The United States of America is currently experiencing a series of aftershocks set in motion by its Supreme Court’s tectonic ruling in Windsor in June 2013, striking down Section 3 of the federal Defense of Marriage Act as unconstitutional on equal protection grounds, which means that the federal government must recognize same sex marriages that were legally performed in states that permitted them. As of this writing, just as we are celebrating the first Windsor anniversary, every state has an active marriage equality lawsuit in state/federal courts. The Tenth Circuit Court of Appeals, in a first-of-its-kind-since-Windsor significant leap forward, just upheld a lower court ruling declaring that the fundamental right to marry a person of one’s choice includes choosing someone of the same sex, and that Utah’s same-sex marriage ban cannot withstand the extremely high burden of “strict scrutiny” that is triggered whenever one group of individuals is denied a fundamental right. In other words, Utah failed to convince the court that its ban is precisely tailored to achieve a compelling government interest. Utah has vowed to appeal all the way to the U.S. Supreme Court. Utah’s lawsuit aside, six federal circuit courts of appeal currently have eleven lawsuits pending, six of which are officially on an expedited schedule. Looking at the schedules, lawsuits targeting state marriage bans from at least three states (Utah, Oklahoma and Virginia) could reach the U.S. Supreme Court in time for the Court to consider taking them up for briefing, argument, and decision during its upcoming term.

The lightning speed with which such a monumental societal shift in gay rights has come about in the United States is nothing short of stunning - just eleven years ago, it was a crime in several states to engage in private consensual homosexual activity. Two important cases in the U.S. Supreme Court’s history are pertinent here. First, in 1986, in Bowers, the Court upheld the constitutionality of the portion of Georgia’s sodomy law that criminalized private consensual homosexual activity. Seventeen years later, in 2003, in Lawrence, the Court explicitly reversed itself, invalidating Texas’s sodomy law (and thus, all remaining such state bans) as unconstitutional, in violation of the right to privacy and liberty.

But Lawrence wasn’t the case that started the U.S. Supreme Court’s post-Bowers pro-gay jurisprudence. The tipping point was Romer, the case that, in 1996, set an important precedent for both Lawrence and Windsor. In that case, the Court found that Colorado’s constitutional amendment that prevented “any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination” on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” violated the U.S. Constitution. From the opinion of the Court, it is worth noting that “the impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.”

The city of Boulder, in particular, is credited with the oldest legislated sexual orientation anti-discrimination laws in 1974. That law didn’t last long, before being repealed by popular vote that same year. As if in response, in 1975, Clela Rorex, a Boulder County clerk, issued the first ever U.S. marriage licenses to same-sex couples, after obtaining a memo from the district attorney's office that clarified that doing so wasn't specifically prohibited by Colorado’s marriage laws,
which, at that time, were gender neutral. Those licenses were quickly invalidated by the Attorney General, and the matter was never contested in court. It was not until 1987, just a year after Bowers, that Boulder voters approved the same antidiscrimination ordinance they repealed thirteen years ago. That was the first such measure in the country to be passed by popular referendum, and would go on to join other such local ordinances in contributing to the movement behind the discriminatory Colorado Constitutional Amendment that would, in turn, lead to Romer.

It is notable that the same person authored the majority opinions in Romer, Lawrence, and Windsor – Justice Anthony Kennedy. In almost every other issue, he has sided with his four conservative colleagues, but when it comes to gay rights, his trilogy of opinions with the Court’s liberal justices have earned him the title “the legal champion of gay rights.” By the same token, Justice Scalia, who drafted scorching dissents on all three cases, has been labeled “the most outspoken legal opponent of gay rights.” In each of his dissents, he uncannily predicted, with increasing directness and vigor, the next gay rights victory that must logically follow. In fact, his most recent Windsor dissent, in which he went to extreme lengths to illustrate how the majority opinion could be used to strike down state marriage bans as unconstitutional, has been amply cited by many lower courts that have since done exactly that. It seems likely that very soon, Justice Scalia will be rewarded with the chance to officially gloat “I told you so!” right in front his eight colleagues, from his seat on the bench.

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Recent events in India, however, stand in stark contrast to the steady pace with which gay rights in the United States have been advanced by its Supreme Court. In particular, just last December, India’s Supreme Court recriminalized consensual homosexual activity, turning the clock back on gay rights. The law in question is Section 377 of the Indian Penal Code (IPC). The IPC, which took effect in 1862, was drafted under Lord Macaulay, an agent of British colonialism. It became the backbone of India’s criminal law after India gained independence in 1947. The Constitution of India, the longest written Constitution of any sovereign country in the world, didn’t come into effect until 1950. As the supreme law of India, its Constitution, of course, trumps any conflicting law of the IPC, especially Section 377, whose text reads as follows:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”

In upholding the constitutionality of Section 377, India’s Supreme Court wrote that the law “does not criminalize people of a particular identity or orientation – it merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.” One could argue that the Court correctly observed that there was no equal protection violation. But as the Delhi High Court (the lower court) correctly found, the law was in clear violation of the Constitution’s substantive due process guarantees, for no legitimate governmental interest could justify Section 377’s denial of the fundamental right to privacy, autonomy and dignity enshrined in the Indian Constitution. The Supreme Court simply disagreed with this conclusion, giving no clear rationale for why Section 377 should survive a due process scrutiny.
This chapter of India’s ongoing gay rights battle is two decades old. In 1994, a 
group known as AIDS Bedhbbhav Virodh Andolan (ABVA), which worked on issues related 
to human rights of persons living with HIV/AIDS, filed a petition before the Delhi 
High Court, asking for Section 377 to be repealed. India’s wheels of justice turn 
extremely slowly, as evidenced by the fact that this petition took nearly seven 
years to be heard. When it came up for a hearing in 2001, the group had disbanded. 
Yet, the contents and arguments in this petition were far ahead of its time.

The dropped baton was then picked up and dusted off by another organization that 
works on HIV/AIDS and sexual health issues, called the Naz Foundation. Naz filed a 
similar petition in 2001, again before the Delhi High Court, asking the Court to 
read down Section 377 as excluding acts of consensual private sex from its purview. 
(At that time, Lawrence was working its way through the Texas criminal appeal courts 
in its journey to the U.S. Supreme Court.) In 2004, the Delhi High Court dismissed 
the petition, ruling that Naz did not have standing to challenge Section 377, as 
the petition had no cause of action and there was no prosecution pending against 
Naz, and that a purely academic challenge to a law’s constitutionality couldn’t be 
entertained. A review petition challenging this dismissal was filed, in which Naz 
pointed out that that the homosexual community in India, on account of Section 377, 
is a socially disadvantaged group, which is unable to approach the Court directly 
for fear of being identified and subject to harassment by the police, and that it 
is legally permissible for organizations or individuals to represent affected 
parties in such cases. The Delhi High Court dismissed the review petition as well.

Naz then took to India’s Supreme Court, filing a special leave petition on the 
limited question of whether the High Court could dismiss the petition on the grounds 
that there was no cause of action. In 2006, the Supreme Court agreed with Naz, 
remanding the case to the Delhi High Court so that the merits may be considered. 
In 2008, a 2-judge panel of the Delhi High Court heard 12 days of oral argument.

On July 2, 2009, the Delhi High Court, in a landmark ruling, read down Section 377 
to decriminalize consensual sexual relations between adults in private. The Court 
located the rights to dignity and privacy within the right to life and liberty 
guaranteed by the Constitution, and held that criminalization of consensual sexual 
relations between adults denied these rights for no legitimate purpose. The Union 
of India, which was the Defendant in the case, agreed with the decision, and decided 
not to appeal it. However, several outraged organizations (mostly Christian and 
Muslim religious groups) sought to intervene and filed numerous special leave 
petitions against Naz before India’s Supreme Court, the first of which was from an 
astrologer named Suresh Kumar Koushal, who also ended up lending his name to the 
consolidated appeals. Despite vehement demands, the Supreme Court declined to stay 
the High Court’s order, but agreed to take up Koushal.

Between 2009 and 2011, intervening briefs supporting Naz were filed by several 
groups constituting of parents of LGBT persons, mental health professionals, and 
prominent law academics. A 2-judge panel of the Supreme Court heard 15 days of oral 
argument over 6 weeks in 2012.\footnote{India’s Supreme Court, which started out with just eight judges (including a Chief Justice), and used to sit en banc on every case, has now 
exchanged to thirty one judges, and most cases are heard only by “division benches” consisting of two or three judges. The judges are still 
required to come together in larger “constitutional benches” of five or more when required to settle fundamental questions of law.} Vikram Raghavan’s law blog summarizes the panel’s 
attitude during oral argument: “During the hearings, both judges volunteered some 
really quaint and antiquarian gems. Singhvi boasted that he had never met a gay 
person in his life. (A similar comment later haunted U.S. Supreme Court Justice 
Powell.) Mukhopadhaya openly wondered what a bisexual was. He insisted that
transgendered persons aren’t really homosexuals. Singhvi tried to portray a landmark South African Constitutional Court ruling as the work of a homosexual judge. Worse, the panel freely invoked deeply offensive stereotypes without any apology or reservation. Mukhopadhaya claimed that hijras are always “recipients.” Kothis, he volunteered, have a “feministic way of talking.” Neither judge grasped why sexual orientation leads to discrimination, pain, and suffering. What’s the big deal, the judges appeared to ask repeatedly.”

On December 11, 2013, India’s Supreme Court, in Koushal, reversed the Delhi High Court’s ruling, reinstating Section 377 to its original state, throwing the ball in the Parliament’s court, suggesting that, Section 377 having been upheld as constitutional, the legislature was the proper venue to repeal or modify it. Judge Singhvi, who authored the shoddy 98-page opinion, retired that same day. Despite the disturbing highlights during oral argument, the merits were so strong that the Supreme Court was widely expected to grant India its Lawrence moment. Instead, it coughed up a Bowers moment. It was a huge step backwards for gay rights in India.

Eight review petitions were filed by several organizations including the Union of India, Naz, Voices Against 377, parents of LGBT persons, and mental health professionals. In India’s Supreme Court, review petitions are considered by the same 2-judge panel that delivered the impugned judgment. Justices Dattu (who replaced Singhvi) and Mukhopadhaya considered and dismissed all eight review petitions on January 28, 2014. The two-line order read: “We have gone through the Review Petitions and the connected papers. We see no reason to interfere with the order impugned. The Review Petitions are, accordingly, dismissed.”

The final recourse for challenging a Supreme Court judgment in India is what is known as a curative petition, the concept of which was laid out by the Supreme Court relatively recently, in 2002, where it proclaimed that in order to prevent abuse of its process and to cure gross miscarriage of justice, it may reconsider its judgments in exercise of its inherent powers. In the curative petition, the petitioner is required to aver specifically that the grounds mentioned therein had been taken in the review petition filed earlier and that it was dismissed by circulation. This has to be certified by a senior advocate. The curative petition is then circulated to the three senior most judges (which would include the Chief Justice) and the judges who delivered the impugned judgment, if available. Chief Justice Sathasivam, an outspoken supporter of rights of sexual minorities who openly commended the Delhi High Court’s judgment on Section 377 before he became the Chief, casually mentioned during a public event in February 2014 that a curative petition could be filed even after a review petition is rejected.

Statistically speaking, curative petitions are rarely entertained, and among those rare instances that they are taken up for consideration, the practice is for the judges to schedule a private hearing in chambers, following which a majority of the judges must vote to grant the petition.

The then UPA-led Union of India gave up after its review petition was rejected, and decided not to file a curative petition. However, six curative petitions on Koushal were filed by Naz, Voices Against 377, parents of LGBT persons, mental health professionals, filmmaker Shyam Benegal, and academicians.

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2 UPA stands for United Progressive Alliance, a largely secular coalition of several political parties that stayed in power for a decade until just a month ago, when it was toppled singlehandedly by the Hindu nationalist party BJP (Bharatiya Janata Party). During Naz, the UPA evolved on the subject and now supports decriminalization of Section 377 (as evidenced by their agreement with the Delhi High Court’s judgment and later by their filing of a review petition against the adverse ruling in Koushal). In contrast, the BJP still loudly opposes it.
In this case, the three senior most judges and the judges who considered the review petition consist of Chief Justice Sathasivam, Justice Lodha, Justice Dattu, and Justice Mukhopadhaya. In what is considered an extraordinary step forward, this 4-judge panel, after a chamber hearing on April 22, 2014, ordered that oral argument be heard expeditiously in open court (instead of privately in chambers as is the norm) on whether curative review is warranted. The petition's prospect remains bleak though, as Justice Sathasivam retired on April 26, leaving only three judges on the panel, two of whom had rejected the previous review petition. Nevertheless, a recent and timely Romer-like development might just persuade at least one of these two judges to reconsider:

On April 15, 2014, a different 2-judge panel of India’s Supreme Court, exercising its original jurisdictional authority on a civil writ petition, handed down a landmark judgment that granted third gender status to transgender citizens, noting that “recognition of transgenders as a third gender is not a social or medical issue but a human rights issue,” thereby granting rights to those who identify themselves as neither male nor female. The central and state governments were also directed to take steps for bringing the community into the mainstream by providing adequate healthcare, education and employment. The verdict relied heavily on the Constitution’s equal protection guarantees, and noted that Section 377 had been used to harass and discriminate against the transgender community. Importantly, the judgment proclaimed in one of its dispositive paragraphs:

“We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the transgender community.”

Anand Grover, a senior lawyer in both cases, said: “This rationale of reading both gender identity and sexuality into the Constitution, is the basis to reopen the Section 377 case.”

Even though the April 15 judgment clarified that it pertained only to eunuchs and not to other sections of the society such as gays, lesbians and bisexuals, whom the Court also considered under the umbrella term 'transgender', and that it expresses no opinion on the constitutionality of Section 377 as it was already decided in Koushal, its reasoning and conclusion are undoubtedly in fundamental conflict and cannot be reconciled with the Court’s December 11 judgment in Koushal. As Menaka Guruswamy, counsel for filmmaker Shyam Benegal, puts it: “The case is ultimately about a consistent interpretation of the Constitution which is in consonance with the jurisprudence of this Court when it has confronted social and historical disadvantage and discrimination as in the case of caste, gender or even disability.”

It remains to be seen how oral argument on the curative petition will unfold. If granted, the Court will order reopening of the case for de novo review by a fresh panel. It is expected that a plea will be made for Koushal, if reopened, to be assigned to a 5-judge constitutional bench (as the Supreme Court rules mandate, when a case involves a substantial question of fundamental law) instead of a regular 2-judge division bench.

Here’s hoping that India’s Supreme Court will soon grant us our Lawrence moment that is promised to us by our Constitution.

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