



## VARIOUS ASPECTS OF DECRIMINALISING HOMOSEXUALITY IN INDIA

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### ABSTRACT:

*This paper seeks to discuss concept of homosexuality in India. Section 377 of the IPC (Indian Penal Code) is the only law in India that deals with homosexuality. This section makes homosexuals ipso facto criminals and directly violates their privacy, dignity and fundamental rights. Criminalization of homosexuality results in the violation of human rights of LGBT (Lesbian Gay Bisexual and Transgender) community as denying right of same sex marriage to this community leads to discrimination on the grounds of sex. Various conventions and judgments state Privacy is one of the basic rights of human. Unreasonable interference in consensual sexual activities between two adults of the same sex inside the four walls of house violates their Fundamental Rights particularly right to privacy and a person's choice of sexual accomplice is no business of the State to regulate on. The comparative study with other countries like England and Australia provide a conclusion for the need of modification of section 377 of the IPC in*

*India. Even England, the country on the basis of which laws in India were framed, no longer penalises homosexuality. The need of the hour is decriminalization of homosexuality and modification must be made in regressive section 377 of the IPC as it suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community and violates the constitutional protections provided by the constitution thereby declaring homosexuals as criminals.*

### INTRODUCTION:

The term homosexuality means "sexual attraction or the tendency to direct sexual desire toward another of the same sex."<sup>1</sup> It is consider as "Involving or characterized by sexual attraction between people of the same sex."<sup>2</sup>

Homosexuality, as a sexual orientation, is defined as "an enduring pattern of or disposition to experience sexual, affectional, or romantic attractions primarily to" people of the same sex, it also refers to an individual's sense of personal and social identity based on those attractions, behaviours expressing them, and membership in a community of others who share them." Homosexuality is not a matter of individual choice. It depends on ones sexual orientation.

Section 377<sup>3</sup> of the IPC (Indian Penal Code, 1860) is the only law in India per

any man, woman or animal, shall be punished with 1[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.

<sup>1</sup> Merriam-Webster dictionary

<sup>2</sup> The Oxford Dictionary

<sup>3</sup> Unnatural offences.—whoever voluntarily has carnal intercourse against the order of nature with



se dealing with or somewhat touching the concept of homosexuality. Unlike rape, Section 377 does not talk about ‘force’ and/or ‘coercion’ and hence even consensual sexual intercourse ‘against the order of nature’ is punishable under Section 377. This provision punishes homosexuality ipso facto. Section 377's legislative objective is based upon stereotypes and misunderstanding that are outmoded and enjoys no historical or logical rationale which render it arbitrary and unreasonable.

Section 377 of the IPC dating back to 1860, introduced during the British rule of India, criminalizes sexual activities “against the order of nature”, including homosexual sexual activities. Prior to that, sexual activities, including amongst homosexuals, were not penalized in India. It is a law of the colonial era, that has very successfully distorted the way Indians look at alternate sexuality, has been done away with in its country of origin but it still haunts the sexual minorities in India.

Indian Penal Code was drafted by Lord Macaulay and introduced in 1861 in British India. Section 377 IPC is contained in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body".

In India for the first time question of legality of section 377 criminalising homosexuality was raised in the case of

Delhi High Court, *Naz Foundation v. Government of NCT of Delhi (2009)*<sup>4</sup> where it was declared that Section 377 of the IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21 [Right to Protection of Life and Personal Liberty], 14 [Right to Equality before Law] and 15 [Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth] of the Constitution .

The above judgment brought a hope for LGBT community, but this hope was for only a short period of time as the Supreme court overturned the above mentioned judgment in *Suresh Kumar Koushal v. Naz Foundation (2013)*<sup>5</sup> case, set aside the Delhi High Court judgment and said that homosexuality or unnatural sex between two consenting adults under Section 377 of IPC is illegal and will continue to be an offense.

#### **RIGHT TO PRIVACY (A FUNDAMENTAL RIGHT) AND DECRIMINALISATION OF HOMOSEXUALITY:**

‘Privacy’ is ‘a state in which one is not observed or disturbed by other people.’<sup>6</sup> It is ‘the quality or state of being apart from company or observation.’

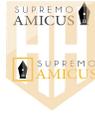
The relation between concept of privacy and homosexuality has been raised numerous times while taking about the

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

<sup>4</sup> WP(C) No.7455/2001

<sup>5</sup> Civil Appeal No. 10972 of 2013

<sup>6</sup> As per Oxford dictionary



issue of decriminalisation of homosexuality. For the enforcement of 377, it would be, the police as law enforcement agents of the state to actually catch two men having sex in the privacy of their bedroom or their other private space. Thus, for the enforcement of this section “the reach of the prosecutory powers of the law must go into the sacred sphere of the home”.

Now the question arises why Privacy for citizen especially homosexuals is the need of hour. Firstly, privacy has come to be viewed as central to one’s identity, dignity, sense of self and autonomy. In this view privacy is a pre-requisite for self-development.

Also, an integral part of such individual/decisional autonomy is the ability to make one’s own choices, develop and determine one’s personality and identity, and have intimacy and meaningful interpersonal relations. At its root, this is the freedom to express one’s identity without fear.

Right to privacy has been recognized all around the globe. Some conventions like. Article 12 of the Universal Declaration of Human Rights (1948)<sup>7</sup> and Article 17 of the International Covenant on Civil and Political Rights<sup>8</sup> (to which India is a party) have specifically stated that, “No one shall be subjected to arbitrary or unlawful interference with his privacy,

<sup>7</sup> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

family, home and correspondence, nor to unlawful attacks on his honour and reputation.”

In the case of *Olmstead v. United States*<sup>9</sup>, was a case of wire-tapping or electronic surveillance and where there was no actual physical invasion, Justice Brandeis, stated that the fourth amendment protected the right to privacy which meant “the right to be let alone”, and its purpose was “to secure conditions favourable to the pursuit of happiness”, while recognising “the significance of man’s spiritual nature, of his feelings and intellect the right sought “to protect Americans in their beliefs, their thoughts, their emotions and their sensations” (page 478). His dissenting opinion came to be accepted as law 4 decades later.

In the case of *Jane Roe v. Wade*<sup>10</sup>, the Court said that although the Constitution of the USA does not explicitly mention any right of privacy, the United States Supreme Court recognised that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

<sup>8</sup> individual liberty, in the form of the freedoms of movement, thought, conscience and religion, speech, association and assembly, family rights, the right to a nationality, and the [right to privacy](#)

<sup>9</sup> 277 US 438 (1928)

<sup>10</sup> 410 US 113 (1973 )



In *Griswold v. Connecticut*<sup>11</sup>, the U.S. Supreme Court was cautious to highlight the importance of privacy in the peculiar sphere of marital bedrooms in the context of birth control. In *Lawrence v. Texas*<sup>12</sup>, when confronted with the question of the legality of certain sexual conduct between persons of the same sex, the court held that no “majoritarian sexual morality” could override legitimate privacy interests.

It was held by Ackermann J. in the case of the National Coalition for Gay and Lesbian Equality v. the Minister of Justice<sup>13</sup>, decided by Constitutional Court of South Africa on 9th October, 1998 that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.

Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Choosing a

partner for sexual relations is a vital aspect of individual's life and this right cannot be taken away by state on the grounds of lack of acceptance in Indian society. Intruding with the intimate and personal sphere of home or bedroom of an individual is infringing the right to privacy. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

In *Maneka Gandhi v Union of India*<sup>14</sup>, the Court reiterated that the term ‘personal liberty’ is of “the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man.”, and thus Sexual orientation and sexual activity is a matter of one's privacy.

*In the case of Naz Foundation v Government Of Nct Of Delhi (2009)* it was held that, ‘the sphere of privacy allows person to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her own choice, and fulfil all legitimate goals that he/she may set. In the Indian Constitution, the right to live with dignity and the right of privacy are recognised as dimensions of Article 21. Section 377 of IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. It was also held that this

<sup>11</sup> 381 U.S. 479 (1965)

<sup>12</sup> 539 U.S. 558 (2003)

<sup>13</sup> 1998 (12) BCLR 1517 (CC)

<sup>14</sup> 1978 AIR 597



*section infringes rights guaranteed under article 14 and 15 of the Indian constitution and it was stated that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter.'* However this judgment was overturned later on by the apex court on some unreasonable grounds.

Subsequently in *NALSA v. Union of India*<sup>15</sup>, the Court said that the value of privacy is fundamental to those of the transgender community.

Later the SC in its 547-page privacy judgment in the case of *Justice Puttasawmy v Union of India*<sup>16</sup> observed that right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution. The court noted that sexual orientation is an essential attribute of privacy and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Though these observations made by the SC are obiter dicta, in other words not legally binding, but could have a significant impact when the court hears the curative petition challenging Section 377.

Thus, consensual sexual activities between two adults of the same sex should not be regulated by a law as it violates their Fundamental Rights particularly right to privacy and a person's choice of sexual accomplice is no business of the State to regulate on. Otherwise, the draconian laws like Section 377 will be abused to brutalize and torture the persons belonging to the gay community.

### **HOMOSEXUALITY AND HUMAN RIGHTS**

Homosexuality is considered as the quality or characteristic of being sexually attracted solely to people of one's own sex<sup>17</sup>. It is a sexual attraction or tendency to direct sexual desire toward another of the same sex<sup>18</sup>. It is never legal to discriminate against lesbian, gay, bisexual, transgender or intersex people. The right to equality and non-discrimination are core principles of human rights, enriched in the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and human rights treaties.

The equality and non-discrimination guarantee provided by international human rights law applies to all people, regardless of sex, sexual orientation and gender identity or "other status."<sup>19</sup> There

<sup>15</sup> WP (Civil) No 604 of 2013

<sup>16</sup> WRIT PETITION (CIVIL) NO 494 OF 2012

<sup>17</sup> Oxford dictionary online, available at <https://en.oxforddictionaries.com/definition/homosexuality>.

<sup>18</sup> Merriam-Webster online, available at <https://www.merriam-webster.com/dictionary/homosexuality>.

<sup>19</sup> Interpretation of the opening words of Universal Declaration of Human Rights which read as "All human beings are born free and equal in dignity and rights."



is no hidden exemption clause, in any of human treaties that might allow a State to guarantee full rights to some but withhold them from others purely on the basis of sexual orientation and gender identity, it is a very settled principle that each and every one is equal if some rights are available to others than it should be available to each and every one irrespective of their sex. Moreover, United Nations human rights treaty bodies have confirmed that sexual orientation and gender identity are included among prohibited grounds of discrimination under international human rights law. This means it is unlawful to make any distinction of people's rights based on the fact that they are lesbian, gay, bisexual or transgender (LGBT), just as it is unlawful to do so based on skin colour, race, sex, religion or any other status. This position has been confirmed repeatedly in decisions and general guidance issued by several treaty bodies, such as the United Nations Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, and the Committee on the Elimination of Discrimination against Women.

The European Union is at the forefront of fighting for the equality of LGBT; their rights are associated with human rights, which is a fundamental European contribution. According to Article 8 of the European Convention on Human Rights, each individual's privacy is defined as an autonomous zone of liberty, each and every one of us can do in their private life what they want to do, as long

as we do not harm anyone else. This way, not only LGBT, but everyone is legally protected from being prosecuted by the state for their preferences, hobbies and other activities that are connected to their private life.

The following international and regional treaties determine standards for the protection of lesbian, gay, bisexual and transgendered persons.

**International Covenant on Civil and Political Rights (1996) (article 2 and 26):**

For sexual orientation the Covenant –the main international treaty on civil and political rights-is important because in 1994, in the case Toonen vs. Australia, the Human Rights Committee held that the references to “sex” in Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gay and bisexuals.

[Convention for the Protection of Human Rights and Fundamental Freedoms \(1949\)](#) (article 8 and 14) Sexual orientation is not mentioned explicitly in any of the provisions of the Convention. Nonetheless, the relevance of the Convention (abbreviated as ECHR) was established in a series of cases where the [European Court of Human](#)



[Rights](#) found that discrimination in the criminal law regarding consenting relations between adults in private is contrary to the right to respect for private life in article 8 ECHR (*Dudgeon v UK*<sup>20</sup>, *Norris v Ireland*, 1988, *Modinos v Cyprus*, 1993). The court was the first international body to find that sexual orientation criminal laws violate human rights and has the longest and largest jurisprudence in addressing sexual orientation issues. The case law also includes an 1997 decision of the European Commission on Human Rights (former first body for individual complaints) that a higher age of consent for male homosexuals acts from that for heterosexual acts was discriminatory treatment contrary to Article 14 ECHR in respect of the enjoyment of the right to privacy (*Sutherland v UK*).

Regarding sexual orientation discrimination in the military services, the Court held that the ban on homosexuals in the military was in breach of Article 8 ECHR (*Lustig-Prean and Beckett v UK*, 2000). Also in 2000, the Court held that, through the conviction of a man for having homosexual group sex in private, a State is in violation of the Convention (*A. D. T v UK*).

The Court also held in *Salgueiro da Silva Mouta v Portugal* that a homosexual father cannot be denied custody of his child based on his (homo)sexual orientation, the matter infringing upon the father's right to family life in Article

8 ECHR. The Court confirmed that Article 14 ECHR (non discrimination) was to be interpreted as including sexual orientation.

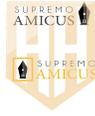
### European Union (EU):

Several European Union laws offer protection from discrimination based on sexual orientation and additional requirements refer to the human rights situation in accession countries.

The founding treaties on the European Union were amended in the [Treaty of Amsterdam](#) to enable European Union to fight sexual orientation discrimination. On May 4, 1999 the following provision in Article 13 European Committee Treaty entered into force in the first ever international treaty to explicitly mention and protect sexual orientation: "[...] the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

In December 2000, the Council adopted a (binding) general [Framework Directive](#) on equal treatment in employment prohibiting direct and indirect discrimination on the grounds of religion or belief, age, disability or sexual orientation. The Framework Directive is binding upon the current member states, while the accession states are required to

<sup>20</sup> [1981] ECHR 5



have completed national implementation of the Directive before joining the EU.

[The EU Charter of Fundamental Rights](#) is meant to be the EU code of fundamental rights and was proclaimed in Nice in December 2000. The Charter currently is a non binding document but is important since it expresses the European Union vision on human rights. For lesbians, gay and bisexuals the Charter is important because of the explicit non-discrimination provisions in Article 21 (1): "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited".

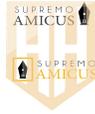
[The European Parliament \(EP\)](#) passed several (non binding) resolutions on human rights and sexual orientation, the first, adopted in 1984, calling for an end to work related discrimination on the basis of sexual orientation. In 1994, the "Roth" Report detailed the variety of discrimination against lesbians and gays in the EU and the Parliament adopted a recommendation on the abolition of all forms of sexual orientation discrimination. Although its power is limited, EP can exert a significant political influence on the Council and the Commission as in 1999 it requested them "to raise the question of discrimination against homosexuals during membership negotiations, where necessary". Regarding the enlargement of the

European Union, the EP adopted in 1998 a resolution stating that it "will not give its consent to the accession of any country that, through its legislation or policies violates the human rights of lesbians and gay men".

European Union law regards discrimination against [transgender](#) persons as a form of sex discrimination. This principle was established by the [Court of Justice](#) in the 1996 case of *P v S and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex. (Case C-13/94, *P v S and Cornwall County Council*<sup>21</sup>). "Gender identity discrimination" is the term now generally used to describe discrimination against transgender persons.

In November 2006, a group of 29 international human rights experts, including a former United Nations High Commissioner for Human Rights, UN independent experts, current and former members of human rights treaty bodies, judges, academics and human rights defenders, met in Yogyakarta, Indonesia, and affirmed a set of principles drawing on legally binding international human rights law to address the application of a broad range of international human rights standards to issues of sexual orientation and gender identity. The Yogyakarta Principles on the application of International Human Rights Law in Relation to Sexual Orientation and

<sup>21</sup> [1996] ECR I-2143



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

It was agreed upon-

The right to freedom from criminalisation and sanction on the basis of sexual orientation, gender identity, gender expression, or sex characteristics- Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation gender identity, gender expression or sex characteristics.<sup>22</sup>

**A COMPARATIVE ANALYSIS OF HOMOSEXUALITY WITH OTHER COUNTRIES:**

In India whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.<sup>23</sup>

Naz Foundation filed a Public Interest Litigation (PIL) in December 2002 to challenge IPC Section 377 in the Delhi High Court. On 4<sup>th</sup> July 2008, the Delhi High Court noted that there was “nothing unusual” in holding a gay rally, something which is common outside in India.

Subsequently on 2<sup>nd</sup> July 2009, in the case of Naz Foundation v. National Capital Territory of Delhi, the High Court of Delhi struck down much of s.377 of the IPC as being unconstitutional, however; on 11<sup>th</sup> December 2013, Supreme Court sets aside the 2009 Delhi High Court order which had decriminalised gay sex.

Indian Penal Code was drafted by Lord Maculay and introduced in 1861 in British India. Section 377 is based on Common law<sup>24</sup>, at that time laws were made to suppress the voice of minority.

**United Kingdom:**

Homosexuality had been an offence in United Kingdom, until the passage of the Sexual Offences Act 1967. It is an Act of Parliament in the United Kingdom<sup>25</sup> which decriminalised homosexual acts in private between two men, both of whom had to have attained the age of 21. It was only applicable to England and Wales and did not cover the Merchant Navy or the Armed Forces. Homosexual acts were decriminalised in Scotland by Criminal Justice (Scotland) Act 1980, which took effect on 1 February 1981, and in Northern Ireland by the Homosexual Offences (Northern Ireland) Order 1982.

**The United States of America:**

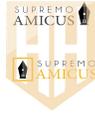
A significant move regarding LGBT rights have come from the United States Supreme Court. In four landmark rulings between the years 1996 and 2015, the

<sup>22</sup> 33<sup>rd</sup> principle of THE YOGARTA PRINCIPLE PLUS 10 available at [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

<sup>23</sup> Section 377 of Indian Penal Code 1860

<sup>24</sup> The ancient law of England based upon the societal customs, judgements and decrees of the court.

<sup>25</sup> 1967 c.60



Supreme Court invalidated a state law banning protected class recognition based upon homosexuality, struck down sodomy laws nationwide, struck down Section 3 of the Defence of Marriage Act, and made same-sex marriage legal nationwide.

In case of *Obergefell v. Hodges*<sup>26</sup>, Supreme Court of the United States ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection clause of the fourteenth Amendment to the United States Constitution. Decided on June 26, 2015, this case overturned *Baker*<sup>27</sup> and requires all fifty states must lawfully perform and recognize the marriages of same sex couples on the same terms and conditions as the marriages of opposites-sex couples.

#### Australia:

[Australia](#) inherited the [United Kingdom's](#) sodomy laws on white [colonisation](#) after 1788. These were retained in the criminal codes passed by the various colonial parliaments during the 19th century, and by the state parliaments after Federation.

Following the [Wolfenden report](#), the Dunstan Labor government in [South Australia](#) introduced a "consenting adults in private" defence in 1972. This defence was initiated as a bill by [Murray Hill](#), father of former Defence Minister [Robert Hill](#), and repealed the state's sodomy law in 1975. The Campaign Against Moral

Persecution during the 1970s raised the profile and acceptance of Australia's gay and [lesbian](#) communities, and other states and territories repealed their laws between 1976 and 1990. The exceptions were Tasmania and Queensland.

Male homosexuality (i.e., sodomy) was decriminalised in South Australia in 1975, and in the [Australian Capital Territory](#) in 1976, followed by [New South Wales](#) and the Northern Territory in 1984. Western Australia did the same in 1989. The states and territories that retained different [ages of consent](#) or other vestiges of sodomy laws later began to repeal them: Western Australia did so in 2002, and New South Wales and the Northern Territory did so in 2003. Tasmania decriminalised sodomy in 1997 following the High Court case *Croome v Tasmania*<sup>28</sup>.

#### Positive developments at international level (Situation in other countries)<sup>29</sup>:

In 1986 Denmark equated homosexual couples with married ones concerning the right of succession.

In 1989 the Irish Parliament adopted a "Prohibition to Incitement to Hatred Act" covering hate speech against homosexuals.

In May 1989 the Danish Parliament enacted a "law on the registered partnership" of homosexual couples. It stipulates equal rights with one

<sup>26</sup> 83 U.S.L.W. 4592

<sup>27</sup> [1999] 2 SCR 817

<sup>28</sup> 191 CLR 119

<sup>29</sup> Available at

<http://www.legalservicesindia.com/articles/h1om o.htm>



exception: same-sex couples are not allowed to adopt children together.

In 1991 the total ban on homosexual relations was abolished in the Ukraine.

In 1992 a number of Dutch local authorities started accepting the official registration of same-sex partnerships. In October 1993 a bill was introduced in parliament equalizing legal protection for "registered partners" vis-vis married couples.

In 1990 and 1992 respectively, Estonia and Latvia abolished laws penalizing homosexuality.

In June 1992 the German "Land" Brandenburg enacted a new Constitution emphasizing recognition of non-marriage partnerships by the state. In 1993 the "Land" Berlin included sexual identity as a non-discrimination criterion in its Constitution.

In Germany same-sex couples who were denied the right to marry have appealed at the Supreme Courts. Judges interpret the right to marry as an exclusive right for heterosexuals (while family law does not specify gender). In its decision of October 4, 1993 the Constitutional Court upheld this view and ruled the appeal inadmissible, while emphasizing the task for the legislative power to bring about legal protection for same-sex partnerships.

In 1992 the total ban on homosexuality was abolished in Gibraltar and the Isle of

Man (both under UK Home Office jurisdiction).

In spring 1993, the Norwegian parliament adopted the same-sex partnership law based on the Danish one.

France, Ireland and The Netherlands have provisions against discrimination of gays and lesbians at the workplace.

In April 1993 the Russian Parliament enacted a new Penal Code which no longer includes the prohibition of homosexuality.

Lithuania which became member of the CoE in May 1993 repealed the ban on homosexuality one month after its admission.

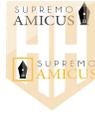
In June 1993, the Irish parliament abolished the law prohibiting male homosexuality and simultaneously, set an equal age of consent at 17.

In autumn 1993 the French government adopted a law directing insurance companies to accept joint insurance coverage for non-married couples.

In October 1993, the "Unfair Dismissal Act" in Ireland was extended to include the prohibition of discriminating treatment on grounds of sexual orientation.

In November 1993 the parliament of the German free state Thuringia adopted a new Constitution prohibiting discrimination on grounds of sexual





orientation - pending public approval by a referendum in late 1994.

The Irish Parliament is planning to establish an Equality Commission to monitor all forms of discrimination against homosexuals.

In June 1994, the Swedish parliament adopted a partnership law based on the Danish and Norwegian model.

In August 1994, the total ban on homosexual relations was repealed in Serbia (incl. Kosovo).

In January 1995 homosexuality was decriminalized in Albania.

A bill was introduced in the Cyprus parliament in January 1995 to abolish the ban on homosexuality.

On 15 June 1995 the parliament of Moldova abolished the ban on homosexuality.

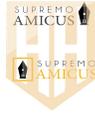
### CONCLUSION:

Justice Kennedy referring to the impact of anti-sodomy laws on the lives of gays, lesbians and transgender in Lawrence stated that: "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime."

The Indian courts need to recognise that they cannot permit the state to continue to demean the existence of people with same sex desires in this country. Section 377 with its broader shadow of criminality is the biggest enemy to the dignity and humanity of a substantial minority of Indian citizens. But there are

many grounds that are put forward by the law making authority of the country like this decriminalisation will open flood gates for delinquent behaviour, public morality and public decency, also many child right activists argue that section 377 is necessary to tackle the cases of child abuse. But after the enactment of the Protection of Children from Sexual Offences ( POSCO ) Act 2012, there is no need of section 377 in child sexual abuse cases as the POSCO act is more child friendly and much more stringent.

Also the section 377 suffers from arbitrariness and ambiguity as it distinguishes between carnal intercourse which is against the order of nature and not against the order of nature unlike rape this section ,does not talk about 'force' and/or 'coercion' and hence even consensual sexual intercourse' against the order of nature is punishable under section 377. Also the words used in this section 'natural' and 'order of nature' are not defined and has left it to the discretion of the courts, leading to a lot of controversy. Further, this section does not differentiate between consensual and coercive sex. Due to an absence of legislative guidance it is left to the Court to decide what constitutes against the order of nature. The test in this regard has shifted from acts without possibility of procreation to imitative acts to acts amounting to sexual perversity. The object of the classification which seeks to enforce Victorian notion of sexual morality which included only procreative sex is unreasonable as condemnation of non procreative sex is no longer a legitimate state object in today's era.



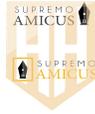
Further for a secular country like India what is forbidden in religion need not to be prohibited in law. A legal wrong is necessarily a moral wrong but vice versa is not correct. Thus, morality cannot be grounded to restrict the fundamental rights of the citizens of the country.

The courts need to acknowledge that by decriminalising homosexuality they will not permit a mere sexual activity, but decriminalise the lives of actual citizens who are connected to that sexual act. The public benefits of this decriminalisation would start with a sense of self-acceptance, comfort, confidence and evolving pride among gays, bisexuals, lesbians, transgender, hijras – all of whom are in some way or the other caught within the tentacles of section 377. Decriminalisation of section 377 will create a space for homosexuals to interact with the rest of the civil society, in a relatively more equal position.

The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality. Thus neglecting the rights a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender is not a sustainable basis to deny the right to privacy.

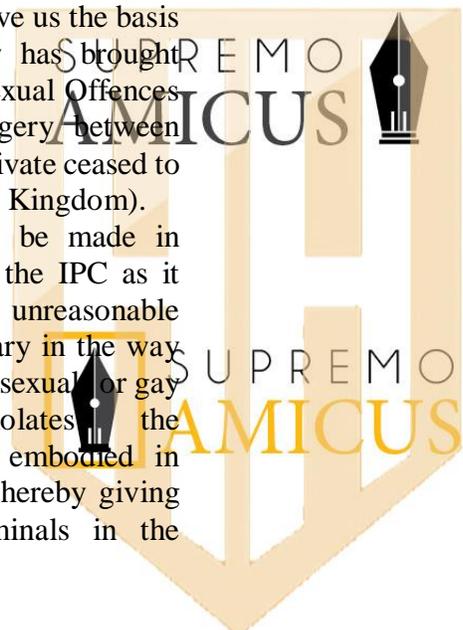
Thus it is the need of hour for the legislature to take up issue of decriminalization of homosexuality on a serious note. The diligence of the parliament in which is undisputedly the representative body of the people can be seen by not considering the 172nd law commission report submitted by chairman B P Jeevan Reddy on March 25, 2000 seriously. In the 172nd report, the Law Commission of India has recommended deletion of Section 377 IPC, while focusing on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and *inter alia*, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC focusing on the elements of will and consent to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not. Conclusively the Section 377 IPC in the opinion of the Commission, deserves to be deleted in the light of recommended amendments.

Finally, the loss of privacy can lead to discrimination and denial of opportunities, leaving many amongst the LGBTQI community on the margins of society. The Supreme Court was cognizant of this in its judgment in *NALSA*, concerning transgender persons, where it observed “non-recognition of Hijras/ transgender persons denies them equal protection of law ... thereby leaving them extremely vulnerable to harassment, violence and sexual assault.”



The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities. The right to privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. One's sexual orientation is undoubtedly an attribute of privacy. As far as the private affair of an individual is concerned, within the four corners of the house, nobody has the right to interfere into it. Everybody has the right to lead the life they want.

Even the country which gave us the basis of most of our law now has brought reforms in the nature of Sexual Offences Act, 1967 (whereby buggery between two consenting adults in private ceased to be an offence in the United Kingdom). Thus, modifications must be made in regressive section 377 of the IPC as it suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexual or gay community and violates the constitutional protections embodied in Articles 14, 19 and 21<sup>30</sup> thereby giving them unjust tag of criminals in the society.



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<sup>30</sup> Article 14 : Right to equality;  
Article 19 : Right to Freedom;

Article 21 : Right to Life and Liberty of the  
Indian Constitution