hindu*, 2014).

6. In December 2015, a bill introduced by Shashi Tharoor to strike down Section 377 was defeated in Parliament 77-24, showing that even the newly elected parliament had no interest in decriminalizing homosexuality (“Shashi Tharoor’s Bill to Decriminalize Gay Sex Defeated in Lok Sabha,” *Huffington Post*, 2015). In early February, 2016, a three-member bench decided to hear all the petitions filed by gay activists and organizations, but nine months later a date has yet to be set. This delay leaves homosexuality in India criminalized and without any respite in the foreseeable future (“Supreme Court’s Next Step on Section 377 and LGBT Rights,” *The Hindu*, 2016).

7. In June of 2016 the Indian representative to the United Nations abstained from a vote creating a position for an independent expert on gender identity and sexual orientation to review the extent and degree of discrimination of the LGBT community in countries around the world. The Ministry of External Affairs cited the ongoing court cases, and felt that it would be inappropriate to vote on an issue which had not been ruled on by the Supreme Court. However, the representative continued to vote on resolutions weakening the position, including one resolution which ensured that the reports issued by the office holder would have to take into account the existing laws within the countries. That is to say, criminalizing homosexuality would not necessarily be considered discriminating against homosexuals (“Supreme Court’s Next Step on Section 377 and LGBT Rights,” *The Hindu*, 2016).

8. The ambiguity of homosexuality’s standing in Indian law allows for societal prejudices against gay men to continue to flourish. The U.S. Department of State’s 2011 Country Report on India (released 2012) notes that LLGBT persons “faced discrimination and violence in many areas of society,” also commenting that LGBT persons “faced physical attacks, rape, and blackmail,” and furthermore that “police committed crimes against LGBT persons and used the threat of arrest to coerce victims not to report the incidents.” This is consonant with the known corrupt behavior of the Indian police, not remedied by attempted workshops and programs in police training (Human Rights Watch, *A Broken System: Dysfunction, Abuse and Impunity in the Indian Police*, 2009). In the past, human rights groups put out reports alleging that gay men were held captive in psychiatric hospitals in programs intended to “cure” them of homosexuality, that police extorted sex from gay men under threat of arrest, and that HIV/AIDS outreach workers were persecuted by police (Human Rights Watch, *India: Repeal Colonial-Era Sodomy Law*, 2006; Human Rights Watch, *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers* *in India*, 2002; UNHCR, India: *Situation of Homosexuals, Availability of Support Groups and State Protection June 2004- April 2009*). The U.S. State Department’s comment in its 2004 Country Report that “gay and lesbian rights are not considered human rights in India” (2005) accurately describes the overall situation in India still today. Legislative changes, ambiguous as they are, show some progress but have not essentially changed the life situation of a gay man in India.

9. Although it is possible for a homosexual man experiencing harassment to hire lawyers to press his case to the highest levels of the Indian judicial system – where it may get a fair hearing, particularly if media are involved – the average person, particularly a little-educated individual from a rural area, simply has no chance to fight back against social mores that allow or even encourage beatings and rapes from gangs or family members as punishment for homosexuality. Police at local levels do not have the consciousness of the gay rights lobbies in Delhi, Mumbai or Kolkata, and regularly simply report a gay man complaining of harassment to his family or village which is then expected to handle the matter.

10. A factor playing a significant role in many cases of persecution of homosexuals is the cultural tradition of family honor. It is not only because an individual is gay that is the source of the scandal, but because he brought shame upon the entire family and clan. In India, the preservation of family honor through fulfillment of traditional obligations like marriage is key to all social standing. Honor crimes such as we know are conducted against women are also conducted against gay family members. These are difficult to prosecute because the whole society rallies around the family facing the dishonor of homosexuality.

11. There are deep religious roots in the majority Hindu tradition regarding homosexuality. The Manu Smriti is a text dating back almost two thousand years, and it speaks explicitly against homosexuality. If an adult woman was found having sexual relations with an unmarried girl, for instance, her “head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey.” If two unmarried girls have sex, each must pay a fine the double of her marriage fee, and received ten lashes with a rod. For Brahmins and forward-caste men, “causing an injury to a priest, smelling wine or things that are not to be smelled, crookedness, and sexual union with a man are traditionally said to cause loss of caste.” Likewise, a twice-born (forward-caste) man “who has had intercourse with a male, or with a female in a cart drawn by oxen, in water, or in the day-time, shall bathe, dressed in his clothes.” This refers to a ritual cleansing bath restorative of caste status in Hinduism. (“Homosexuality in India: Better Late Than Never,” *India Law Journal*.)

12. All the major religions in India condemn homosexuality and any legal challenges to decriminalize it. Though the *hijras* (transgender individuals) did have a valid position in traditional Indian society (and indeed the “third gender” has recently been legally recognized), this is not the position occupied by gay men fleeing India for the United States. These are gay as defined by their own culture, which is an extremely low, indeed outcast, position in society. A gay man can expect help from no one, and attacks, rapes and harassments from many. These abuses are likely wherever in India he may attempt to resettle.

13. Given the State Department’s initiative on gay rights, particularly focusing on those persons forced to flee their countries, the United States should consider each case of homosexual asylum carefully.