Koushal v. Naz Foundation and the Lessons of International Refugee Law

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Introduction

In December 2013, the Supreme Court of India declared that section 377 of the *Indian Penal Code*, which criminalises sexual acts 'against the order of nature', does not contravene the *Constitution of India*. In its decision in *Suresh Kumar Koushal and anor v. NAZ Foundation and ors* (2013)[2] ("*Koushal"*), the Supreme Court overruled the Delhi High Court's earlier judgment in *Naz Foundation v. Government of NCT of Delhi (2009)*[3] *("Naz Foundation")* – which had found section 377 to be inconsistent with the *Constitution of India*'s guarantees of equality,[4] non-discrimination[5] and human dignity and privacy[6] and the right to health.[7] By contrast, the Supreme Court adopted a more restricted view of each of these constitutional guarantees, emphasising the need for the exercise of 'self restraint' on the part of the courts[8] and deferring to the capacity of 'the competent legislature' to consider 'the desirability and propriety of deleting Section 377'.[9]

In *Koushal*, the Supreme Court asserted that the respondent (the initial petitioner), the Naz Foundation, had 'miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them'.[10] In so finding, the Supreme Court emphasised that 'in [the] last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence[s] under Section 377 IPC',[11] finding, in the absence of reported prosecutions, insufficient evidence for a declaration that the relevant section contravened the Constitution. To the extent that section 377 has been used 'to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community', the Supreme Court found that 'this treatment is neither mandated by the section nor condoned by it', with misuse of the section by state authorities in practice insufficient grounds for a finding that the section itself lay *ultra vires.*[12]

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[2] Suresh Kumar Koushal and anor v. NAZ Foundation and ors, Civil Appeal No 10972 of 2013 [India, 2013].

[3] Naz Foundation v. Government of NCT of Delhi, 160 DLT 277 [Del. H. Ct, 2009].

[4] *Id.* at ¶¶ 88-98.

[5] *Id.* at ¶¶ 99-104.

[6] *Id.* at ¶¶ 26-60.

[7] *Id.* at ¶¶ 61-74.

[8] Suresh Kumar Koushal and anor v. NAZ Foundation and ors, Civil Appeal No 10972 of 2013, ¶ 32 [India, 2013].

[9] *Id.* at ¶ 56.

[10] *Id.* at ¶ 40.

[11] *Id.* at ¶ 43.

[12] *Id.* at ¶ 51.

The Supreme Court's decision in *Koushal* has been widely criticised.[13] Yet many of its most controversial aspects – ranging from the obvious preference for 'official' sources and evidence of state-sanctioned persecution over testimony from non-government observers as to widespread abuses in practice, to the broader privileging of certain forms of 'harm', such as prosecution, over the very real harm caused by discrimination and ostracism – are not unique to this decision alone, but have given rise to lasting controversies in refugee law and practice as well. (For the purposes of the present discussion, 'refugee law' refers to the jurisprudence of the *Convention relating to the Status of Refugees*[14] ("*Refugee Convention*") and the related *Protocol relating to the Status of Refugees* [15] ("*Refugee Protocol*"), including debates surrounding the determination of refugee status and the integration of the *Refugee Convention* into domestic law.) In particular, *Koushal*'s emphasis upon the fact that section 377 has seldom led to reported prosecutions mirrors ongoing controversies within international refugee jurisprudence with regard to the weight to be given to certain forms of evidence; *Koushal*'s findings in this respect parallel debates within refugee law as to whether the criminalisation of same-sex sexual activity alone may give rise to a well-founded fear of persecution, even absent the enforcement of such prohibitions.

By analysing *Koushal* in light of contemporary debates in refugee law, this article aims to identify potential alternate directions for Indian constitutional law with regard to the rights of lesbian, gay, bisexual, transgender and queer ("LGBTQ") people. Scholars and practitioners in international refugee law have developed innovative means by which decision-makers, including judges, may give regard to forms of harm not visible through regard to state records and actions alone, and in doing so to rethink settled notions of what constitutionally-prohibited forms of 'harm' may be. These innovations may be drawn upon in future legal advocacy on behalf of LGBTQ people in India.

This article draws upon the author's experience as a Consultant to Craddock Murray Neumann Lawyers, a law firm in Sydney, Australia, with a significant practice in refugee law. Given the author's professional context, the sources cited in this article are disproportionately Australian; however, the article also aims to provide an overview of international developments and innovations in refugee jurisprudence beyond Australia's borders. The views expressed in this article are solely those of the author and do not represent the views of Craddock Murray Neumann Lawyers.

Refugee Law and Sexual Orientation: A Brief History[16]

In assessing the lessons which may be drawn from refugee law's approaches to the claims of LGBTQ asylum seekers, it is necessary to first establish how claims founded upon LGBTQ status came to be regarded as legitimate grounds for seeking

[13] See, for example (of various works on the subject), Danish Sheikh and Siddharth Narrain, *Struggling for Reason: Fundamental Rights and the Wrongs of the Supreme Court*, 48(52) ECONOMIC AND POLITICAL WEEKLY 14 (2013); Upendra Baxi, *Naz 2: A Critique*, 49(6) ECONOMIC AND POLITICAL WEEKLY 12 (2014); Madhav Khosla, *The Courtly Way*, THE TELEGRAPH, 17 December 2013.

[14] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[15] Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

[16] A previous version of this section was presented as Freedom To Be: Assessing the Claims of LGBTQ Asylum Seekers, Paper Presented at the Conference on Gender and Sexuality, National Law School of India University (30 November 2013).

asylum. Many of the challenges faced by LGBTQ applicants for protection under the *Refugee Convention* in earlier years – in establishing that they did, in fact, constitute a legitimate 'particular social group', and in proving that the forms of harm to which they were subject could in fact constitute persecution – remain relevant even after these early struggles have been ostensibly won. The strains of thought which once denied the legitimacy of LGBTQ claims for asylum exhibit many of the same false assumptions made by decision-makers in the present day.

The history of claims for refugee status based upon sexuality in Australia prior to 2003 is representative in this respect. Traditionally, Australian officials responsible for refugee status determination ("RSD officers"), as well as Australia's Refugee Review Tribunal and Federal Court, had found that 'the capacity of an applicant to avoid persecutory harm' was relevant to whether an asylum seeker could be said to face a 'real chance'[17] of harm if removed to their country of origin.[18] Applying this line of reasoning, LGBTQ applicants were found not to face a real chance in circumstances where they could remain 'discreet' as to their sexuality – whether by relocating within their country of origin (to a new locale where their previous profile would not be discovered) [19] or by living 'quietly without flaunting their homosexuality'.[20]

In its decision in *S395/2002*,[21] a majority of the High Court of Australia ("the High Court"), Australia's final appellate court, overturned prior decisions of the Federal Court in finding that 'discretion' is no defence where persecution is feared on the basis of sexuality. McHugh and Kirby JJ, for the majority, found that the Refugee Review Tribunal (in finding that the appellants, gay men from Bangladesh, had not previously suffered harm because they had 'acted discreetly') had asked itself the wrong questions: it had not considered *why* the appellants had done so, or what may occur to them if they chose to 'liv[e] openly in the same way as heterosexual people in Bangladesh live'.[22] In doing so, McHugh and Kirby JJ issued a ringing call for tolerance, rare amongst the usually-legalistic and restrained judgments of the High Court: that '[s]ubject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may

[17] In Australia, whether a person has a 'well-founded fear' of persecution requires that they face a 'real chance' of harm. See Chan v. MIEA, 169 CLR 379, 389 (Austl., 1989) (Mason CJ). A 'real chance' may exist even where 'there is less than a fifty per cent chance of persecution occurring' (*Id.*), or even where 'there is only a 10 per cent chance that [an asylum seeker] will be… persecuted [if returned to their country of origin]' (*Id.* at 429) (McHugh J).

[18] In Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, 216 CLR 473, 492n17 (Austl., 2003) (McHugh and Kirby JJ), the following decisions of the Federal Court in which this proposition was upheld are cited: Khalili Vahed v. Minister for Immigration and Multicultural Affairs, FCA 1404 [Fed. Ct. Aust., 2001]; SAAF v. Minister for Immigration and Multicultural Affairs, FCA 343 [Fed. Ct. Austl., 2002]; Nezhadian v. Minister for Immigration and Multicultural Affairs, FCA 1415 [Fed. Ct. Austl., 2001]; WABR v. Minister for Immigration and Multicultural Affairs, 121 FCR 196 (Fed. Ct. Austl., 2002).

[19] Jenni Millbank, *Sexual orientation and refugee status determination over the past 20 years: unsteady progress through standard sequences, in* FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM 33, 37 (Thomas Spijkerboer ed., 2013).

[20] Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, 216 CLR 473, 511 (Austl., 2003) (Callinan and Heydon JJ, dissenting).

[21] Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, 216 CLR 473 (Austl., 2003).

[22] Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, 216 CLR 473, 493 (Austl., 2003) (McHugh and Kirby JJ).

disapprove of that person's associations or particular mode of life'.[23] These principles, within McHugh and Kirby JJ's judgment, lead inexorably to the conclusion that '[s]ubject to the law of the society in which they live, homosexuals as well as heterosexuals as free to associate with such persons as they wish and to live as they please'.[24] The 'laws' in question are only those which serve what can be classified 'as a legitimate object of that country'.[25]

The High Court's decision in *S395/2002* was 'the first decision of an ultimate appellate court anywhere in the world to deal with a claim for refugee status based on sexual orientation'.[26] It has subsequently been followed by the UK Supreme Court's decision in *HJ (Iran) and HT (Cameroon)* [2010].[27] The Office of the UN High Commissioner for Refugees ("UNHCR") have issued *Guidelines* with regard to claims based on sexual orientation and gender identity, in which it is made explicit that applicants for refugee protection 'are entitled to live in society as who they are and need not hide that'.[28] The Court of Justice of the European Union has asserted that 'a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it',[29] with asylum seekers hence protected from any requirement that they conceal their sexual orientation or identity in their country of origin as a precondition to evade persecution.[30]

The move within international refugee law to recognise members of sexual minorities as potentially eligible for protection under the *Refugee Convention* – where they fear that, if removed to their country of origin, they will face persecution by reason of their sexual identity or orientation – is in many respects an inspiring one. Decades of adverse precedents from courts and decision-makers have been swept away through sustained legal activism and advancing public sentiment. The demise of the 'discretion' argument – despite its longevity and established body of precedent – hopefully prefigures the future disavowal of *Koushal.* Nonetheless, despite the recognition that claims for refugee status may in theory be premised upon sexual identity or sexual orientation, LGBTQ asylum seekers continue to face difficulties in establishing their claims for asylum owing to other obstacles – both methodological and substantive. These obstacles, their relationship with problematic aspects of the Supreme Court's decision in *Koushal*, and the lessons which may be learned from the efforts of international refugee scholars, litigators and judges to overcome these hurdles are discussed further below.

Refugee Law and *Koushal* on Evidence: A Preference for Formality

[23] *Id*. at 491 (McHugh and Kirby JJ).
[24] *Id.*
[25] *Id.*
[26] Millbank, *supra* n 19, at 391.
[27] HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, UKSC 31 [UK, 2010].
[28] UN HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: CLAIMS TO REFUGEE STATUS BASED ON SEXUAL ORIENTATION AND/OR GENDER IDENTITY WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/12/09, ¶ 12 (2012).
[29] Minister voor Immigratie en Asiel v. X and Y; Z v. Minister voor Immigratie en Asiel, Joined Cases C-199/12 to C-201/12, [2013] ECR I____ (delivered November 7, 2013), ¶ 46.
[30] *Id.* at ¶ 71.

The fact that LGBTQ persons *can* now be recognised as refugees – although an undoubtedly significant development – has not removed other barriers to such applicants being granted asylum. In particular, LGBTQ asylum seekers must establish not only that they genuinely fear harm because of their sexuality if returned to their country of origin, but that their fear of harm is objectively well-founded. This will generally involve the assessment of independent country evidence ("country of origin information", or "COI") by RSD officers. This section will analyse trends in the usage of COI, identify potential analogies with the Supreme Court's decision in *Koushal* and suggest possible approaches for future benches to take, drawing inspiration from the work of scholars and judges in critically dissecting the conscious or unconscious biases of sources of evidence in refugee law.

Not all COI is created equal. In particular, 'official' sources, such as statements by government decision-makers or government records, may mask substantial discrimination or persecutory practices occurring 'on the ground', absent the official or rhetorical support of the government of the day – even if, in reality, the state tolerates such abusive practices. While official sources may appear to enjoy substantial benefits over reports from non-governmental organisations – the ostensible lack of an agenda or ideological objective attached to government record-keeping, the state's greater financial and logistical capacity to gather information (especially about its own operations), and the comparative ease with which government views and policy may be ascertained by national embassies in order to assist RSD officers 'back home' (as compared, for example, to the potential perils involved in embassy staff reaching out directly to NGOs which may be harshly critical of the government in question) – RSD offiers must always weigh these benefits against the substantial potential biases or methodological limitations within such sources. These limitations are inherent both in sources produced by the governments of asylum seekers' countries of origin, and by sources prepared by the RSD officers' own governments (in particular, their embassies in countries from which asylum seekers have fled) where such sources are based in large part upon pronouncements by governments accused of perpetrating or permitting persecution.

In Australia, Judge Driver of the Federal Circuit Court has called for caution against undue reliance upon such governmental sources as evidence of how stigmatised groups are treated in practice. In the refugee context, frequent reliance upon diplomatic missives is particularly suspect: 'The fact that a diplomatic post is not aware of something does not mean that it did not occur', rendering equivocal observations – such as, in the immediate case before Judge Driver, that Australia's embassy in Iran were "not aware of Faili Kurds being targeted because of their ethnicity" – an unreliable basis for factual findings.[31] As Symes and Jorro have noted, '[i]t might be naïve to give much credence to statements from the officials of states from where asylum is sought',[32] with the UK Immigration Appeal Tribunal noting in *A (Turkey)* that 'one would hardly expect [a government] to admit to ill treatment of its nationals on return'.[33] Government sources may hence prove an unreliable guide where abusive practices flourish at the 'ground level', despite the nominal opposition of the central polity to these practices.

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[31] SZSFK v. Minister for Immigration and Anor, FCCA 7, ¶ 31 [Fed. Cir. Ct. Aust., 2013].
[32] Mark Symes and Peter Jorro, ASYLUM LAW AND PRACTICE 67 (2003).
[33] A (Turkey), UKAIT 00034, ¶ 32 [UK Asy. and Imm. Trib, 2003]

Despite the limits of government sources, RSD officers have frequently displayed a preference for 'official', governmental sources of information over reports from NGOs or other non-state observers. In Australia, this trend is embodied within Ministerial Direction No 56, under which RSD officers must 'take account of certain country information assessments prepared by the Department of Foreign Affairs and Trade'.[34] The fact that RSD officers are bound to give regard to one particular source of information, but not necessarily to others, inevitably gives these sources a privileged position in the decision-making process. This is particularly problematic in light of the fact that such sources have often proven to be at odds with the conclusions presented in NGO reports and other sources of independent commentary. As Dauvergne and Millbank have observed, in the context of reliance upon advice from Australia's Department of Foreign Affairs and Trade ("DFAT") on sexuality-based claims:

> "The DFAT evidence, when it was on the question of country conditions specific to sexuality, was almost universally negative to the applicant's case… When DFAT evidence on sexuality was accepted, 89 per cent of applicants were unsuccessful. On the rare occasions when DFAT evidence on sexuality was rejected, the numbers of successful applicants actually exceeded those who were unsuccessful. Where DFAT evidence was at odds with country information provided by other sources, such as NGOs, the [Refugee Review] Tribunal tended to prefer the evidence of DFAT."[35]

To Crock and Martin, Ministerial Direction No 56 'send[s] a very clear message that the executive (via DFAT) wants to influence decision makers'.[36] If the uses to which DFAT advice have been put in the past were not sufficient to convey the context of this message, media coverage of Ministerial Direction No 56 made the government's intentions explicit; the move was reported as part of a broader strategy on the part of the Government 'to toughen up the asylum seeker claims process', particularly in the context of remarks by Australia's Minister for Foreign Affairs that most asylum seekers arriving in Australia were 'economic migrants'.[37] While the Government responsible for Ministerial Direction No 56 was removed from office in the 2013 federal election, the subsequent (incumbent) administration has exhibited equivalent scepticism about 'a very significant economic motivation to this movement of people in choosing Australia in which to seek asylum'.[38]

The Australian experience hence illustrates the extent to which governmental sources may lack sufficient independence or methodological rigour to provide an effective portrait of abusive practices, particularly where such practices result from the impunity of state actors or their allies (rather than from official government policy). This may be because of the limited scope of government information and inquiries

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[34] Quoted in Refugee Review Tribunal of Australia, GUIDE TO REFUGEE LAW, January 2014, *available at* http://www.mrt-rrt.gov.au/Conduct-of-reviews/Guide-to-refugee-law.aspx, 1-27.

[35] Catherine Dauvergne and Jenni Millbank, *Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers*, 31 FEDERAL LAW REVIEW 299, 314 (2003).

[36] Mary Crock and Hannah Martin, *Refugee Rights and the Merits of Appeals,* 32 UNIVERSITY OF QUEENSLAND LAW JOURNAL 137, 139 (2013).

[37] Samantha Hawley and Jane Norman, *Tribunals ordered to consider new country assessments when deciding on asylum claims*, AM, 17 July 2013, *available at* http://www.abc.net.au/news/2013-07-17/refugee-tribunals-ordered-to-consider-new-country-information/4824788.

[38] Samantha Hawley, *Coalition has reservations about refugee convention*, AM, 18 July 2013, *available at* http://www.abc.net.au/am/content/2013/s3805470.htm.

(covering merely selected forms of abuses to which people, particularly LGBTQ people, may be subject – a topic considered further in the subsequent section) or a result of the strong potential for bias in how those abuses are reported, with government sources subjected to insufficient scrutiny as to the purposes for which they are produced and the practical ends they serve. Although the above examples are principally drawn from Australia, they are of international relevance; in every jurisdiction, decision-makers must similarly consider how much weight to give to official sources in light of their potential to misrepresent conditions 'on the ground', whether knowingly or unknowingly.

It is hence of concern that, as noted above, the *Koushal* decision exhibits such blind faith in official statistics and law reports as an exhibit of LGBTQ Indians' experiences of persecution – or, as *Koushal* concluded, lack thereof. It is this privileging of particular forms of data that led the Supreme Court to attach such weight to the limited number of reported prosecutions under section 377,[39] to so readily dismiss the evidence (in the form of 'affidavits [and] authoritative reports by well known agencies'[40]) provided by the petitioners at first instance,[41] and to conclude that no 'incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them'[42] had been made out. (Indeed, this analysis of section 377's pernicious effects purely in terms of its impact upon state agencies – as opposed to its role in sanctioning broader societal abuses – is itself problematic, for reasons explored below). As Sheikh and Narrain record, the Supreme Court's emphasis upon one particular form of evidence causes it to neglect any suggestion that 'the impact of the law can go beyond just actual arrest and conviction'.[43] The Supreme Court's findings in this regard are particularly disappointing in light of the Delhi High Court's willingness in *Naz Foundation* to accept the conclusions of the affidavits and reports prepared by NGOs at first instance as to 'a widespread use of Section 377 IPC to brutalise MSM and gay community',[44] even contrary to assertions by the government itself as to the limited (formal, official) application of the statute.[45]

If a future bench of the Supreme Court is to overrule *Koushal*, it must adopt a different approach to evidence – looking beyond government documentation of prosecutions under section 377 and giving greater weight to evidence from non-official sources (such as NGOs) as to the very real harm perpetrated in the name of the section in practice, including the license it gives to police, as well as non-state actors, to commit human rights abuses). As much as RSD officers have often, in practice, fallen into similar habits of mind as those exhibited by the Supreme Court in *Koushal* (privileging evidence perpetrated under the auguries of the state itself to the reports of non-state observers), refugee law has also given rise to an extensive critique of this assumption in decision-making – expressed both through scholarship and

[39] Suresh Kumar Koushal and anor v. Naz Foundation and ors, Civil Appeal No 10972 of 2013, ¶ 43 [India, 2013].
[40] Naz Foundation v. Government of NCT of Delhi, 160 DLT 277, ¶ 50 [Del. H. Ct., 2009].
[41] Much of this affidavit evidence is *available at* http://altlawforum.org/litigation/the-delhi-hc-naz-foundation-decision-documentation-of-a-right-that-dares-to-speak-its-name/.
[42] Suresh Kumar Koushal and anor v. Naz Foundation and ors, Civil Appeal No 10972 of 2013, ¶ 40 [India, 2013].
[43] Sheikh and Narrain, *supra* n 13, at 16.
[44] Naz Foundation v. Government of NCT of Delhi, 160 DLT 277, ¶ 50 [Del. H. Ct, 2009].
[45] *Id.* at ¶ 74.

through cases, including those cited and discussed above. This critique stresses the need for greater skepticism in decision-making of the biases of ostensibly 'neutral' sources. The Indian movement to repudiate *Koushal* and strike down section 377 of the *Penal Code* may draw upon many of the insights advanced within these sources.

The decision of the Immigration and Asylum Chamber of the UK Upper Tribunal ("the Tribunal") in *MD (same-sex oriented males: risk) India CG* [2014][46] ("*MD*") represents an interesting contrast to the Supreme Court's approach in *Koushal* and an illustration of a 'refugee law approach' to section 377 – albeit one yielding results potentially similarly disappointing to LGBTQ advocates. In its decision, the Tribunal considered whether 'same-sex oriented males'[47] seeking asylum in the United Kingdom would, if removed to India, face persecution upon their return. In doing so, the Tribunal paid extensive regard to affidavit and oral evidence from Dr Akshay Khanna[48] and reports by government agencies in the US, UK, Canada and Australia (themselves drawing upon press and NGO reports).[49] Although the Tribunal's decision continues to use the small number of reported prosecutions to conclude that 'such prosecutions are extremely rare',[50] the Tribunal nonetheless considers a broader range of actions pursued under the nominal ambit of the section – finding that '[t]here can be no dispute that violence and extortion of same-sex oriented males still occurs in India and that those of lower caste, or working class (such as the *Hijra* or *Kothi*), are more vulnerable to such actions'.[51]

It must, however, be borne in mind that the Tribunal made a number of findings adverse to the interests of the appellant in *MD* – that there is no 'real risk of consensual activities between males being prosecuted in India',[52] that the 'scale and frequency of police violence against, or extortion and blackmail of, same-sex oriented males' is not so prevalent that same-sex oriented males in general will face a 'real risk' of such,[53] that there is no evidence that same-sex oriented males will face a 'real risk' of homophobic violence (from non-state actors),[54] that same-sex oriented males will be capable of finding employment and hence providing for themselves in India[55] and that same-sex oriented males will be able to access healthcare[56] and housing.[57] Significantly, in light of the issues to be explored in the following section, the finding that '[s]ame-sex orientation is seen socially, and within the close familial context, as being unacceptable in India',[58] and the restoration of s377 in *Koushal,* were not found to be sufficient in establishing a sufficient level of serious harm (as an element of persecution) to outweigh the effects of the Court's counterveiling findings, as listed above.

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[46] MD (same-sex oriented males: risk) India CG, UKUT 00065 (IAC) [UK Upp. Trib., 2014].
[47] Significantly, the Tribunal paid considerable attention to appropriate terminology, including the need to accommodate differing cultural norms as to sexual identity: *Id.* at ¶¶ 8, 114-116.
[48] *Id.* at ¶¶ 13-41.
[49] *Id.* at ¶¶ 42-51, 118.
[50] *Id.* at ¶ 131.
[51] *Id.* at ¶ 144.
[52] *Id.* at ¶¶ 132, 174(b).
[53] *Id.* at ¶¶ 144, 174(c).
[54] *Id.* at ¶¶ 149, 174(c).
[55] *Id.* at ¶ 161.
[56] *Id.* at ¶¶ 163-165.
[57] *Id.* at ¶ 167.
[58] *Id.* at ¶ 174(d).

Some of these findings reflect the undeniable differences between Indian constitutional law and refugee law; the question of whether section 377 is constitutional does not require that it be proven that LGBTQ Indians will face 'persecution' as that term is commonly understood under refugee law. Other differences reflect, with respect, an overly cautious interpretation of 'no evidence', or insufficient evidence, about a particular fact as amounting to evidence that abusive practices do not occur – suggesting an openness to sociological research as a source of evidence which could be accommodated in future through the broader dissemination of testimony and witness accounts of abuses by LGBTQ Indians and their advocates. Despite these opportunities for future development, the decision hence illustrates some of the limits to an approach based upon methodological reform alone; the fact that the evidence adduced was insufficient to give rise to a finding of persecution suggests that the meaning of the term 'persecution' may require reformulation.

Refugee Law and *Koushal* on 'Harm': Dismissing Discrimination

Even if an asylum seeker is able to establish that LGBTQ people face a real chance of 'harm' in their country of origin – and, furthermore, that they too would be harmed if forcibly removed to that jurisdiction – they face a further hurdle: of establishing that the form and degree of harm to which they would be subjected is of sufficient intensity to satisfy one of the essential elements of 'persecution'.[59] As *MD* demonstrates, societal stigma and the existence of discriminatory or persecutory laws 'on the books' alone may be found not to suffice.

Serious harm alone is not sufficient to result in a finding of persecution. In addition to the severity of harm feared, a failure of state protection must also be established – with the harm itself inflicted, or the protection withdrawn, owing to the 'Convention characteristics' (race, religion, nationality, political opinion or membership of a particular social group) of the person in question. This link between the harm feared and the asylum seeker's Convention characteristics is the "Convention nexus". However, as noted above, requisite severity of harm is amongst the elements required to be satisfied for an asylum seeker to be eligible for protection under the Convention.

Under article 1A(2) of the *Refugee Convention,* a 'refugee' is defined as a person who is unable or unwilling to avail themselves of the protection of the country of their nationality owing to a 'well-founded fear of being *persecuted*' (emphasis added),[60] by reason of their Convention characteristics (as listed above). Decision-makers have traditionally shied away from providing a precise definition of which forms of harm may, when combined with a failure of state protection and a Convention nexus, constitute persecution – given that there are no limits upon 'the perverse side of human imagination'.[61] As Hathaway puts it, the drafters of the Convention 'realized the impossibility of enumerating in advance all of the forms of maltreatment which

[59] See Minister for Immigration v. Khawar, 210 CLR 1, ¶ 118 (Austl., 2002) (Kirby J); Refugee Appeal No 71427/99, ¶ 112 [NZ Ref. St. App. Auth., 2000]; R v. Immigration Appeal Tribunal, Ex parte Shah, 2 AC 629, 653 [UK, 1999] (Lord Hoffman).
[60] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, art. 1A(2).
[61] Guy S. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW 40 (1983).

might legitimately entitle persons to benefit from the protection of a foreign state'.[62] Nonetheless, commentators and judges have tended to define the required form and degree of harm in terms of 'sustained or systemic violation of basic human rights',[63] violations of 'core entitlements' recognised in international law,[64] or else injuries to 'individual integrity and human dignity'.[65] Lesser violations – whether in terms of the importance of the right impaired, or degree of the injury to that right – will hence not necessarily be sufficiently severe for the harm concerned to give rise to a finding of persecution under refugee law.[66] The requisite degree of 'persecutory harm'[67] – not merely harm which possesses a Convention nexus or against which the state will not protect the asylum seeker, but which is of sufficient severity to warrant protection under the *Refugee Convention* – must be made out.

This section analyses two elements of this debate on 'harm'. It discusses whether discrimination alone can amount to 'persecutory harm' in refugee law (provided, of course, that such harm satisfies the other elements of persecution). It also discusses the separate but related issue of whether criminalisation of same-sex sexual acts alone (without consistent or even reported enforcement) can be sufficient, in itself, to indicate that LGBTQ persons in such a jurisdiction are subject to 'persecution'. Each debate holds lessons for post-*Koushal* litigation and activism in India.

Discrimination

International orthodoxy differs as to whether the discrimination experienced by LGBTQ persons may be sufficient to amount to persecutory harm. Even within the United States, courts have differed as to this issue – finding in one instance that the denial of employment (and hence denial of the opportunity to provide for oneself and subsist) to an LGBTQ applicant for asylum in their country of origin could amount to persecution,[68] while finding in another case that denial of medical treatment to LGBTQ persons with HIV was insufficient to amount to persecutory harm.[69] Australia has proven uniquely averse to arguments of persecution founded upon discrimination. Subsection 91R(2) of the *Migration Act,* enacted in 2001,[70] contemplates persecutory harm through discrimination only in such circumstances where a person's 'capacity to subsist' is placed at risk through 'significant economic hardship',[71] 'denial of access to basic services'[72] or 'denial of capacity to earn a livelihood of any kind'[73]. Authorities conflict as to whether the phrasing of the section thereby requires that a complete inability to subsist must be made out before a claimant for protection can succeed on the basis of a well-founded fear of

[62] James C. Hathaway, THE LAW OF REFUGEE STATUS 102 (1991).
[63] Ward v. Canada, 2 SCR 689, 733 [Can. 1993]. See also James C. Hathaway, *supra* n 62, at 104-105.
[64] Hathaway, *supra* n 62, at 112.
[65] Guy S. Goodwin-Gill, *supra* n 61, at 40.
[66] This will be the case even even where the other elements of persecution are established – that is, a failure of state protection and a nexus to a protected characteristic under the Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, art. 1A(2).
[67] James C. Hathaway and Jason Pobjoy, *Queer Cases Make Bad Law,* 44 INTERNATIONAL LAW AND POLITICS 315, 351 (2012).
[68] Kadri v. Mukasey, 543 F 3d 16 (1st Cir. 2008).
[69] Parades v. U.S. Att'y Gen, 219 F App'x 879 (11th Cir. 2007).
[70] See Migration Legislation Amendment Act (No 6) 2001 (Austl.).
[71] Migration Act 1958 (Austl.) s 91R(2)(d).
[72] Migration Act 1958 (Austl.) s 91R(2)(e).
[73] Migration Act 1958 (Austl.) s 91R(2)(f).

discrimination.[74] Prior to s91R(2)'s enactment, Australian jurisprudence remained to be generally unsympathetic to claims of this nature; in *MMM*, for example, the Federal Court found that the prospect of starvation – as a result of an applicant's ostracism from their family by reason of their sexuality – could not amount to 'persecution' within the meaning of the *Refugee Convention*, instead amounting to 'a purely private matter'.[75] Even in more liberal jurisdictions, claims based upon deprivations of socio-economic rights (including through discrimination) face 'heavy factual obstacles' in establishing the requisite degree of harm within the meaning of persecution.[76]

Nonetheless, despite resistance within many jurisdictions, there is a long tradition of refugee jurisprudence recognising discrimination of sufficient magnitude as potentially amounting to persecutory harm under the *Refugee Convention*.[77] As Michelle Foster writes, 'there is evidence that from the earliest days of its operation some types of socio-economic claims were considered to fall within the purview of the Refugee Convention definition [of persecution].'[78] Courts' conceptualisation of persecution through discrimination, in the refugee law context, has encompassed both particular incidents of discrimination (such as discrimination in employment[79] and education[80]) and, more commonly, through the cumulative effect of broader-ranging discrimination across a variety of fields.[81]

Indeed, in some jurisdictions discrimination, and associated experiences of vilification and stigmatisation, has been recognised as a form of harm sufficient, in its intensity, to contribute to a finding of persecution. In *SCAT* [2003] (interestingly, an Australian case), Madgwick and Conti JJ noted the substantial effects of discrimination upon mental well-being:

> "If people are, from an early age, considered by the great majority of the people in the society in which they live to be "dirty", are positively treated as if they are dirty, and if there is otherwise widespread and far reaching discrimination against them, it requires no degree in psychology to accept that this may well be very harmful to mental well-being."[82]

Similarly, Baroness Hale has noted that '[t]o suffer the insult and indignity of being regarded by one's own community [as "contaminated"]… is the very sort of

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[74] MZYPB v. Minister for Immigration and Citizenship, FMCA 226 [Fed. Mag. Ct. Austl., 2012]; but see M93 of 2004 v. Minister for Immigration and Multicultural and Indigenous Affairs, FMCA 252 [Fed. Mag. Ct. Austl., 2006].
[75] MMM v. Minister for Immigration and Multicultural Affairs, FCA 1664 [Fed. Ct. Austl., 1998].
[76] AM & AM (armed conflict: risk categories) Somalia CG, UKAIT 00091, ¶ 78 (UK Asy. and Imm. Trib., 2008].
[77] Provided that the other elements of persecution – a lack of state protection and a Convention nexus – are satisfied.
[78] Michelle Foster, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 88 (2007).
[79] Dunat v. Hurney, 297 F 2d 744 (3rd Circ, 1961); Ye Hong v. Minister for Immigration and Multicultural Affairs, 1356 FCA [Fed. Ct. Austl., 1998]; Baballah v. Immigration and Naturalisation Service, 335 F 3d 981 (9th Cir. 2003).
[80] Ali v. Canada (Minister of Citizenship and Immigration), 1 FCR 26 [Fed. Ct. Can., 1997].
[81] Secretary of State for the Home Department v. Kondratiev, UKIAT 08283 [Imm. Appl. Trib., 2002].
[82] SCAT v. Minister for Immigration and Multicultural and Indigenous Affairs, FCAFC 80, ¶ 21 [Full Fed. Ct. Austl., 2003].

cumulative denial of human dignity which to my mind is capable of amounting to persecution'.[83]

Although discrimination is generally conceptualised in Indian constitutional law in terms of articles 14 and 15 of the *Constitution of India,* there is a growing body of international opinion which regards discrimination of sufficient magnitude as a violation of human dignity. Oscar Schachter, for instance, regarded '[d]enial of education or employment opportunities to persons on ground of their membership in groups or their beliefs' as inimical to human dignity.[84] In Canadian law, dignity is jeopardised or harmed by 'unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits'.[85] This amounts to a natural evolution of modern interpretations of article 21 of the *Constitution of India.* The expansion of article 21 from a mere guarantee of procedure according to law to a broader guarantee of the right to life with 'human dignity', encompassing 'the basic necessities of life', including 'adequate nutrition, clothing and shelter over the head',[86] is well-recorded elsewhere.[87]

In the Delhi High Court's decision in *Naz Foundation*, the link between dignity and freedom from discrimination in Canadian law was approvingly cited.[88] Although the judgment's consideration of article 21 jurisprudence largely turns upon the distinct (albeit related) implicit rights to privacy, autonomy and 'full personhood', the Court's condemnation of section 377's 'criminali[sation of LGBTQ persons'] core identity solely on account of [their] sexuality' as violative of article 21 (rather than confining its observations in this respect solely to its consideration of article 15) allows the right to dignity to bear an implicit complementary prohibition upon discrimination.[89] To this end, the Delhi High Court asserted that 'it is the recognition of equality which will foster the dignity of every individual'.[90]

By contrast, the Supreme Court in *Koushal* does not concern itself with the Delhi High Court's findings in this regard – just as it fails to address the Delhi High Court's findings with regard to the prohibition of discrimination on the basis of sexual orientation within article 15 of the *Constitution.*[91] In future cases, however, refugee law offers opportunities to expand upon the Delhi High Court's early efforts to associate dignity with freedom from discrimination – through the efforts of judges

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[83] R v. Special Adjudicator (Hoxha), UKHL 19, ¶ 36 [UK, 2005] (Baroness Hale).
[84] Oscar Schachter, *Editorial Comment: Human Dignity as a Normative Concept*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 848, 852 (1983).
[85] Law v. Canada (Minister of Employment and Immigration), 1 SCR 497, ¶ 53 [Canada, 1999].
[86] Francis Coralie Mullen v. Administrator, Union Territory of Delhi, AIR 1981 SC 746, 753 (India, 1981) (Bhagwati J).
[87] Debates surrounding the interpretation of article 21 and the evolving meaning of 'dignity' in Indian constitutional law lie outside the scope of this paper. Relevant sources include Shylashri Shankar and P. B. Mehta, *Courts and Socioeconomic Rights in India* in Varun Gauri and Daniel M. Brinks, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (2008); Shylashri Shankar, SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS (2009); Madhav Khosla, *Making Social Rights Conditional: Lessons from India* (2011) 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 739.
[88] Naz Foundation v. Government of NCT of Delhi, 160 DLT 277, ¶ 28 [Del. H. Ct, 2009].
[89] *Id.* at ¶ 48.
[90] *Id.* at ¶ 131.
[91] See Danish Sheikh, *Crimes of Unreason: Danish Sheikh,* KAFILA, Dec. 12, 2013, *available at* http://kafila.org/2013/12/12/crimes-of-unreason-danish-sheikh/.

and scholars internationally to establish that the element of 'serious harm' within persecution may not merely consist of physical harm or prosecution, but may derive from exposure to discrimination in and of itself.

Criminalisation

Beyond the lived experience of societal discrimination (including within the family), discriminatory *laws* may exert a profound influence upon the lives of LGBTQ people – even if those laws are seldom or never enforced. In recent decades, domestic and international courts have considered whether the existence of such laws may violate fundamental human rights and/or amount to persecutory harm for the purposes of the *Refugee Convention*, even if they are not enforced. Many authorities arising from this continuing controversy may be of significant relevance to the future of LGBTQ rights advocacy in India.

In *Norris v. Ireland,* the European Court of Human Rights had observed that the maintenance of legislation prohibiting homosexual conduct 'constitutes a continuing interference with the applicant's right to respect for his private life'.[92] By contrast, however, the Court of Justice of the European Union held in *"XYZ"*[93] that 'the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution',[94] given that the fundamental rights violated by such provisions – such as, for example, the aforementioned right to respect for one's private life – are not amongst those (in the context of European human rights jurisprudence) from which no derogation is possible.[95]

XYZ is not, however, the sole view on this issue. Violation of the right to 'a meaningful "private" life' was found to constitute persecutory harm by Rodger Haines QC in *Refugee Appeal No 74665/03* [2005].[96] Hathaway and Pobjoy essay a number of ways in which 'the harm occasioned by the modification of one's behaviour or suppression of one's identity' in light of criminalisation may be considered a relevant form of 'persecutory harm'[97] – through both the modification of behaviour itself (amounting, as above, to a denial of the right to a private life) and through 'the psychological harm occasioned by the modification of behaviour'.[98] An analogy may be found with the US Court of Appeals for the Third Circuit's judgment in *Fatin* – in which government compulsion of an individual to 'engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs' was held to amount to a form of harm sufficient, in its intensity, to amount to 'persecutory harm'[99] – that is to say, harm of sufficient intensity, when combined with the other requisite elements of persecution under article 1A(2) of the *Refugee*

[92] Norris v. Ireland, Application no. 10581/83, ¶ 38 [Eur. Ct. H. R., 1988].
[93] Minister voor Immigratie en Asiel v. X and Y; Z v. Minister voor Immigratie en Asiel, Joined Cases C-199/12 to C-201/12, [2013] ECR I____ (delivered November 7, 2013).
[94] *Id.* at ¶ 55.
[95] *Id.* at ¶ 54.
[96] Refugee Appeal No 74665/03, INLR 68, ¶ 126 [NZ Ref. St. App. Auth., 2005]
[97] Hathaway and Pobjoy, *supra* n 67, at 351.
[98] *Id.* at 352.
[99] Fatin v. Immigration and Naturalization Service, 12 F 3d 1233, ¶ 48 (3rd Cir. 1993) (Alito J); Fisher v. Immigration and Naturalization Service, 37 F 3d 1371, ¶ 41 (9th Cir. 1994).

Convention, to amount to persecution. In a national constitutional context, the Canadian Supreme Court took note of harm to 'personal confidence and self-esteem' as a product of homophobic discrimination in *Vriend v. Alberta,*[100] with the law's maintenance of such discrimination held to be significant by itself in perpetuating 'the view that gays and lesbians are less worthy of protection as individuals in Canada's society'.[101] In his judgment in *National Coalition for Gay and Lesbian Equality* [1998], Ackermann J of the Constitutional Court of South Africa remarked that such psychological harm (resulting from criminalisation of its own accord) is particularly acute within the context of 'the criminalisation of consensual sodomy in private between adult males'.[102]

In *Naz Foundation*, the Delhi High Court extensively considered the impact of criminalisation in itself on the LGBTQ community. The Court observed (on the basis of international scholarship) that 'criminalisation of same-sex conduct has a negative impact on the lives of these people… Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in different spheres of life' – including exposure to 'harassment, blackmail, extortion and discrimination'.[103]

As noted above, the Supreme Court – in confining itself to certain forms of evidence – gave regard only to the reported judgments of appellate courts in relation to section 377. In doing so, the Court, in addition to restricting its perspective to a mere 'fraction' of unreported prosecutions and trial judgments,[104] gave no regard to the effects of criminalisation on the personal or psychological level (beyond exposure to prosecution). The Court's findings with regard to the impact of section 377 upon personal autonomy and privacy are notoriously cursory.[105] Refugee law's emerging focus upon criminalisation as a form of harm in itself represents an alternate current of legal opinion – one which may hopefully inspire future judges to view the effects of section 377 in a far less blinkered light, examining the law not only in terms of its lived effects (with reference to a far broader range of sources) but through the harm inflicted by its very existence.

Conclusion

Despite the Supreme Court's dismissive approach to the use of comparative sources in *Koushal* – including the blithe dismissal of decisions from other jurisdictions as unsuited to 'deciding the constitutionality of the law enacted by the Indian legislature'[106] – international public law, including the law of human rights, has always drawn upon the experiences of other jurisdictions and other disciplines in resolving common problems. Indeed, given the complexity of the issues concerned,

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[100] Vriend v. Alberta, 1 SCR 493, ¶ 102 [Can., 1998] (Cory J).
[101] *Id.*
[102] National Coalition for Gay and Lesbian Equality v. Minister of Justice, ZACC 15, ¶ 23 [SA Con. Ct., 1998] (Ackermann J).
[103] Naz Foundation v. Government of NCT of Delhi, 160 DLT 277, ¶ 50 (Del. H. Ct.].
[104] Sheikh and Narrain, *supra* n 13, at 16.
[105] *Id.*
[106] Suresh Kumar Koushal and anor v. Naz Foundation and ors, Civil Appeal No 10972 of 2013, ¶ 52 [India, 2013]. One must question the extent to which a law established under colonial rule amounts to a 'law enacted by the Indian legislature' at all.

one would hardly hope for anything less. As Michael Kirby has observed, '[a] lot of very clever people, in many lands and in international courts and tribunals', are engaged in 'elucidating the meaning and application of common or identical principles'; in this context, courts and tribunals should not ignore such reasoning in 'an unworthy self-denying ordinance of intellectual restriction'.[107]

In years past, Indian constitutional courts have drawn upon scholarship and case law of different jurisdictions in order to expand the rights of Indian citizens and ensure that the law's interpretation keeps pace with practical realities and the day-to-day lives of Indian citizens.[108] Just as 'foreign decisions and academic literature' assisted the Supreme Court in 'carving out its distinctive approach to standing' in the early days of the PIL movement,[109] so too debates within refugee law may inform future benches of the Supreme Court in identifying appropriate metrics by which the occurrence of harmful practices might be measured, or in redefining what forms of conduct deserves constitutional condemnation.

[107] Michael Kirby, *International Law – The Impact on National Constitutions*, 21 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 327, 359 (2006).
[108] See generally Arun K. Thiruvengadam, *In Pursuit of "The Common Illumination of our House": Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 INDIAN JOURNAL OF CONSTITUTIONAL LAW 67, 80-94 (2008).
[109] *Id.* at 90.