SECTION 377 AND AFTERMATH THE KS PUTTASWAMY CASE

By *Pooja Yadav and Akriti Sonwani*
From *National Law Institute University, Bhopal*

Abstract

It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. The rights of the lesbian, gay, bisexual and transgender population cannot also be construed to be so-called rights. They are real rights. The purpose of this research is to study the impact of the section 377 in India, introduced in the year 1861 by the British government which criminalizes sexual activity done in an unnatural way even done with the consent of the person involved in such an activity. This study shows that how section 377 is not only inconsistent to the current scenario but is also unconstitutional in its nature as violating the fundamental rights of the minuscule class of the society. The research is an analysis of the said law, its application and impact on the homosexual class of the society restricting their development as a human being; mentally, physically, economically and socially. This paper looks at the history of this legislation, and examines how vague it is, the definition of what constitutes "natural" and the challenge upon its constitutional validity, and the reasons given by the Hon'ble High Court of Delhi and the Supreme Court of India. The research paper analyzes the impact of the decision of KS Puttaswamy case on the homosexual community in terms of their right to privacy.

SECTION 377 AND AFTERMATH THE KS PUTTASWAMY CASE

In India, so far, no such progressive changes have taken place as regards social and legal recognition and homosexuals remain victims of violence in different forms supported by the state and society. In India from a scattered group of a few hundred, homosexuals are at present hundred million strong and growing community evolving its own hip and happenings. These Indian gays are talking live in chat rooms, looking for soul mates, falling in love, having sex on the net and crossing cities to be with each other in real world.[1] This shows that homosexual relationships are not unheard of in India, but they generally exist in the country's larger cities where people can be more open about their sexuality. [2] In recent past, the homosexual community of Calcutta, Mumbai and Bangalore also hosted the gay pride march.[3] All the above instances show that the homosexual community in India is

[1]http://www.ilga.info/index.html
[2]BBC news article dated 29 May 2001
[3]findarticles.com/p/articles/mi_m2065/is_n1_v50/ai_20344099/pg_4 - 28k

visible, and is gradually becoming vocal in their demand.[4]

The existence of Section 377 raises fundamental questions. Why should someone's dignity and privacy be undermined by their sexual preference? Why should someone's fundamental life choices be conditioned by other people's prejudice, ignorance, and stigmatization? Why should public health be compromised by an archaic and pedantic notion of public morality? And finally, why should a sizeable population of Indians (or even a "minuscule minority") be deemed criminals in the eyes of the law, simply for being themselves?

At the outset though, it is important to understand why privacy is particularly important to the LGBTQI community. First, 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 or, as Cohen puts it, a shorthand for "breathing space". Section 377 denies a person the right to full personhood, by going against the constitutional values of dignity, fraternity, and inclusiveness.Second, 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, thus, it is the freedom to express one's identity without fear.Third, the existence of the law, regardless of its exercise, causes a chilling effect on the true expression of one's identity. It encourages anti-gay violence and facilitates harassment, blackmail, and exploitation by the police and larger society. As noted by the Supreme Court sexual orientation is an essential component of identity, whose fulfillment is hindered when there is a loss of privacy and dignity.

What is 377?

377 of the Indian Penal Code criminalizes any "unnatural" offences with an imprisonment for life or extending to ten years, and a fine. It draws a parallel from laws prohibiting sodomy and bestiality in England, consent being wholly immaterial. India has an anti-sodomy provision that is Section 377 of the Indian Penal Code. This section has been included in a Chapter of the Indian Penal Code titled 'Of Offences to the Human Body'. The sub-chapter in which Section 377 is located is titled 'Of Unnatural Offences' Sec 377 of IPC states that:

> 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. Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.[1]. The ambit of Section 377, extends to any sexual union involving penile insertion. As evident from the language of this section, consent is wholly immaterial in the case of unnatural offences and the party consenting would be equally liable as an abettor. Thus, even consensual sexual acts such as fellatio and anal penetration may be punishable under

[4]Arvind Narain, *Queer: Despised Sexuality, law and Social Change* (Books for Change, 2004).

this law.The question arises what are these unnatural offences? [5] This section is very vague as what is against the order of nature is not possible to define objectively. What is natural and what is not is a subject of debate and has led to much confusion. As per this section, homosexuality is construed as an unnatural offence as it is considered to be against the order of nature. This has led to many controversies and has led to questions regarding the constitutional validity of this section. Thus, in order to determine the constitutional validity of this section and the reasons for its incorporation in the IPC it is important to look at its historical basis.

Natural v. unnatural

The Black's law dictionary defines natural as (1) "A fundamental quality that distinguishes one thing from another; the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something".To determine what is natural, a functional basis is cited which basically means that every instrument or organ of the body has a particular function to perform, and therefore, using such an organ for a purpose inconsistent with its principal function is unnatural.[6] As per this logic, every form of sex other than penile-vaginal will be considered as unnatural. The same logic is used to denounce anything other than procreative sex as unnatural. This logic though prima facie illogical has been endorsed by courts in various cases. In *Khanu v Emperor*[7] it was held that "the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible". The courts in India have interpreted the term "carnal intercourse against the order of nature" so broadly that it now includes from oral and anal sex to penetration into artificial orifices such as folded palms or between thighs. Such a wide application of section 377 where the language itself is not very clear has led to the arbitrary application of the law and thus questions were raised regarding the constitutional validity of this section. Apart from this, section 377 clearly makes homosexuality illegal on the ground that it is against the order of nature. This has also led to various controversies in view of recognition of right to freedom as a fundamental human right, it is considered world over that criminalization of homosexual acts is a clear violation of right to privacy[8] In view of the arbitrariness of section 377 and violation of basic fundamental rights the constitutional validity of this section was challenged in the court. Lord Macaulay drafted the Indian Penal Code and introduced it in British India in 1861[9] at that time; moral standards largely

[5] Black's Law Dictionary 750 (9th ed. 2009).

[6] See Burton Leiser, Homosexuality and the Unnaturalness Argument in SEX, MORALITY AND THE LAW 44 (Gruen & Panichas eds., 1996)

[7] AIR 1925 Sind 286

[8] KD Gaur , Indian Penal Code 618(3rd ed. Universal Law Publ'g co Pvt Ltd. 2013).

[9] David Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the*

based on religious views (particularly Judeo-Christian beliefs) governed the inclusion of many laws. Thus, sodomy was criminalized because, according toJudeo-Christian beliefs, sexual intercourse for non-procreative purposes was 'against the order of nature'[10] Section 377 reflects these beliefs and codifies them as part of Indian law.

Section 377, since its conception, has been the subject of changing judicial interpretation in India. Different tests have been prescribed over time to penalize crimes under this Section. Initially, in cases such as *Khanu* v. *Emperor*, [11]the court held that the test to determine whether carnal intercourse is against the order of nature is to see whether the sexual act is performed without the possibility of reproduction. Later cases such as *Lohana Vasantlal Devchand* v. *State* [12] and *Calvin Francis* v. *Orissa* [13] arrived at contradictory judgments as to whether oral sex fell within the ambit of Section 377. In *Calvin Francis*, the Court made its judgment using the guiding conditions of 'sexual perversity' and 'abnormal sexual satisfaction'. Subsequently, in *Fazal Rab Choudhary* v. *State of Bihar*,[14] the Court held that for a crime to be punishable under Section 377, it would have to indicate a level of 'sexual perversity'. Therefore, the first test described in *Khanu* in order to determine whether sexual acts were against the order of nature was based on considerations of the possibility of procreation, whereas the later test described in *Calvin Francis* and *Fazal RabChoudhary* was based on considerations of sexual perversity. The Court held that the petition fell within the ambit of Section 377 and the defendant would have to face trial. The determination of the meaning of the term 'carnal intercourse against the order of nature' has been a matter of substantial judicial concern. The meaning of Section 377 was restricted to anal sex initially in 1884; it was expanded to include oral sex by 1935, and later was broadened further to include thigh sex. The absence of a consent-based distinction in the wording of the section has equated homosexual sex with rape and equated homosexuality with sexual perversity.

INDIA AND HOMOSEXUALITY

Legal Status of Homosexuals in India

Section 377 of the Indian Penal Code (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India, this Law relating to homosexuality was adopted from the British penal code dating to 19th century. Similarly,section 292 of IPC refers to obscenity and there is ample scope to include homosexuality under this section. Also, section 294 of Indian Penal Code, which penalizes any kind of "obscene behavior in public", is also used against gay men. It is important to note here that in

Nineteenth Century, 513-557, and 32(3) Modern Asian Studies (1998).

[10] Siddhartha Narrain, *The Queer Case of Section 377* (Feb. 16, 2012), Sarai Reader 2005: Bare Acts 466. http://www.sarai.net/publications/readers/05-bare-acts/06_siddharth.pdf

[11] AIR 1925 Sind 286

[12]AIR 1698 Guj 255

[13] 24. 1992 (2) Crimes 455

[14]AIR 1983 SC 32

England the offence of homosexuality between consenting partners has been abolished by the Sexual Offenders Act 1967 (that is in the country of origin of this law) whereas in India, the consent is quite immaterial for constituting an offence as defined under this section.[15] Thus in India, it is primarily section 377 which explains and defines unnatural offences. [16] It is this section which makes Homosexuality illegal with life imprisonment or with imprisonment for ten years with fine.

Cases and Sentence

In the history of the statute from 1860 to 1992 there were only 30 cases in the High Courts and Supreme Court. Out of these 30 cases, 18 were non-consensual, four were consensual of which three were before 1940 and eight were unspecified and 15 out of 30 cases registered were assault on minors.[17]In a judgment(*Fazal Rab Vs State of Bihar*) the Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy.[18] The Supreme Court in 1983 observed that: 'the offence is one under Sec. 377, IPC which implies sexual perversity.[19] Considering the consent of the boy, the Supreme Court reduced the sentence from three years of rigorous imprisonment to six months rigorous imprisonment.[20] All these instances indicate that the actual sentence imposed under this section is not usually heavy[21]

Mainstream Reaction

Indian society is a traditional multicultural diversified integrated society wherein Hindus dominate. And for Hindus marriage is an enduring heterosexual Sacrament. Other Indian communities also have a similar opinion that marriage is a heterosexual institution. Even Shiv Sena members attacked theaters in New Delhi and Bombay where the film fire' (1988) and 'Girlfriend' (2004) was being screened they tore down posters, smashed furniture and organized violent protests.But at the same time, Lesbian groups and women's rights organizations organized rival protests to demand the film run.[22] That is the strong reaction of society is that many people dismiss same-sex behavior as a Western, upper-class phenomenon. Many others label it as a disease to be cured, an abnormality to be set right or a crime to be punished. While

[15] Under this clause, a third party can sue the partners who voluntarily entered into sodomy thereby infringing on the right to personal liberty and privacy as enshrined in the Fundamental Rights of the Constitution.

[16] The legal status of homosexuality in the Indian Armed Forces follows the model set by Sec. 377 of IPC. Sec. 46 of chapter VI – offences of the Army Act, 1950 states: any person subject to this Act who is guilty of any disgraceful conduct of a crude, indecent or unnatural kind shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or much less punishments as is this Act mentioned. Similar provisions exists in the Air force Act and Navy Act.

[17]AIR 1983 (SC) 323

[18]http://gendwaar.gen.in/rep9.pdf

[19]In this case perversity was treated synonym for homosexuality

[20] It went on to say that "No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking'.

[21]Urvashi Vaid 'Building bridges: thoughts on Identity and South Asian G/L/B/T Organizing' *Trikone Magazine*, Tenth Anniversary Issue, 1996.

[22] web.amnesty.org/library/index/engPOL100012005

there are no organized hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.[23] But in the last five years, the Indian gay community has moved into and flourished on what has probably been the most accepting space they could have ever hoped to find- the Internet. Thus, they are forming NGOs, calling up help-lines and meeting regularly to evolve strategies for their cause. Above all, they are partying- not just in remote farmhouses in secret but also in starred hotels and at gatherings of the glitterati where gay fashion designers and diplomats are counted among the star guests. The sexual minorities in India are largely stigmatized and disempowered socially, culturally, politically and often legally and economically too says Ashok Row Kavithe.[24]Due to which isolation becomes intrinsic to the existence of a large number of lesbian and gay adolescents, and this feeling of isolation is often accompanied by self-loathing and confusion as to their future this is so because Section 377 which is used to criminalize and prosecute homosexuals in actual legitimizes the abuse of homosexuals. Gay right activists and homosexuals have now started demanding social and legal recognition of homosexuality because they have a firm opinion that Legal protection is probably the only way by which homosexual community can be guaranteed social rights, rights against exploitation and more importantly, health rights.

THE PROGRESS; JUDICIALDEVELOPEMENTTHROUGHTHETHREECRITICALJUDGEMENTSOFNAZ FOUNDATION CASE, SURESHKUMARKAUSHAL CASEANDTHEKS PUTTASWAMY CASE

The issue started with the Naz foundation case. The Naz Foundation (the petitioner in the 2009 case) is an NGO that has been working for many years on HIV/AIDS intervention and prevention. The petitioner argued that Section 377 should be limited for several reasons outlined below.First, the petitioner argued that the existence of Section 377 of the Indian Penal Code caused extensive discrimination towards the gay community and transgendered individuals by state authorities (physical and verbal abuse, harassment, and assault) under the pretext of enforcing the provision of the IPC, severely impairing HIV/AIDS prevention efforts. [25] According to the petitioner, the existence of Section 377 led to the denial of fundamental rights to these individuals. Second, the petitioner contended that legislation criminalizing consensual oral and anal sex was based on Judeo-Christian moral standards and had no place in modern society. According to the petitioner, Section 377 was predominantly used in contemporary India in cases of sexual assault and abuse of minors. Thus, criminalizing consensual same-sex activity in private served as nothing more than a weapon for police brutality and abuse.[26] The

[23] According to a report published by the People's Union for Civil Liberties – Karnataka in February 2001

[24]Ashok Row Kavihe is the editor of Bombay Dost ("Bombay Friend"), the Quaterly gay magazine published in India.

[25] Naz Foundation v. Government of NCT and Ors. 160 (2009) DLT277.

[26] 49 Peoples' Union for Civil Liberties, *Human Rights Violations against the Transgender Community: A*

existence of this section perpetuated discrimination, abuse, harassment, arbitrary arrests and detention amongst other human rights travesties. This in turn adversely affected HIV/AIDS prevention efforts, since these communities took their activities underground in fear of persecution and abuse and became largely inaccessible to AIDS prevention workers. The provision therefore directly resulted in the marginalization and victimization of a certain class of people for no legitimate reason.[27]Third, the petitioner submitted that Section 377 of the IPC infringed upon the fundamental rights of privacy and dignity that fall within the ambit of Article 21 of the Indian Constitution. The petitioner argued that the fundamental right to privacy and dignity under Article 21 could only be waived in existence of a compelling state interest, but that such an interest was notably absent in the application of Section 377.Fourth, the petitioner submitted that Section 377 infringed upon the fundamental right to equality under Article 14 of the Indian Constitution because there was no rational connection between the legislative objective of the Section (to penalize 'unnatural sexual acts') and the classification created by this Section (differentiating between procreative and non-procreative sexual activities). Because it arbitrarily targeted the gay community, the petitioner contended that the classification was unreasonable.[28]The petitioner also submitted that the expression 'sex' in Article 15 of the Indian Constitution could not be read to include only gender but should also include sexual orientation. Therefore, since Article 15 outlined the right of non-discrimination, it implied that discrimination on the basis of sexual orientation (perpetuated by Section 377) violated this fundamental right.[29]

Finally, the petitioner also submitted that Section 377 curtailed the basic freedoms guaranteed to all citizens under Article 19(1) (a), (b), (c) and (d). The petitioner argued that the section curtailed an individual's ability to make personal statements about one's sexual preferences, one's right of association/assembly, and one's right to move freely to engage in homosexual conduct.[30]

The Court found the argument of the respondent to be 'completely unfounded since it is based on incorrect and wrong notions', because there was no evidence showing the link between decriminalization of homosexuality and the spread of HIV/AIDS.[31] Responding to the petitioner's final argument regarding Section 377's violation of Article 19(1) of the Indian Constitution, the respondent contended that Section 377 did not impact the freedoms given under Article 19(1), since it criminalized only a sexual act, leaving people free to express their opinions on homosexuality and its decriminalization.[32] Therefore, the respondents maintained that Section 377 was constitutionally valid.[33] However, in light of the Court's findings on Section 377 of the IPC's infringement on Articles 14, 15 and 21 of the Indian Constitution, the Court did

study of kothi and hijra sex workers in Bangalore, India (2003).

[27] Supra note 1

[28] *Id.* at 22.

[29] *Id.* at 9.

[30] *Id.* at 10

[31] . *Id.* at 59

[32] *Id.* at 24

[33] *Id.* at 24

Not find it necessary to explore infringement of Article 19. [34] NACO's submission corroborated the petitioner's contention that homosexuals and other sexual minorities were highly susceptible to HIV/AIDS, and stated that the increased vulnerability of these particular groups stemmed from a higher level of unsafe activity as well as impaired decision-making abilities that hindered HIV/AIDS prevention.[35]In terms of the right to health (recognized as a part of Article 21 of the Indian Constitution)29, the Union Ministry of Health and Family Welfare argued that since homosexuals lived in constant fear of law enforcement, they were reluctant to reveal same-sex sexual behavior. As a result, this large section of society carried out its sexual activities in silence, making it very difficult for public health workers to access them for the purpose of HIV/AIDS intervention and prevention. NACO submitted that it was imperative that the gay community had the right to render themselves visible without fear of persecution by state authorities so that HIV/AIDS prevention efforts could be effectively conducted. [36] The Law Commission of India, in its 172nd report, recommended the removal of Section 377 before the judgment in 2000. [37] The Law Commission, in reviewing laws relating to sexual offences (in light of increased incidence of sexual assault of minors as well as custodial rape), endorsed the deletion of Section 377 along with amendments in Section 375 of the IPC to a new Section 376E.32The Law Commission recommended the redefinition of Section 375 under 'Sexual Assault', penalizing not only rape but also any non-consensual, non-penile-vaginal penetration.[38]

On these grounds, the Court was unable to accept the respondent's argument thatSection 377 should be retained to cover consensual sex between adults in private in the interest of public health and morality. The Delhi High Court held Sec 377 as violative of the constitution of India, but in *Suresh Kumar Kaushal vs UOI*, it again held to be not violative of the constitution of India. But now the verdict in the KS Puttaswamy Case (2017) directs again towards the judgment of 2009 and gives a ray of hope for de-criminalizing section 377.The Supreme Court in Puttaswamy has laid the ground for overruling Kaushal. It is now up to the same court to recognize the validity of same-sex love.

The other two judgments:

The judgmentin Suresh Kumar Kaushal case is both constitutionally preposterous and morally egregious. The Supreme Court tells us that our Constitution, whose Preamble proclaims a commitment to equality and justice for all, whose Bill of Rights has three specific Articles dedicated to equality and non-discrimination, nonetheless relegates Indians to second-class citizenship on the basis of their sexual orientation. And in *so* doing, it flies in the face of international law, the dicta of respected human rights instruments such as the ICCPR and the Universal Declaration of Human Rights and puts India in the company of countries such as Somalia, South Sudan,

[34] *Id.* at 101
[35]. *Id.* at 51
[36] *Id.* at 51
[37] *Id.* at 51
[38] *Id.* at 67

Yemen and Saudi Arabia. And it perversely tells a *minority* to take the case for protecting its rights to the most *majoritarian* institution of government, the Parliament.

All of which might be justifiable if it was even remotely supported by constitutional reasons. It is not. The result is a travesty, and the reasoning is farcical. The fundamental points are: this judgment is likely to be presented—and discussed—as an issue of judicial restraint and separation of power, because it holds the matter ought to be decided by Parliament. That, however, is a smokescreen for the real issue: *does the Constitution—in particular, Articles 14, 15 and 21—prohibit discrimination on the basis of sexual orientation?* If the Constitution does do so, then S. 377 is unconstitutional, and there is *no question* of judicial restraint, and no space for arguments that the legislative forum is the appropriate sphere for this. Article 13(2) of the Constitution could not make this clearer:

"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

For example, if the Parliament made a law today that banned all newspapers from reporting on political issues, no Court would *ever* hold that that was "a matter for Parliament to decide." They would strike it down for violating a Constitutional right—Article 19(1) (a). The basic issue, therefore, is about the existence of a constitutional right that protects homosexuals from discriminatory legislation. To frame this as an issue of "restraint" and argue that the Court was operating on the principle of judicial restraint is deeply misleading.

CASE CRITIQUE

Now, considering the decision of Supreme Court in SK Kaushal's case, placing reliance on Dworkin's theory it is pertinent to mention that Supreme Court simply stated that a decision cannot be taken by ignoring the legislative intent behind a statute. It noted that there is a presumption of constitutionality in favour of all laws, including pre-constitutional laws, as the Parliament is deemed to act for the benefit of the people. The element of 'self - restraint' is extremely violative of what Dworkin states in his theory. Even if the judge requires certain standards and principles before establishing that certain rule or law should be interpreted or reinterpreted in a certain way, how can the Court bring the clause of 'self - restraint'. This is an absurd point and definitely unconscionable to a basic logic. However, the Supreme Court did not even look into the constitutional validity of Section 377 properly and in depth. The Court has failed on both the aspects: in looking into the constitutional validity of Section 377 and resorting to 'self - restraint'.

The **first basis** of the Supreme Court judgment was on the basis of the pre-constitutional laws and the presumption of constitutionality of the legislative law. Law on Sec 377 is a pre - constitutional law. Though the power of judicial review is plenary however keeping in view the importance of separation of power self-restraint is exercised by the judiciary and has manifested itself in the presumption of the constitutionality of the law, enunciated by a constitutional bench in *Ram Krishna*

Dalmia vs Shri Justice SR Tendulkar and Others AIR 1958 SC 538[1]. It was considered that this principle of presumption of constitutionality of law not only applies to the post-constitutional laws (future laws) but also to the pre-constitutional laws (existing laws) and if no amendment is made in such a pre-constitutional law it may represent a decision that the legislature has taken to leave the law as it is and this decision is no different from the one to amend and change the law or enact a new law.Also, what court relied on was that the doctrine of severability and the practice of reading down a statute both arise out of the principle of presumption of the constitutionality of the law. However, the question arises is that it may be pertinent to know that a statute although could have been a valid piece of legislation keeping in views the societal norms and conditions of those times.Another significant canon of determination of constitutionality is that the court would be reluctant to declare a law invalid or *ultravires* on the account of unconstitutionality. Declaring a law unconstitutional is one of the last resorts taken by the court, the courts would preferably put into service the principle of 'reading down' or 'reading in' the provisions to make it effective,workable and ensure the attainment of the object of the act**,** but what are the objects of this sec 377? However, in *Minerva Mills Ltd and Others vs UOI (1980)* the court identified the limitations upon the practice of reading down. The device of reading down is not to be used to be resorted to in order to save the susceptibilities of the lawmakers, nor indeed to imagine a law of one's own liking to be passed.

The Court relied on **the principle that self-restraint** must be exercised and the analysis must be guided by the presumption of constitutionality. A Number of amendments had taken place in IPC since then and also the 172nd report of the law commission also insisted upon the deletion of sec 377. However, the legislature has chosen not to amend the law or revisit the law, so the court presumed that the representative body of the people of India since has not chosen to amend the law or touch upon it, therefore, the law is untouchable or is incapable of being addressed. Legislature most of the time prefer not to open the Pandora boxes relating to many issues as per their own conveniences so does that mean that the law is valid or is such that it is incapable of being remitted or being addressed.

Archaic- The history of unnatural offences against the order of nature and their enforcement in India during the Mogul time, British time and post-independence, shows that the concept was introduced by the British and there was no law criminalizing such acts in India. It is based on Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation. Post-independence the section remained on the statute books and is now seen as part of Indian values and morals.

Sec 377 is vague and seeks to **introduce classification** which is not based on rational criteria and the object it seeks to advance is not a legitimate state object. It impacts them as a class disproportionately because it restricts only certain form of sexual intercourse that heterosexual persons can indulge in the section ends up criminalizing

identity and not only merely the acts as it is usually homosexuals or transgender persons who are associated with the sexual practices proscribed in section 377. The expression "carnal intercourse against the order of nature "is not clearly defined anywhere in the code. In the absence of the legislative guidance, courts are left to decide what acts constitute the same. This results in the arbitrary application of the penal law which is violative of article 14. [39]

Article 14 permits class legislation only if there is an intelligible differentia between the classes, a rational nexus with the objective of the legislation, and the constitutional validity of the objective itself. The State's reasons for retaining the law were health—it would prevent the spread of AIDS—and enforcing public morality. The Delhi High Court found on fact that there was no connection between homosexuality and public health (in fact, quite the opposite), and it held that the only morality that the State was permitted to enforce was found within the four corners of the Constitution - *Constitutional* morality, derived from the text, the structure and the philosophy of the Constitution itself. On Article 15, the Court held that "*sexual orientation*" was a protected category, contained within the term "*sex* ". And on Article 21, the Court held that the right to privacy—incontestably an aspect of personal liberty, as upheld by a string of decisions—could only be restricted by showing a compelling state interest. Here, the State had shown none.

Pause for a moment and take this in. First, the Court says—without an iota of evidence—that there are two classes of persons—those who engage in sexual intercourse in the "ordinary course", and those who don't. What is ordinary course? Presumably, heterosexuality. Why is this ordinary course? Perhaps because there are more heterosexuals than homosexuals around, although the Court gives no evidence for that. Well, there are also more black-haired people in India than brown-haired people. Is sex with a brown-haired person against the order of nature because it happens less often? But forget that. *Where is the rational nexus? What is the legitimate governmental objective? Even if we accept that there is an intelligible differentia here, on what basis do you criminalize—and thus deny equal protection of laws—to one class of persons?* The Court gives no answer. Alternatively, "ordinary sex" is penal-vaginal, and every other kind of sex is "against the ordinary course of nature". Again, no evidence to back *that* claim up apart from the say-so of the judge. There is only one possible justification, which the Learned Judge briefly cites before—that in defining an offense, the Court is not indulging in class legislation at all, but only in prohibiting action (presumably to get around Article 15), but here he has *already* rejected that argument by admitting that there is class involved. And if there is class involved, then *the government needs to show rational nexus and legitimate objective! No rational nexus- there is no rational nexus to the classification created between procreative*

[39] Refer to AK Roy v. UOI (1982) 1 SCC 271, KA Abbas v. UOI and Anr. (1970) 2 SCC 760, Harish [39]Chandra Gupta v. State of UP AIR 1960 All 650, Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board (2009) 15 SCC 458).

*and non-procreative act and thus violative of article 14.*Section 377 IPC makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody. Thus, it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people. 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's interest "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 the 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.When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. The result is that a significant group of the population is, because of its sexual non- conformity, persecuted, marginalized and turned in on itself.[40]

In **Para 43** of the judgment the most absurd and retrograde reasoning given by the court is that since in the last 150 years only 200 people have been prosecuted (as per the reported orders) this cannot be made a sound reasoning for declaring sec 377 ultra vires of article 14,15 and 21 of the constitution of India.

If there is class involved—and the Court admits there is—and if homosexuals necessarily engage in sexual intercourse against the order of nature—then by criminalizing that act, there is discrimination on the basis of sexual orientation. The question is whether that attracts Article 15. Article 15 prohibits discrimination on a number of grounds: religion, race, caste, sex and place of birth. With the *possible* and partial exception of religion, what unites these features is that they are all essential aspects of any individual's private and public identity.To this we can add Article 16(2) (prohibition of discrimination in employment on similar categories); Article 17 (prohibition of untouchability — discrimination on the basis of birth); and Article 18 (abolition of titles—advantages (a form of discrimination), normally on the basis of birth).

And lastly, **Article 21** and the right to privacy, expressly upheld in *Gobind* to

[40]Sachs, J. in The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, [Para 108].

include family life, and in *Kharak Singh* to require a compelling State interest in case of interference. This is not just bad constitutional law. *This is no constitutional law.* The Court tells us today that our Constitution guarantees all citizens the equal protection of laws—but withholds that protection from homosexuals. The Court tells us today that our Constitution prohibits discrimination if you're born a certain gender, or a certain caste, or a certain religion—but not if you possess a certain sexual orientation. The Court tells us today that we all have a right to privacy in our personal lives—but not in our choice of whom to love. Is there any conceivable constitutional principle that justifies this, the unbearable wrongness of *Kaushal v Naz Foundation?*

The court must consider the principles of interpretation and the changing nature of the society. Public disapproval or disgust for a certain class of person can in no way serve to uphold the constitutionality of a statute. Union of India in its argument submitted that law cannot run separately from the society since it reflects the perception of the society, if it is so then the reservation policy n legislations are then a matter of question n if it is argued that the reservation policies are a matter of the need of the hour then rights to homosexuals too is the need of the hour. Decision on triple Talaaq be another marvelous example. The government relied on the doctrine of compelling state interest, restrictions of public morality public health and healthy environment.

Doc of compelling state interest-the compelling state interest rather demands that the public health measures are strengthened by de-criminalization of such activity. Therefore, there is a need for retention of sec 377. In Case of State of *M.P. v. Kharak Singh*,Mathews J. said Privacy can only be denied by there is compelling state interest shown must superior to the fundamental rights or any constitutional rights which is guaranteed by the constitution of India.Secondly, it must be noted that it was observed that the case of right to privacy differs in different case according, keeping this point into the consideration we can't ignore the fact that the conditions and the situation are the important factors when we come to the facts of any case thus in our opinion the law should be according or consistent with the current situation of the country. In Case of Gobind Singh,Kennedy J. observed that compelling state interest is applicable when comes to restriction on fundamental rights but he explained subjects such as the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest".Thus, this makes a clear appearance that the contention of the state on 377 to protect morality of the country is totally invalid as it is clear that non - consensual sex is a subject which does not come under compelling state interest which the state is talking about.

Sec 377 does not fulfill the just fair and reasonable criteria of substantive due process now read into **Article 21**. By criminalizing these acts which are an expression of the core sexual personality of homosexual men, sec 377 makes them out to be criminals with deleterious consequences thus hampering their human dignity. Also, the criminalization impairs health services

for gay men and thus violates their right to health under 21.**Health-**Article 21 protects intrusion into the zone of intimate relations entered into in the privacy of the home and this right is violated by Section 377, particularly of homosexual men. The issue is therefore whether protection of the privacy is available to consenting adults who may indulge in "carnal intercourse against the order of nature". Right to health is an inherent part of the right to life under Article 21; it is recognized by the ICESC which has been domesticated through Section 2 of theProtection of Human Rights Act 1993. Article 12 of the ICESCR requires states to take measures to protect and fulfill the health of all persons. States are obliged to ensure the availability and accessibility of health services, information, education facilitates and goods without discrimination especially to vulnerable and marginalized sections of the population.

ARTICLE 15 Section 377 is disproportionate and discriminatory in its impact on homosexuals. The law must not only be assessed on its proposed aims but also on its implications and effects. Though facially neutral, the section predominantly outlaw's sexual activity between men which is by its very nature penile non-vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling. In fact, Courts have even excluded married heterosexual couples from the ambit of Section 377. When homosexual conduct is made criminal, this declaration itself is an invitation to perpetuate discrimination. It also reinforces societal prejudices.[41]Sec 377 violates article 15 by discriminating on the ground of sexual orientation as although facially neutral it treats homosexual men unequally compared to heterosexuals and imposes an unequal burden on them. The government of India has introduced an option for "others" in the sex column of the passport application form. This can only be achieved only if the expression "sex" is read to be broader than the binary norm of biological sex as a man or a woman. Like gender discrimination, discrimination on the basis of sexual orientation is directed against an immutable and core characteristic of human personality. If a law operates to discriminate against some persons only on the basis of prohibited ground, it must be struck down.[42]The Case of Naz foundation the High Court stated that Article 15's prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.

[41](Anuj Garg v. Hotel Association of India, Peerless General Finance Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343, Grace Jayamani v. EP Peter AIR 1982 Kant. 46, Lawrence v. Texas, National Coalition for Gay and Lesbian Equality, Dhirendra Nadan v. State–Criminal Case Nos.HAA0085 & 86 of 2005 (Fiji High Court).

[42](M Nagaraj v. UoI, Anuj Garg v. Hotel Association of India, Toonen v. Australia, Egan v. Canada, Vriend v. Alberta, Punjab Province v. Daulat Singh AIR 1946 PC 66, State of Bombay v. Bombay Education Society [1955] SCR 568)

VOLUME 7 ISSN 2456-9704

WHAT THE SUPREME COURT SAID ON HOMOSEXUALITY IN THE PRIVACY JUDGMENT (2017 KS PUTTASWAMY CASE)

- The Supreme Court, in its judgment on privacy, said 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.
- "That 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," the Supreme Court said in its judgment.
- "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular," the nine-judge bench observed.
- The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights", the court observed.

Taking the landmark case of *K.S. Puttaswamy v. (UOI AIR 2017)* decided by nine-judge benchinto the consideration we come up with the opinion that the article 377 can be challenged for its constitutional validity as according to judgment given by the SC in case of Right to Privacy which the court said is a fundamental right mentioned not expressly yet implicitly in the constitution and can be brought by interpretation.

Points taken to show invalidity of 377:

International treaties to which India is also a partDirective Principle Article 51c, "Foster respect for international law and treaty obligations in the dealings of organized peoplewith one another" means that state cannot make any law which is inconsistent to international law or treaties to which it is party or that the legislation can make any law to enforce the subjects of international treaties.

Article 17 of International Covenant on Civil and Political Rights Act 1966,"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence or to unlawful attacks on his honor and reputation"

Article 12 of Universal Declaration of Human rights;

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection against such interference or attacks."
>
> Under Right to Privacy, sexual orientation is also part thus a person freedom to conduct his sex life and personal relationships as he cannot be infringed as it is his personal liberty and dignity that how a person brings up his body.

National Legal Services Authority v. UOI

It was stated that provisions in conventions UDHR and ICCPR ensures the protection against unlawful interference with aperson's privacy, family, and home.Thus, by

reviewing all this we see that in the case of Suresh Kumar Kaushal v. Naz Foundation the decision of Delhi HC was consistent to international conventions to which India is also a part and the decision of SC was inconsistent with the international conventions as these conventions protect right to privacy in which interest of these minuscule is also protected.

The Constitution of India

Preamble the basic structure of Indian Constitution, liberty, and dignity are the words which are incorporated in the preamble which comes within the ambit of the right to privacy. J. Sapre in his judgment explained that both the words are interrelated with each other in such way that contravening on would ultimately affect another, need to be practice along.Article 14, Right to Equality, talks about classification which should be reasonable for protecting public interest or policy and restrict legislative classification.The case of Maneka Gandhi explains that there should be a reasonable classification, which the law or the procedure with restricts the fundamental rights of an individual must reasonable, just and fair Bhagwati J. stated

"The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

Article 21-It is explained by many cases that the scope of this articleis very larger. It protects the personal liberty and dignity of an individual, therefore, ultimately protects the privacy of an individual.Kania J. in case of Gopalan stated that "Personal liberty covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression, "personal liberty" the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word "personal" leads me to believe that those rights are not covered by the expression of personal liberty"

In the case of NALSA, it was interpreted that article 21 confirms the right to privacy of every individual by giving the expression such as individual autonomy, dignity, identity and personal liberty.Explaining the ambit of article 21 in case of *Anuj Garg v. Hotel Association* court explained "personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."Article 19 (1) has relation with article 21 as it deals with personal liberty mentioned in article 21 overlapping each other.According to Sanjay

Kaul, J. sex orientation is one important aspect of the dignity that every person under Indian Constitution has right to maintain his sex relation, it is an essential attribute of privacy.Section 377 thus denies the right of certain class or group of people which is a fundamental right described in the constitution not expressly yet implicitly which is interpreted by the judges in the recent case of Right to Privacy and any fundamental right cannot be taken by any class even if the class is minuscule. Thus article 377 is in violation of article 21, 19 and as well as article 14 as there no equal protection of rights for the minuscule fraction of the Indian society that is lesbians, gays, transgender, bisexuals. Thus, the classification made by the government is unreasonable which is merely on the non-acceptance of the society at large and not considering the constitutional rights of that small fraction of the constitution.377 can be said invalid law or constitutionally invalid.

Triple test mentioned in Maneka Gandhi case for reasonable interference:

- Must prescribe a procedure
- The procedure must withstand the test of one or more of the fundamental rights conferred in article 19 which may be applicable in a given situation
- Must also be liable to be tested with the reference to article 14.

Here, in this case, the interrelationship between the same sex person is restricted under the 377 which restrict their fundamental right of dignity, personal liberty, and autonomy mentioned in article 21. Secondly, seeing the reasonability of the law, reasonable restriction can be put to fundamental rights by article 19[2] as it mentions subjects for which state can put reasonable restriction to fundamental rights, in this case the contempt of the state is all about the non-societal acceptance of this which cannot be considered as reasonable restriction.Third, with reference to article 14 which talks about right to equality that no classification should be there, here there is unreasonable classification made by the state which doesn't give equal rights to minuscule class of the society that is gay, lesbians.Thus, 377 doesn't fit with triple test and need to be abolished as it violates the fundamental rights of the minuscule group and creates a classification which is unreasonable, vanishing their rights given in article 21, 19, 14 of the constitution of India.

Relation of Human Rights with Right to Privacy

Human rights are the basic rights which are given to every individual by birth which can't be infringed by any person or the state itself, these are basic rights which person possess for maintaining his life with liberty and dignity.These are rights which are inalienable and cannot be taken at any stage.It is also to notice that in the world of democracy and civil society the state has the duty to maintain the human rights of every individual by making laws or by removing such law which is in contrary with the human rights.Human rights to Communication Surveillance launched at U.N. human rights council in Geneva in September 2013:

"Privacy is a fundamental human right and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as

freedom of expression and information, and freedom of association, and is recognized under international human rights law…."

Indian provisions on Human Rights

Protection of Human Rights Act 1993, Section 2 [1] d:

"Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international covenants and enforceable by the courts in India;

The Case of *Ram Deo Chauhan v. Bani Kanta Das (AIR 2010)* it was explained by the court that the scope of human rights mentioned in Protection of Human Rights Act 1993 has a large scope which covers rights related to life, liberty, equality and dignity of the individuals. The significance of this case is much as it defines what human rights actually are as there is no particular definition or says the scope of human rights. the court stated that rights related to life, liberty, equality, dignity, of the individual guaranteed by the constitution or international covenants, denial of such rights is a violation of human rights itself.

CONCLUSION

Archbishop Desmond Tutu rightly said that "I have spoken against the injustice of apartheid, racism, where people were penalized for something about which they could do nothing, their ethnicity I, therefore, could not keep quiet, it was impossiblewhen people were hounded for something they did not choose, their sexual orientation. "If you are not like everybody else, then you are abnormal, if you are abnormal, then you are sick. These three categories, not being like everybody else, not being normal and being sick are in fact very different but have been reduced to the same thing"[43]. The existence of Section 377 raises fundamental questions. Why should someone's dignity and privacy be undermined by their sexual preference? Why should someone's fundamental life choices be conditioned by other people's prejudice, ignorance, and stigmatization? Why should public health be compromised by an archaic and pedantic notion of public morality? And finally, why should a sizeable population of Indians (or even a "minuscule minority") is deemed criminals in the eyes of the law, simply for being themselves?

A modern democracy rests on the twin principles of majority rule and the need to protect the fundamental rights of *all* citizens. Fundamental rights are inalienable and transcend challenge or limitation. These rights identify subjects, withdraw them from political controversy, place them beyond the reach of majorities, and establish them as legal principles to be applied by courts equally for everyone this was recognized by the court in Puttaswamy (the plurality opinion and separate concurrences), holding that privacy is an inalienable right that inheres in every person, which is *reflected* in the Fundamental Rights Chapter of the Constitution, rather than guaranteed by it. In this context, it is important to appreciate that just as homosexuality is not a 'western import', IPC was neither Indian nor a gift from God. IPC was drafted by the British, based on prevailing Victorian notions of morality which were imported to India, and

[43]Michel Foucault, (2004) 'Je suis un artificier'. In Roger-Pol Droit (ed.), Michel Foucault, entretiens. Paris: Odil.

continue to remain here long after they have been discarded by the British. The second aspect of a constitutional democracy relates to the counter-majoritarian role played by the judiciary, which has to ensure that a majoritarian government does not override minority rights. While the law may be the product of representative majoritarian moral beliefs, constitutional guarantees (and constitutional morality) will lose significance if they are given majoritarian interpretations. There are many groups, or "discrete and insular minorities" who remain excluded from the everyday exchanges and compromises of democratic politics, which tend to prioritize political expediency over protection of rights. In 2016, the Lok Sabha voted against Shashi Tharoor's bill to decriminalize homosexuality. In this background, Justice Kennedy's majority opinion in the US Supreme Court gay marriage ruling in Obergefell vs Hodges bears reiteration: "The nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."

The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favorably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Section 377 could be decriminalized; however, this must not mean that they would be allowed to do things in open and pollute the society but must be allowed only when done in private as at last, it's a matter of their freedom which they do have. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lies at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

*****