

A DISCOURSE ON LGBT

By Shivangi Mishra³⁴⁵

INTRODUCTION

“It comes to this then: there always have been people like me and always will be, and generally they have been persecuted.”

— E.M. Forster, *Maurice*.

The English law was reformed in Britain by the Sexual Offences Act, 1967, which decriminalized homosexuality and acts of sodomy between consenting adults (above age of 21) pursuant to the report of Wolfenden Committee³⁴⁶. The Committee advising the Parliament had recommended in 1957 repeal of laws punishing homosexual conduct. Before this even in England, homosexuality was crime, but they reformed their law according to need and want of their society. Lord Macaulay drafted Indian Penal Code, 1860 and introduced it in 1861.

But we are still bearing the odds of S. 377³⁴⁷ and IPC, a code which was drafted approx. 150 years ago. Ironically, while the British drafted Section 377 of the IPC, while replacing a tolerant Indian attitude towards sexuality with a highly oppressive one, this law was repealed in the UK.

LGBT stands for lesbian, gay, bisexual and transgender and along with heterosexual they describe people's sexual orientation* or gender identity*. In use since the 1990s, the term is an adaptation of the initialism LGB, which itself started replacing the term gay when in reference to the LGBT community beginning in the mid-to-late 1980s,³⁴⁸ as many felt the term gay

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³⁴⁶ Wolfenden Report, as available on http://www.glbtc.com/social-sciences/wolfenden_report.html as accessed on July 14, 2009 at 12:45 IST.

³⁴⁷ S. 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 a term which may extend to ten years, and shall also be liable to fine.

³⁴⁸ Vanita & Kidwai 2001, p. 25.

* Discussed later.

community did not accurately represent all those to whom it referred.³⁴⁹ These terms are explained in more detail here:³⁵⁰

Lesbian: A lesbian woman is one who is romantically, sexually and/or emotionally attracted to women. Many lesbians prefer to be called lesbian rather than gay.

Gay: A gay man is one who is romantically, sexually and/or emotionally attracted to men. The word gay can be used to refer generally to lesbian, gay and bisexual people but many women prefer to be called lesbian. Most gay people don't like to be referred to as homosexual because of the negative historical associations with the word and because the word gay better reflects their identity.

Bisexual: A bisexual person is someone who is romantically, sexually and/or emotionally attracted to people of both sexes.

Transgender or Trans: Is an umbrella term used to describe people whose gender identity (internal feeling of being male, female or transgender) and/or gender expression, differs from that usually associated with their birth sex. Not everyone whose appearance or behavior is gender-typical will identify as a transgender person. Many transgender people live part-time or full-time in another gender. Transgender people can identify as transsexual, transvestite or another *gender identity*.

Gender Identity: One's gender identity refers to whether one feels male, female or transgender (regardless of one's biological sex). Gender expression refers to outwardly expressing one's gender identity.

Transsexual people live or wish to live full time as members of the gender other than that assigned at birth. Transsexual people can seek medical interventions, such as hormones and surgery, to make their bodies fit as much as possible with their preferred gender. *The process of transitioning from one gender to another is called gender reassignment.* Biological females who wish to live and be recognized as men are called female-to-male (FTM) transsexuals or

³⁴⁹ Subir K Kole (2007-07-11). "Globalizing queer? AIDS, homophobia and the politics of sexual identity in India".

³⁵⁰ Definitions adapted from More Than a Phase (Pobal, 2006), For a Better Understanding of Sexual Orientation (APA, 2008) and Answers to Your Questions About Transgender Individuals and Gender Identity (APA, 2006).

Trans men. Biological males who wish to live and be recognized as women are called male-to-female (MTF) transsexuals or Trans women.

Transvestite or cross-dressing individuals are thought to comprise the largest transgender sub-group. Cross-dressers sometimes wear clothes considered appropriate to a different gender. They vary in how completely they dress (from one article of clothing to fully cross-dressing) as well as in their motives for doing so. A small number can go on to identify as transsexual.

Gender Reassignment: Gender Reassignment also called transitioning, is the process of changing the way someone's gender is lived publicly and can be a complex process. People who wish to transition often start by expressing their gender identity in situations where they feel safe. They typically work up to living full-time in a different gender, by making gradual changes to their gender expression. Connecting with other transgender people through peer support groups and transgender community organizations is also very helpful for people when they are going through the transition process. Transitioning typically involves changes in clothing and grooming, a name change, change of gender on identity documents, hormonal treatment, and surgery.

Coming Out: Coming Out is the term used by lesbian, gay, bisexual and transgender (LGBT) people to describe their experience of discovery, self-acceptance, openness and honesty about their LGBT identity and their decision to disclose, i.e. to share this with others when and how they choose.

Sexual Orientation: Sexual Orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions. Three sexual orientations are commonly recognized - heterosexual, homosexual (gay and lesbian) and bisexual.

Homophobia: Homophobia refers to fear of or prejudice and discrimination against lesbian, gay and bisexual people. It is also the dislike of same-sex attraction and love or the hatred of people who have those feelings. The term was first used in the 1970s and is more associated with ignorance, prejudice and stereotyping than with the physiological reactions usually attributed to a 'phobia'. While homophobic comments or attitudes are often unintentional, they can cause hurt and offence to lesbian, gay and bisexual people.

Transphobia: Transphobia refers to fear of or prejudice and discrimination against people who are transgender or who are perceived to transgress norms of gender, gender identity or gender expression. While transphobic comments or attitudes are often unintentional, they can cause hurt and offence to transgender people.

Homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. Homosexuals are as normal as 'you' and 'me'. Yet, just because they love 'their own kind', they are ostracized and hounded by the law. And branded as 'queers' and 'aberrations' — precisely what they are not. Homosexuals are normal humans attracted to their own gender.

Relationships are defined by comfort levels and not societal sanctions, "Like heterosexuality, homosexuality is an orientation which is not unnatural. The world accepts this orientation; society is changing." What is not changing is the legal mindset in India.

HISTORICAL BACKGROUND

Humjinsi – an Urdu word meaning "the being of the same nature or genus, or species or class". It is also used to indicate "relationship". More specifically, the contemporary Urdu usage is for "relationships between people of the same sex" – that is, for homosexuals.

The history of LGBT peoples and cultures around the world dates back to the first recorded instances of same-sex love and sexuality of ancient civilizations. What survives of many centuries' persecution resulting in shame, suppression, and secrecy it has only recently been pursued and interwoven into historical narrative. In 1994 the annual observance of LGBT History Month began in the US, and it has since been picked up in other countries. They cover the history of the people, LGBT rights and related civil rights movements. It is observed during October in the United States, to include *National Coming Out Day* on October 11.³⁵¹ In the United Kingdom, it is observed during February, to coincide with a major celebration of the 2005 abolition of Section 28, which had prohibited schools from discussing LGBT issues or counseling LGBT or questioning youth.³⁵²

Hindus regard all beings as manifestations of one universal *Atman* (*Spirit*), Atman has no gender. Hindu texts have discussed variations in gender and sexuality for over two millennia.

³⁵¹ "LGBT History Month Resources". Glsen.org. Retrieved 2013-11-02.

³⁵² Local Government Act 1988 (c. 9), section 28. Accessed July 1, 2006 on opsi.gov.uk.

Like the erotic sculptures on ancient Hindu temples at Khajuraho and Konarak, sacred texts in Sanskrit constitute irrefutable evidence that the whole range of sexual behavior was known to ancient Hindus. Homosexuality has been prevalent across the Indian subcontinent throughout history, and that homosexuals were not necessarily considered inferior in any way.³⁵³

The Sushruta Samhita³⁵⁴, for example, a highly-respected Hindu medical text dating back to at least 600 B.C., mentions two different types of homosexual men (kumbhika - men who take the passive role in anal sex; and asekya - men who devour the semen of other men) as well as transgenders (sandha - men with the qualities, behavior and speech of women). It also states that men who behave like women, or women who behave like men, are determined as such at the time of their conception in the womb.

In ancient India there were a few examples of LGBT related issues. Here can be given example of *Shikhandi of Mahabharata* who was a eunuch or transgender or third gender. It is described in *Vedas and Kama Sutra* also that there are three types of human nature (prakrti), i.e. Pums Prakrti (male nature), Stri Prakrti (female nature) and Tritiya Prakrti (third nature).

Provenance of three types of gender is described in the foundation of Hindu law Manusmriti : *“A male child is produced by a greater quality of male seed, a female child by the prevalence of the females, if both are equal, a third-sex child or boy and girl twins are produced”*³⁵⁵. But in the case of homosexuality, it's described in some ancient books like Arthasatra, Manusmriti that homosexuality is a very minor offence.

LEGAL ASPECT

“With ignorance comes fear- from fear comes bigotry. Education is the key to acceptance.”
— Kathleen Patel, The Bullying Epidemic-the guide to arm you for the fight.

Section 377, IPC reads as: **“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 a term which may extend to ten years, and shall also be liable to fine.

³⁵³ Manu Smriti, chapter 8, verse 369.

³⁵⁴ Wilhelm, Amara Das, Tiritiya-Prakriti: People of the Third Sex, pp. 267, 334. Philadelphia, PA: Xlibris Corporation, 2003; See also, Sushruta Samhita, 3.2.42-43.

³⁵⁵ Manusmriti, 3.49.

In the *Naz Foundation Judgement*³⁵⁶ the Hon'ble Delhi High Court in deciding the case, firstly reiterated the test for any law which interferes in personal liberty³⁵⁷, as set out in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248³⁵⁸: that (i) there must be a procedure; (ii) that procedure must be tested against one or more of the fundamental rights conferred under Article 19 which are applicable; and (iii) it is also susceptible to be tested against Article 14, and must be right, just, fair and not arbitrary. Following were the main issues in this case:

❖ Right to Privacy

The Court noted that the Indian Constitution does not contain an explicit provision in relation to the right to privacy, however the Supreme Court has interpreted such a right on the basis of Article 19 protecting freedom of expression and movement, and Article 21 protecting the right to life and liberty. The Court made extensive reference to United States jurisprudence on the right to privacy as read into the Constitution, including *Roe v. Wade* 41 US 113 (1973) and *Planned Parenthood of South-eastern Pa v. Casey* 505 US 833 (1992). It then went on to consider the development of this right in India including the case of *Kharak Singh v. The State of U.P.* (1964) 1 SCR 332, which traced the right to privacy in India to the right to 'life' in Article 21 of the Constitution.

In addition, the Court referred to specific rights of persons of different sexual orientation in this respect by reference to the *Yogyakarta Principles** on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, which the Court noted asserts the rights to equal enjoyment of rights of all persons regardless of their sexual orientation. Taking stock of these provisions, the Court concluded that Section 377 denies the dignity of such individuals criminalizes their identity and violates their right to privacy which is protected within the ambit of Article 21 of the Constitution. In making this finding, the Court dismissed the arguments of the MHA that the decriminalization of sodomy will lead to the increase of HIV/AIDS on the basis that there was no medical evidence to support this contention. The Court also noted that this claim contradicted the arguments made by NACO and the Ministry of Health and Family Welfare.

³⁵⁶ *Naz Foundation v. Government of NCT of Delhi and Others*, 160 (2009) DLT 277.

³⁵⁷ Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.

³⁵⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

* Discussed later.

With respect to the public morality arguments put forward by the respondents the Court, citing the European Court of Human Rights jurisprudence of *Dudgeon v. The United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), and *Norris v. Republic of Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), stated that mere public disapproval or popular morality is not a sufficient basis for placing such restrictions on the enjoyment of fundamental rights. The Court asserted that the only morality which matters is Constitutional morality. The Court determined that the Constitution of India protects and promotes diversity and ensures an egalitarian society where freedom is no longer a privilege. The Court determined that criminalization of homosexuality runs counter to that Constitutional morality.

❖ Article 14 and Equality

The Court reiterated the test set by Article 14 that any distinction or classification be based on an intelligible differentia which has a rational relation to the objective sought and is not unfair or unjust. Section 377, the Court said, does not distinguish between public and private acts, or between consensual and non-consensual acts thus does not take into account relevant factors such as age, consent and the nature of the act or absence of harm. The Court stated that such criminalization in the absence of evidence of harm seemed arbitrary and unreasonable. In considering the legal principles imposed by Article 14 of the Constitution the Court took into account the Declaration of Principles of Equality “as current international understanding of Principles on Equality”. Drawing on Principles 1 (right to equality), 2 (equal treatment) and 5 (definition of discrimination) the Court emphasized the need to include sexual orientation among protected grounds of discrimination and build indirect discrimination and harassment into any consideration of the right to equality.

Thus, dealing with the argument that Section 377 was neutral, as submitted by the MHA, the Court stated that although the provision on its face is neutral and targets acts rather than persons, and in its operation it unfairly targets a particular community, having the result that all gay men are considered criminal. This led the Court to conclude that Section 377 discriminated against a particular community in violation of Article 14 of the Constitution.

❖ Article 15 – Sex or Gender?

Article 15 was described by the Court as a particular application of the general right to equality under Article 14. The Court considered the petitioner’s argument that the reference to ‘sex’ in Article 15 should be interpreted as including sexual orientation on the basis that discrimination

on the grounds of the latter is based on stereotypes of conduct on the basis of sex. The Court itself referred to the Human Rights Committee's decision in *Toonen v. Australia*, (No.488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994) in which the Tasmanian Criminal Code which criminalized sexual acts between men, was considered a violation of Article 2 of the International Covenant on Civil and Political Rights, where a reference to 'sex' was taken as including sexual orientation.

On that basis the Court stated:

"We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15."

The Court consequently found that Section 377 was unconstitutional on the basis of Article 15 of the Constitution. In its conclusion, the Court referred to the belief in inclusiveness which is ingrained in the Indian Constitution and explained that discrimination was:

"The antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual".

To sum up, the Court declared that Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts of adults in private, violates Articles 21, 14 and 15 of the Constitution. By saying this, the High Court has proved that it is surely a custodian of fundamental rights of citizens of India. Emotions and pressure must not be considered while deciding a case. Thus giving such a landmark judgment under the pressure of billions is highly encomium. Legislative objective of Section 377 of penalizing "unnatural sexual acts" has no rational nexus to the classification created between procreative and non-procreative sexual acts, and is thus violative of Article 14 of the Constitution of India, 1950.

Hence the Delhi High Court in deciding that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The decision like this was necessary to ensure that the LGBTs should not be made a matter of ridicule or discrimination or abomination. Even

if we take the reference of *Ajay Goswami case*³⁵⁹, where the Hon'ble Supreme Court observed that contemporary social standards determine what is obscene and what is not. Again the High Court Judgment seems to be correct by validating the homosexuality.

Role of the Supreme Court of India in this issue

After the Delhi High Court had pronounced its judgement on 2nd July 2009, lots of hue and cry was made by various religious organizations as well as eminent religious and social leaders. As a result, a petition was filed by Suresh Kumar Koushal³⁶⁰, an astrologer against the Delhi High Court Judgment in the Supreme Court of India. On 20th July, 2009 the Supreme Court heard Suresh Kumar Koushal's Petition. This matter was mentioned in the Chief Justice's court on 9th July, 2009 and the court had issued notices to parties including the Union of India and Naz Foundation.³⁶¹

On 20th July, 2009 the bench comprising Chief Justice K.G. Balakrishnan and Justice Sathasivam heard the matter for admission and grant of stay. Mr. Goolam Vahanvati, Advocate General of India, appearing for the Government stated that the government had taken a particular stand in the High Court and in light of the present situation it is yet to decide on the matter. However the government did not support the granting of interim stay and sought further time. The counsel for Suresh Kumar Koushal submitted that the decision of the Delhi High Court would lead to a rise in "gay parlours" and "gay prostitution". He mentioned that instances of same sex marriages have also been reported. Anand Grover appearing for Naz Foundation said that the Home Ministry had itself admitted that Section 377 of the Indian Penal Code was rarely invoked against adult consensual sex, therefore there would be no prejudice caused if the decision remains operative.

He further argued that the Appellants had failed to plead that they were prejudicially affected and therefore had no Locus Standi. The Chief Justice however, said that in a public interest matter such as this, third parties may be heard. Anand Grover further stated that marriage and prostitution were unrelated to the judgment and had no bearing on the matter. He further argued that as far as male prostitution is concerned the Immoral Traffic (Prevention) Act is gender neutral and would cover this.

³⁵⁹ *Ajay Goswami v. Union of India*, 2007 SCC 143.

³⁶⁰ *Suresh Kumar Kaushal v. Naz Foundation SLP(C)* No.15436/2009.

³⁶¹ Ministry Clears Path to Same-Sex Marriage available at <http://search.japantimes.co.jp/cgi-bin/nn20090328a2.html> as accessed on September 4, 2009 at 14:56 IST. Id.

The Bench declined to grant an interim stay for it found that no adverse consequences would follow. Meanwhile, Tijarawala, private secretary to yoga guru Baba Ramdev and former Uttar Pradesh DGP and senior VHP leader B P Singhal also filed the separate petitions against the Delhi High Court judgment on 17 August, 2009 and 13 December, 2009 respectively. In both the attempts to get a stay against the Delhi High Court judgment decriminalizing gay sex between two consenting adults drew a blank as the Supreme Court declined to stay the High Court judgment. The Division Bench comprising the then Chief Justice K G Balakrishnan and Justice P Sathasivam, however, issued notices to the Centre and Naz foundation on the application seeking stay of the operation of the impugned judgment till final disposal of the petitions.

The All India Muslim Personal Law Board³⁶² also moved the Supreme Court challenging a Delhi High Court judgement on legalizing homosexuality between consenting adults by filing a petition on 2nd February, 2010. The AIMPLB in its petition contended that Gay sex was against the principle of nature and will lead to sexual corruption in society and may also increase the incidents of people contracting serious ailments like cancer and Aids. However, the gay community had finally found its lone supporter in noted film director and Rajya Sabha Member Shyam Benegal³⁶³, who approached the Supreme Court in support of Delhi High Court judgement, legalizing an act of homosexuality between two consenting adults. Mr. Benegal, in his petition filed on 22nd February, 2010, had contended that there was nothing wrong and illegal in the High Court ruling because no FIR can be registered without a complaint and the High Court ruling clearly implies if either of the party complains, then only gay sex would be an offence. Several petitions including that of Yoga Guru Baba Ramdev are still pending in the Supreme Court.

Taking the reference of latest development on the homosexuality issue in US, where the US Supreme Court allowed same sex marriage in Washington DC and Chief Justice John Roberts of the US Supreme Court rejected a request from opponents of gay marriage to put on hold a new law that allows same-sex couples to wed in Washington, DC on 3rd March, 2010. And also the reference of the landmark judgment of the US Supreme Court in *Lawrence v. Texas* would certainly guide the Supreme Court of India in this regard. Early sodomy laws were not

³⁶² All India Muslim Personal Law Board Moves SC Over Legalizing Homosexuality, <http://www.indlawnews.com/NewsDisplay.aspx?87bd3cbf-f0d2-40b8-9df0-b9bac18e82a0> as accessed on 26 March, 2010 at 16:20 IST.

³⁶³ Shyam Benegal approaches SC to voice gay rights, www.newkerala.com/news/fullnews-56475.html as accessed on 28 March, 2010 at 13:50 IST.

directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally, whether between men and women or men and men.

Moreover, early sodomy laws seem not to have been enforced against consenting adults acting in private. In-stead, sodomy prosecutions often involved predatory acts against those who could not or did not consent: relations between men and minor girls or boys, between adults involving force, between adults implicating disparity in status, or between men and animals. In his dissenting opinion in *Bowers Case*³⁶⁴ Justice Stevens concluded that (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process.

Justice Kennedy in *Lawrence v. Texas*³⁶⁵ delivered the opinion of the Court:

"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."

In this respect, the Supreme Court should contemplate not only moral values and cultural integrity of the country before deciding the matter on merits but also the liberty and freedom of each individual in the country. There is a need to keep state away from the personal life of the people. Right of privacy also needs to be broadening its scope and ambit in regard of the homosexual activity.

A Bench of Justices G.S. Singhvi and S.J. Mukhopadaya set aside the Delhi High Court's verdict decriminalizing homosexuality. Section 377 holds that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits an unnatural offence. The Bench said: *"We hold that Section 377 does not suffer from... unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable."* It, however, said: *"Notwithstanding this verdict, the competent legislature shall be free to*

³⁶⁴ Bowers v. Hardwick, 478 U. S. 186.

³⁶⁵ Lawrence v. Texas, 2003 (539) US 558.

consider the desirability and propriety of deleting Section 377 from the statute book or amend it as per the suggestion made by Attorney-General G.E. Vahanvati."³⁶⁶

Writing the judgment, Justice Singhvi said: *"Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes; and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if, in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family, the person is found guilty. Therefore, the High Court was not right in declaring Section 377 ultra vires Articles 14 and 15 of the Constitution."*

On March 27, 2012, the court reserved verdict after arguments that started on February 15, 2012. Parents of gays, lesbians, bi-sexual and transgenders supported the High Court ruling, which was delivered on petitions filed by the NAZ Foundation and others. It was argued that Section 377 was against their right to life and liberty guaranteed under the Constitution. The Delhi Commission for Protection of Child Rights, the All-India Muslim Personal Law Board and the Apostolic Churches Alliance had opposed the judgment.

The Bench said: *"While reading down Section 377, the High Court overlooked that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders, and in the more than 150 years past, less than 200 persons have been prosecuted for committing offence under Section 377, and this cannot be made a sound basis for declaring that Section ultra vires Articles 14, 15 and 21."*

Section 377 vis-à-vis Article 21 of the Indian Constitution

Section 377 of IPC violates the constitutional protections embodied in Articles 14 and 21. It suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community thus infringing their right under article 14. It also unreasonably and unjustly infringes upon the right of privacy which is sine qua non to article 21. The expanded scope and ambit of the right to life and personal liberty enshrined in Article

³⁶⁶ <http://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece>.

21 sowed the seed for future development of the law enlarging this most fundamental of the fundamental rights. Thus different sexual expressions or orientations automatically come within the ambit of expanded right to life and personal liberty.

At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. Hence even if homosexuals have their own private will to marry with a same sex person and alternative sexual orientation, they have the right to live with dignity in society. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India. The life Homosexuals are as dignified as any other citizen of India.

Section 377 also conveys the message that homosexuals are of less value than other people, it demeans them and unconstitutionally infringes upon their right to live with dignity. Section 377 IPC also creates structural impediments to the exercise of freedom of speech and expression and other freedoms under Article 19 by homosexuals or gays and is not protected by any of the restrictions contained therein. The society must accept them as a part and parcel of it and S. 377 of IPC should have been repealed much earlier as it was creating hurdles for homosexuals to live a dignified life. After the Naz Foundation Case surely the homosexuals would be able to live a dignified life. Furthermore, morality by itself cannot be a valid ground for restricting the right under Articles 14 and 21. Public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute.

In any event, abundant material has been placed on record which shows that the Indian society is vibrant, diverse and democratic and homosexuals have significant support in the population. Courts in other jurisdictions have struck down similar laws that criminalize same-sex sexual conduct on the grounds of violation of right to privacy or dignity or equality or all of them. Issues regarding Right to Privacy in India were raised in *Kharak Singh v. State of Uttar Pradesh*. The Question was whether Right to Privacy might be implied from existing Fundamental Rights in the Constitution of India, 1950, Articles 19(1)(d), 19(1)(e) and 21. The majority opinion was that our Constitution does not in express terms confer any such right on the citizens. Minority opinion (Subba Rao J.) was in favour of inferring right to privacy from right to personal liberty under the Constitution of India, 1950, Article 21.

This right again came for examination before the Supreme Court of India in *Govind v. State of Madhya Pradesh*, and this time Supreme Court took a more elaborate view and accepted a

limited right to privacy as an emanation from Articles 19 (1)(a), 19 (1)(d) and 21. It was also said that the right is not absolute. So, reasonable restriction may be imposed on this right. These restrictions must be the same as are provided under the Constitution of India, 1950, Article 19, clause 2 (2). But in *Unni Krishnan v. State of Andhra Pradesh*, the Hon'ble Supreme Court of India took a bigger step and interpreted the expression Personal Liberty in its widest amplitude and gave a list of rights that may fall under the Constitution of India, 1950, Article 21. Thereby Personal Liberty was held to include Right to Privacy.

It was rightly declared by the Apex Court in *Mr. X v. Hospital Z*, wherein the scope of right to privacy was re-examined and it was declared that the right to privacy is an essential component of right to life. Thus it is not within the constitutional competence of the State to invade the privacy of citizens live or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interests "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalize private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalize conduct which fails to conform to the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.

Why Homosexuality should be legalized?

The culture of marriage has changed over the years and that recognizing same-sex marriage is just another change. A common example given is the change in the status of the woman partner, in that marriage is now seen as a union of equals. But that change goes to a collateral feature of marriage, not its essential nature or essence as recognizing same-sex marriage would. In short, these two changes are not analogous; rather, they are fundamentally different in kind.³⁶⁷ Advocates of same-sex marriage also argued that restricting marriage to opposite-sex couples based on society's need for an institution that symbolizes the inherently procreative relationship between a man and a woman, means that opposite-sex couples who cannot or do not want to

³⁶⁷ Should Same-Sex Marriages be Legalized?, as available on http://www.balancedpolitics.org/same_sex_marriages.htm as accessed on 9 July, 2009 at 12:48 IST.

have children should be excluded from marriage, or, more extremely, that only a man and a woman who produce a child should be allowed to marry.

The argument that same sex marriages should not be made legal "because they do not produce kids" is ridiculous. Should heterosexual couples over 50 not be allowed to marry as they cannot produce kids either? If two people love each other and want to unite their destinies, then it is a beautiful thing which should be celebrated. Whether it is called "marriage" or "life pact" does not matter. Same-sex unions harm no one; one's support or opposition to this is a matter of personal belief and morality, with which the government has no business to interfere.³⁶⁸

Different sexual expressions or orientations automatically come within the ambit of expanded right to life and personal liberty as these rights also include provision for future developments. Right to equality as well as right against any discrimination based on sex would also be violated in absence approval of homosexuality.

Marriage is more than a legal status. It affects many things in society such as tax filing status, joint ownership of property, insurance benefits, and agency law. It affects critical medical decisions. For example, if one member of a gay couple that has been together for 20 years gets critically ill, visitation may not even be allowed since the other isn't considered a "spouse or immediate family member". Also, critical medical decisions must often be made when one person is incapacitated; e.g. should a certain surgery be done or not? It is completely unfair to deny these privileges to people because their relationship doesn't fit the state's definition of one.

An overwhelming amount of research has been done showing that homosexuality has a biological causation; not a genetic one, but a biological one.

SCENARIO IN INDIA

In 1977 Shakuntala Devi published the first³⁶⁹ study of homosexuality in India.

³⁶⁸ Same Sex Marriage: Is It The Time For Legal Recognition, as available on <http://www.legalserviceindia.com/articles/semar.htm> as accessed on 5 July, 2009 at 13:10 IST.

³⁶⁹ Shakuntala Devi (1977). *The World of Homosexuals*. Vikas Publishing House. ISBN 9780706904789.

LGBT people in India face legal and social difficulties not experienced by non-LGBT persons. Sexual activity between two persons of the same sex is criminalized,³⁷⁰ and is punishable by incarceration. India does, however, legally recognize *Hijras* as a gender separate from men or women, making the country one of the few in the world to legally recognize a third gender.

There are 4.9 lakh third gender people in India according to 2011 census, but transgender activists estimated that it would be six or seven times higher than census report. Of the total number of transgender 55000 are in 0-6 age group. 66% of total population of third gender lived in rural area and 34% are lived in urban area. Literacy rate of third gender is just 46%, while national literacy rate is about 74%. Working rate of third gender is just 38% of this community while it is 46% in the general population. The proportions of third gender population are as follows:

STATE	% of Third Gender Population
Uttar Pradesh	28%
Andhra Pradesh	9%
Maharashtra	8%
Bihar	8%
West Bengal	6%
Madhya Pradesh	6%
Tamil Nadu	4%
Odisha	4%
Karnataka	4%
Rajasthan	3%
Punjab	2%

Source: Times of India; May 30, 2014.

There are 25 lakh gays in India according to data submitted in the Supreme Court by the Central Government on March 13, 2012. Among this total population of gays about 7% are affected by HIV. Though LGBT community has some demands and grievances against the state, albeit the state has given some rights to LGBT community, especially to the transgender or Hijra section.

'Right to vote' has been given to the transgender community in 1994. On November 12, 2009 election authorities have declared to grant independent identity to transgender community in

³⁷⁰ "Supreme Court refuses overruling its Verdict on Section 377 and Homosexuality". Bihar Prabha (Biharprabha). Indo-Asian News Agency. 28 January 2014. Retrieved 25 June 2015.

the country's voter lists. Before this declaration members of this group had to mention themselves as male or female in the electoral rolls. But after this declaration they have got the provision to tick 'O', means 'other'. Besides that, on April 15, 2014 the Supreme Court of India has given a landmark judgement about recognition of transgender or Hijra as a third gender. Earlier they always had to mention themselves on Govt. form as male or female. Not only that the apex court has declared Transgender community as socially and economically backward.

Transgender people are called as Thirunar, *Thirunangai* for Male to Female Transgender people and *Thirunambi* for Female to Male Transgender people. The term Aravani in Tamil was widely popularized before 1990's which is a substitute term for Hijra in India and visible male to female transgender people i.e. Thirunangai are often discriminated against in jobs forcing them to resort to begging and prostitution. Thirunangai's (MTF) meet in Koovagam, a village in the Ulundurpet taluk in Villupuram district, Tamil Nadu in the Tamil month of Chaitra (April/May) for an annual festival which takes place for fifteen days. They also meet in Coimbatore Koothandavar temple and Madurai reserve line Maariyamman Temple festival where they offer Mullapaari(sacred millets and grains) to mother goddess.³⁷¹

Tamil Nadu has an estimated population of more than 30,000 transgender people.³⁷² It has made great strides in trying to integrate transgender people into society. This includes welfare schemes initiated by the Government and acceptance of transgender people into the mainstream media and film industry.

The Tamil Nadu state in India was the first state to introduce a transgender (Hijra/ aravani) welfare policy. According to the transgender welfare policy transgender people can access free Sex Reassignment Surgery (SRS) in the Government Hospital (only for MTF); free housing program; various citizenship documents; admission in government colleges with full scholarship for higher studies; alternative sources of livelihood through formation of self-help groups (for savings) and initiating income-generation programs (IGP). Tamil Nadu was also the first state to form a Transgender Welfare Board with representatives from the transgender community.

In a pioneering effort to solve the problems faced by transgender people, the government of Tamil Nadu established a transgender welfare board in April 2008. Social welfare minister will

³⁷¹ Winter, Gopi Shankar (2014). *Maraikkappatta Pakkangal*: Srishti Madurai. ISBN 9781500380939.

³⁷² "Chennai: Move on toilets for transgenders sparks off debate". Express India. 23 June 2009.

serve as the president of the board. *This effort is touted to be the first in India and even in the world.* The government has also started issuing separate food ration cards for transgender people.³⁷³ Even though the transgender welfare board solely started focusing only on the development of Transwomen in recent days the rights of Transmen and gender variants are discussed.

In additional effort to improve the education of transgender people, Tamil Nadu government also issued an order on May 2008 to create a third gender for admissions to government colleges.³⁷⁴ The Government has also decided to conduct a census on the transgender population in order to issue identity cards.³⁷⁵

Tiruchi Siva DMK moved the popular bill, which was supported by all political parties in Rajya Sabha, for transgender people to ensure they get benefits for reserved communities like SC/STs and is taking steps to see that they get enrolment in schools and jobs in government besides protection from sexual harassment.³⁷⁶

After this 2013 verdict of apex court of India LGBT community started to protest more in an organized way. In this way they have been able to collect the support of some celebrities, media as well as common people. The LGBT movement has drawn wide attention of mass in recent time. However, it is not that only after the verdict of Supreme Court LGBT community has drawn wide attention, actually they have been supported by people along with famous person prior to that verdict. In 2005, Prince Manvendra Singh Gohil from Gujrat regal family openly announced that he is a gay. In 2006, Amartya Sen, Vikram Seth demanded repeal of section 377 of IPC. Bilal Nazki, Hon'ble Justice of Bombay High Court, stated in 2008 that section 377 should be reviewed. In the same year, the then Health Minister Anbumani Ramadoss advocated to repeal that section of IPC. Even United Nations Organization reveals its support stating that India should abolish section 377 of IPC. In 2014, present finance minister and senior BJP leader Arun Jaitley showed his positive attitude for decriminalization of homosexuality. On behalf of BJP Shaina NC told that they are in favour of decriminalization of homosexuality. Many film star including Amir Khan, Celina Jaitley, Karan Johar, Riteish Deshmukh, John Abraham, Amitabh Bachchan and so on protested against the ruling of the

³⁷³ http://infochangeindia.org/index.php?option=com_content&task=view&id=7036&Itemid=54.

³⁷⁴ Admission to colleges, The Hindu, 5 May 2008.

³⁷⁵ <http://www.medindia.net/news/Southern-Indian-State-to-Conduct-First-Ever-Census-of-Transgenders>.

³⁷⁶ <http://www.deccanherald.com/content/465345/govt-bring-policy-transgenders.html>.

Supreme Court of India. In 2008, gay 'pride parades' was held in five Indian cities like Bengaluru, Delhi, Indore, Kolkata and Pondicherry. These pride parades got huge support from common people, media, celebrity etc. One LGBT magazine and one gay magazine were published in 2009 and the publication of two magazines are continuing, those are '*Pink Pages*' and '*Bombay Dost*' respectively. In the same year another pride parades was held in Bhubaneswar, Delhi, Bengaluru and Chennai. Pride festivals were held in Mumbai in 2010 and 2011 respectively, where many LGBT films have been shown. In Madurai first LGBT Queer Rainbow festival was held in 2012 with demand to eradicate social discrimination faced by LGBT community. At the same time Kolkata Rainbow Pride festival was held in Kolkata. The first pride parade was held in Gujrat in 2013. In 2014 Delhi election, three political parties like Aam Aadmi Party, Indian National Congress and CPI(M) directly supported the LGBT community by demanding repeal of section 377 of IPC, while BJP was in favour of retaining section 377.

HUMAN RIGHTS & LGBT

India accepts that certain rights have always been understood by man to be basic such as the right to life and liberty³⁷⁷. If Human rights are inseparable from man, they should be equal in their application to all human beings at all places and at all times. These rights are fundamental to the very existence of mankind and not merely for the benefit of one class or one section of the society. Our Constitution reflects this position. The right to life and Individuals liberty is available to all people within its territory and not just its citizens. We have an outstanding Constitution and a plethora of sound laws and policies to uphold different dimensions of Human rights.³⁷⁸ The issues of individuals' rights, duties have remained the subject of discussion in every society in all periods of history and in all civilizations. Human rights as they are currently accepted by UNHRC remain primarily and unavoidably part of an intergovernmental process with inputs of varying degree from civil societies, academia and voluntary organizations. It is essentially a top-down process with legally constituted Governments and their institutions primarily responsible for promotion and protection of Human rights within their own sovereign jurisdiction. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human rights, which proclaims that "All human beings are born free and equal in dignity and rights." India's association with the

³⁷⁷ Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.

³⁷⁸ <https://www.hrw.org/topic/lgbt-rights>.

international Human rights Movement runs deep. Dr. Hansa Mehta - a freedom fighter, educator and social reformer represented India in the United Nations Human rights' Commission which drafted the Declaration. She made significant contributions to the drafting of the Universal Declaration of Human Rights, particularly on the subject of gender equality. India is a signatory to all important international conventions on Human Rights, such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and Conventions on Elimination of all forms of Racial Discrimination, Elimination of all forms of Discrimination against Women, Rights of the Child, and rights of Persons with Disabilities etc. The Government of India has also remained active in protection and promotion of Human Rights through National Human Rights Commission (NHRC). The Protection of Human Rights Act, which established the NHRC, is widely seen as model legislation and has been emulated by many other countries of the world.

The world community has accepted the fundamental and universal declaration of the Human Rights. Yet, the rights of LGBT have not gained recognition in several countries. Countries like India and others, are still hesitating to provide legal recognition to the rights of Gay, Lesbian and third gender to live with dignity.³⁷⁹ The Indian Penal Code Act 377 violates and is obstacle in providing the rights and reorganization to the marriages of the LGBT communities. In its verdict 2013, The Supreme Court of India said that statute - Section 377 of the Indian Penal Code - which outlaws sex "against the order of nature" is constitutionally valid. Conviction carries a fine and a maximum 10-year jail sentence³⁸⁰. The progressive citizen of Indian society have strongly criticized the Supreme Court's verdicts and demanded for the amendments of the Section 377 of the Indian Penal Code. Navi Pillay, Commissioner of UN High Commissioner, criticized the Supreme Court order in legalizing the ban on LGBT and also appealed from the Indian Parliament to take strong steps for the protection of LGBT rights. Therefore, The Government of India is making the mind to reconsider and amend the Indian Penal Act's section 377 in order to legalize the LGBT rights. While, large sections of liberal people in Indian society are in support for the recognition of LGBT rights, unprogressive section of Indian society- conservative, religious, traditional, still think and consider LGBT relations are unnatural, unethical, taboo and oppose the legalization of LGBT rights. Therefore

³⁷⁹ Same Sex Marriage Overview, as available on <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> as accessed on September 5, 2009 at 20:30 IST.

³⁸⁰ Don't dither on Section 377, as available on <http://www.hindu.com/2009/07/01/stories/2009070155550800.htm> as accessed on 7th July at 9:40 IST.

it is need to come forward the progressive people of every corner of the world in supports for the defending of the rights of LGBT persons, who are facing discrimination, stigmatization and threats reportedly from many parts of society. We know, “all cultures and civilizations in their traditions, customs, religions and beliefs share a common set of values,” the universal declaration of Human Rights resolution invokes a single, supposedly agreed-upon value system that steamrolls over diversity, ignores the dynamic nature of traditional practice and customary laws, and undermines decades of rights-respecting progress for women and members of the LGBT communities, among others. UN Secretary-General Ban Ki-moon said in the New York Human rights Watch Film Festival- June 2012, *“In all regions of the world, LGBT people suffer discrimination—at work, at home, at school, in all aspects of daily life.... No custom or tradition, no cultural values or religious beliefs, can justify depriving a human being of his or her rights.”* So, there is still much to be done to address the stigma and discrimination faced by LGBT communities.

Justice is the first principle of social institution. Should it then not be our responsibility and need duty, to give voice to those who continue to suffer and strive to seek for them both relief and justice? That is when Human Rights will begin to address human wrong.

INTERNATIONAL PERSPECTIVE

Laws affecting LGBT people vary greatly by country or territory—everything from legal recognition of same-sex marriage or other types of partnerships, to the death penalty as punishment for same-sex romantic/sexual activity or identity.

LGBT rights are considered human rights³⁸¹ and civil rights.³⁸² LGBT rights laws include, but are not limited to, the following:

- Allowing of men who have sex with men to donate blood.
- Government recognition of same-sex relationships (such as via same-sex marriage or similar unions).
- Allowing of LGBT adoption.
- Recognition of LGBT parenting.

³⁸¹ "About LGBT Human Rights". Amnesty International. Retrieved 29 March 2013.

³⁸² Becker, John (23 March 2012). "LGBT Rights Are Civil Rights". Huffington Post. Retrieved 29 March 2013.

- Anti-bullying legislation and student non-discrimination laws to protect LGBT children and/or students.
- Immigration equality laws.
- Anti-discrimination laws for employment and housing.
- Hate crime laws providing enhanced criminal penalties for prejudice-motivated violence against LGBT people.
- Equal age of consent laws.
- Equal access to assisted reproductive technology.
- Access to sex reassignment surgery and hormone replacement therapy.
- Legal recognition and accommodation of reassigned gender.
- Laws related to sexual orientation and military service.

After a lot of Legal³⁸³ & Social Struggle as of February 2014, seventeen countries, most of them located in the Americas and Western Europe, recognize same-sex marriage (SSM) and grant most of (if not all) the other rights listed above to its LGBT citizens.*

- **Year 2000: Netherlands:** Gay and lesbian couples, who are either citizens of the Netherlands or who have residency permits, are able to marry and adopt. This was the first country in the world to make same-sex marriages available.
- **2003: Belgium:** Same-sex couples, who are residents or citizens can marry, but cannot yet adopt.
- **2005: Spain:** The country legalized SSM in 2005-JUN.
- **2005: Canada:** The country legalized SSM in 2005-JUL-20. Because of Canada's closeness to the U.S. in terms of culture and geography, we have covered events leading up to SSM in detail.

³⁸³ Langemaat v. Minister of Safety and Security 1998 (7) SA 312 (T); National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) ('the National Coalition sodomy case'); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) ('the National Coalition immigration case'); Satchwell v President of South Africa 2002 (6) SA 1 (CC); Du Toit v Minister of Population and Welfare Development 2003 (2) SA 198 (CC); J v Minister of Home Affairs 2003 (5) SA 621 (CC).

* Years cited are when enabling legislation was passed. Most legislatures passed laws that only took effect months later.

- **2006: South Africa:** Their *Constitutional Court* - South Africa's highest court - ruled on 2005-DEC that same-sex marriages must be legalized within a year. On 2006-NOV-15, their legislature passed a law legalizing same-sex marriage, by a vote of 230 to 41 with three abstentions.
- **2008: Norway:** Enabling legislation was passed during 2008-JUN; since 2009, same-sex couples have been able to marry.
- **2009: Sweden:** Enabling legislation was overwhelmingly passed by Parliament on 2009-APR-01. It took effect on 2009-MAY-01.
- **2009: Mexico City:** The city became the first jurisdiction in Latin America to legalize SSM on 2009-DEC-21.
- **2009: Argentina:** Ushuaia, the southern-most city in the world saw the first SSM in Latin America. It is located in Tierra del Fuego province at the southern tip of Argentina.
- **2010: Portugal:** Amazingly, this country in which 97% of the population identifies with the Roman Catholic Church turned its back on the Church's teachings and legalized SSM. The first same-sex couple were married on JUN-07
- **2010: Iceland:** The first same-sex couple to be married was Prime Minister Johanna Sigurdardottir and her long-time female partner Jonina Leosdottir.
- **2010: Argentina:** By mid-July, both houses in the Government had passed a same-sex marriage bill amid intense opposition from the Roman Catholic Church and evangelical Christian groups. It was signed into law; same-sex marriages have been available since 2010-JUL-22.
- **2011-JUL: India:** "Savita, a 25 year old student at Choudhary Charan Singh University and her 20 year old wife Veena, 20, became the first same-sex couple married by a court in Haryana, close to New Delhi.
- **2013-MAY-Brazil:** Brazil's *National Council of Justice* ruled that notaries public must perform same-sex marriages, register same-sex marriages performed elsewhere, and

convert same-sex civil unions into marriages when requested. This decision effectively legalizes same-sex marriages across the country effective MAY-16.

- **2013-JUN:** The governments of three countries have approved SSM:
 - **France.**
 - **New Zealand.**
 - **Uruguay.**
- **2013-JUL:** Same-sex marriage was legalized in **England** and **Wales** and will be available on 2014-MAR-29.
- **2014-FEB:** Same-sex marriage was legalized in **Scotland**.³⁸⁴

Anti-LGBT laws include, but are not limited to, the following: sodomy laws penalizing consensual same-sex sexual activity with fines, jail terms, or the death penalty; anti-"lesbianism" laws; and higher ages of consent for same-sex activity.

In 2011, the United Nations Human Rights Council passed its first resolution recognizing LGBT rights, which was followed up with a report from the UN Human Rights Commission documenting violations of the rights of LGBT people, including hate crime, criminalization of homosexuality, and discrimination. Following up on the report, the UN Human Rights Commission urged all countries which had not yet done so to enact laws protecting basic LGBT rights.³⁸⁵³⁸⁶

As of June 2015, seventy three countries have laws criminalizing homosexuality, most of them located in Asia and Africa.

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, developed in 2006 by a group of LGBT experts in Yogyakarta, Indonesia in response to well-known examples of abuse, provides a universal

³⁸⁴ http://www.religioustolerance.org/hom_mar16.htm.

³⁸⁵ Jordans, Frank (17 June 2011). "U.N. Gay Rights Protection Resolution Passes, Hailed As 'Historic Moment'".

³⁸⁶ "UN issues first report on human rights of gay and lesbian people". United Nations. 15 December 2011.

guide to applying international human rights law to violations experienced by lesbians, gay men, bisexual and transgender people to ensure the universal reach of human rights protections.

Recently, India was among the 43 countries that voted in support of a Russian-drafted resolution that proposed removing benefits for same-sex partners of UN staff, but the resolution failed to pass in the General Assembly committee after 80 nations opposed it.³⁸⁷

Ban Ki Moon has been a strong proponent of equal rights for the LGBT community and had said that he is proud to stand for greater equality for all staff. In introducing the policy last year, the UN chief had called on all members of the UN family to unite in rejecting homophobia. Previously, a staff member's marital status was determined by the laws applicable in his or her country of nationality.

Under the new UN policy on the personal status of same-sex couples, which became effective on June 26 last year, the world body recognized all same-sex couples married in a country where it is legal, regardless of their nationality. About 40,000 UN staff across the world came under the purview of the policy.

It is extremely unfortunate that India should have voted against the UN granting the same privileges to same sex spouses of its staff as to spouses in heterosexual marriages. That it should be on the same side of this issue as countries like Saudi Arabia and Iran, known for their social conservatism, underlines the strangeness of the Indian government's position on the issue. This stance, of course, mirrors the attitude of most of our political class towards the issue of gay rights, which is evident from the fact that a law criminalizing homosexuality remains on the statute books more than a decade after the Law Commission had asked for it to be scrapped. We have consistently argued that a person's sexual orientation should be a matter of no concern to the state, which should only step in where sex - whether heterosexual or homosexual - is non-consensual and coercive.

CONCLUSION

Section 377 has become a weapon in the hands of the police to harass those who have alternative sexual orientations. The IPC which was drafted in the 19th century is bearing

³⁸⁷ <http://timesofindia.indiatimes.com/india/India-joined-Pakistan-42-others-in-a-vote-against-gay-rights-at-UN/articleshow/46686868.cms>.

Sections like 377 which are completely obsolete and repugnant to modern emerging trends. In an age where there is growing acceptance of the idea that LGBTs must be allowed to live in dignity and respect, it is shame that India cannot bring itself to legalize gay behavior.

It is evident, from aforesaid discussions, that homosexuality is a complex phenomenon endemic to all societies from the early days of their formation. Although, the practice of homosexuality may have been in minority, nevertheless, it has been a part of society. It can be said without hesitation that there is a pattern of discrimination against homosexuals which pervades most dimensions of our cultural life, and that is rooted in a heterocentric system that shapes our legal, economic, political, social, interpersonal, familial, historical, educational, and ecclesiastical institutions. The root cause of this pattern of discrimination is perhaps a reasoned system of bias regarding sexual orientation that places heterosexuality as the normative form of human sexuality and thereby connotes prejudice against anyone who falls outside of that form. The British amended the very same law they had once promulgated in India. Now sec. 377 seems to be outdated and a moral of a bygone era. In keeping with international trends in jurisprudence and legal discourse, it is important that our law is also brought in line with international standards and the section be repealed.

The mentality of the people needs to be changed. They have to start accepting that homosexuality is something that people are born with. The gay pride parades with the rainbow flags should not be looked upon with derision, as if it is an impact of globalization. Indian society will have to change so that not a single same sex person has to live in the closet nor has to marry someone out of the need to maintain heteronormativity. *Homosexuality does not destroy the honor of the family, but homophobia destroys the honor of the individual.*