

# Homosexuality and Recent Judicial Perspective – A Socio Legal Analysis



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## Abstract

On 6<sup>th</sup> September, 2018 the Supreme Court of India delivered a verdict which decriminalized homosexuality and held Section 377 of the Indian Penal code as unconstitutional in India. Section 377 of the IPC states: "Whoever voluntarily has carnal intercourse against the order of nature with 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> The judgment, by a Constitution bench of the country's top court, has defanged the British-era

Section 377 of the Indian Penal Code (IPC), which deemed that homosexuality is a punishable offence.<sup>2</sup> The judgment marks the end of the first leg of the long-drawn battle for social legitimacy by the lesbian, gay, bisexual, transgender and queer (LGBTQ+) community. However, other issues such as same sex marriage, inheritance of property and civil rights are yet to receive legal sanction. In this paper, the judgment of the Supreme Court has been analyzed in detail.

**Keywords:** Section 377, Homosexuality, Indian Penal Code, Supreme Court, Judgment.

## Introduction

The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called nature within. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. The said inherent nature and the associated natural impulses in that regard are to be accepted. Non-acceptance of it by any societal norm or notion and punishment by law on some obsolete idea and idealism affects the kernel of the identity of an individual. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions.<sup>3</sup>

## Objective of The Study

This paper has to fold objectives. The main/ first object of this paper is to understand the thought process of our Hon'ble Supreme Court on Homosexuality in India by highlighting the legal literature on this. Though, few years back, Delhi High Court had expressed the same in this regard but the kind of controversy arose after that is brilliantly managed by the Apex Court now in the recent judgment. Secondly, being Homosexuality has a broader social aspect, so the aim of this paper is to analyze the influences of this thought on society at large.

## Review of Literature

In this reference, multiple piece of social and legal literature are read and reviewed to have a depth of the issue. In the list of books, the book named Resource Book on Lesbian, Gay and Bisexual Rights in India, India Centre for Human Rights and Law, 1999 by Bina Fernades, Humjinsi was a thorough study on origin and existence of bisexual people and their rights but the only part missing was their position which was not in equal with the non bisexuals. Another book named Different Daughters: A History of the Daughters of Bilitish and the Birth of the Lesbian Rights Movement by Marcia M. Gallo was also a good research in this reference which was focused on the study and history of Lesbians. This book discussed one side of the homosexuality that was the female as lesbian. The culture of gays was not part of this book. Two more books named I Know My Own Heart: The Diaries of Anne Lister 1791–1840 by Anne Lister and Girls Will Be Boys: Cross-Dressed Women, Lesbians, and American Cinema, 1908-1934 by Laura Horak were also a detailed study on gays and lesbians but their rights were not discussed.

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Few articles were also reviewed. The article named, Homosexuality and India by T. S. Sathyanarayana Rao and K. S. Jacob<sup>4</sup> laid stress on the point that no psychological test could help in finding or solving the problem of homosexuality and also emphasized that this issues was found in all the primitive societies. Another named, Homosexuality by Bill Bynum<sup>5</sup> said that Same-sex preferences are found in individuals in all human cultures, even if attitudes towards homosexuality have varied substantially at different times and different places. The Greeks regularised homosexuality (in men, at least) as part of the normal life cycle, whereby young men had sexual relationships with older men before marriage and fatherhood, and then, as older men, became dominant partners with a winsome youth. Scholars such as Randolf Trumbach have argued that this pattern long survived the decline of classical Greece and may not have disappeared from European societies until the end of the 17th century.<sup>6</sup> One more article named, Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People by Suzanne M. Marks<sup>7</sup> is also reviewed in this reference. The uthor mentions that The interdependent relationship between health and human rights is well recognized. Human rights are indivisible and inalienable rights due to all people. Articles 1, 2, 3, 5, 6, 7, and 16 of the Universal Declaration of Human Rights (UDHR) address, respectively, the rights to equality; freedom from discrimination; life, liberty, and personal security; freedom from torture and degrading treatment; recognition as a person before the law; equality before the law; and the rights to marry and have a family.<sup>1</sup> Some people, specifically lesbian, gay, bisexual, and transgender (LGBT) individuals, are in many places and circumstances denied their claim to the full set of human rights. This puts LGBT people in many countries at risk for discrimination, abuse, poor health, and death — the ultimate human rights violation.<sup>8</sup> The article named, Gay rights, Section 377: A timeline of LGBT law in India – will it be legalised?<sup>9</sup> criticised the judgment of 2009 on homosexuality and asked for review of the same which sowed seeds for the recent judgment named Navtej Singh Johar & ors. v Union of India & ors. Writ Petition (Criminal) no. 76 of 2016. The recent judgment of Navtej Singh Johar is a complete and a wonderful research work on Homosexuality. The Apex Court has coded plethora of research in order to create the decision and justify the same.

The present paper is focused on the vision and thought of hon'ble Supreme Court on the rights and position of gays and lesbians in India. To qualify the content of paper the above literature in form of books and articles and discussion through case laws, provisions of relevant law and news items from media discussion were read and reviewed in order to bridge the research gap.

## Historically Evaluation of Homosexuality Law in India

India was introduced to the law against homosexuality almost 80 years before it became independent. At its zenith, the British Empire as part

of its 'civilizing mission' imposed the criminal law of England, including the anti-sodomy law, on its colonies. While the United Kingdom Parliament legalized homosexuality in England and Wales way back in 1967, and in Scotland in 1980, several British colonies — India until 6<sup>th</sup> September 2018 — had yet to junk the colonial-era law.<sup>10</sup>

Over 80 countries of the world had or still have laws against homosexuality. Over half of these were those that were at some point in time governed by the British. The Indian Penal Code of 1860, often referred to as the Macaulay Code, after Thomas Babington Macaulay who was its principal author, was the foremost jurisdiction that criminalised homosexuality in India. Its impact was such that it was copied in several other British colonies like Fiji, Singapore, Malaysia, and Zambia. Section 377 of the code, that was followed up on at the Supreme Court today read as following: "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."

Over the years, the criminal laws implemented by British authorities in many of its colonies remained in place several years after the Crown stopped ruling them. By the middle of the twentieth century, England itself though was undergoing rapid transformation in its understanding of its law against same-sex activities.<sup>11</sup> A growing body of scientific research in Europe and elsewhere, as well as an emerging global media, ensured enough information being passed on to the public on the issue. Finally, in 1967, the United Kingdom Parliament changed the law for England and Wales. Several of its colonies though, are yet to come of its shadow.

While it is not clear to what extent same sex desire and gender transgression were accepted in the societies which later became British colonies, before colonial rule, it is clear that there doesn't seem to have been a consistent code that unified these regions in terms of an anti-sodomy law. Other codes, such as those stated within some religious texts, do not allow for such transgression. But on the other hand, there are practices and traditions within the myriad cultures of this region which are explicitly accepting of these practices, the Hijra community being a very good example. On the whole it would be naïve to imagine a complete acceptance before British rule. However, we do know that legal criminalization was consolidated with the establishment of the Indian Penal Code during British rule. The legal picture at this time is clarified to us through Section 377<sup>12</sup>.

## The Story of Fight against Section 377

The fight for decriminalisation of section 377 was initially started by AIDS Bhedbhav Virodhi Andolan back in 1991 by publishing — "Less than Gay: A Citizen's Report", which spelled out the problems with 377 and asked for its repeal. And later in 1996 an article in Economic and Political Weekly by Vimal Balasubrahmanyam titled 'Gay Rights in India'<sup>13</sup>

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The first ever challenge in court to Section 377 was filed by the *Aids Bhedbhav Virodhi Andolan* in 1994 in the Delhi High Court after a refusal to distribute condoms in Tihar jail on the grounds that it will 'spread' homosexuality. This petition was based on a 'right to health' argument, and was based on equality for all, prisoners and/or homosexuals alike also that homosexuality has always existed in this region, citing sources from ancient India, and that it is not by any chance a recent foreign import.<sup>14</sup>

Meanwhile, discussions in larger groups on legal rights of LGBT people were held in different spaces. A significant and widely attended national level discussion was held at a workshop co-organised by *Stree Sangam* (now known as LABIA), *Forum Against Oppression of Women* and *India Centre for Human Rights and Law* from Mumbai, and *Counsel Club* from Kolkata. This workshop "Strategies for furthering gay, lesbian, bisexual rights in India" was held in Mumbai in November 1997. Three aspects of legal rights were then seriously discussed i.e. decriminalization, antidiscrimination legislation and domestic partnerships. A resource book *Humjinsi*<sup>15</sup> was published as an outcome of this process. The discussions were confined to these three areas but there was a realization that there are many more areas like child custody and adoption, immigration and asylum rights, rights to protection from hate crimes and violence, rights of transgender people, rights of LGBT persons living with HIV/AIDS and so on, that need to be looked into. Of all of these, however, it was the campaign against Section 377 that took off for various reasons.<sup>16</sup>

The 172nd Law Commission Report of 2000 recommended deletion of Section 377, and in 2001, the offices of *Naz Foundation India* and the *Bharosa* trust were raided and four activists were arrested for possessing 'indecent material' like pamphlets on HIV/AIDS and condoms and charged under Section 377 which could not be corroborated so afterwards released. But this led to another challenge of Section 377 in the court by *Naz Foundation* in the form of public interest litigation based on a right to life and health of all persons, contending that the provision, to the extent that it penalises sexual acts in private between consenting adults, violates the India Constitution, specifically, Articles 14 (equality before the law), 15 (non-discrimination), 19(1)(a)-(d) (freedom of speech, assembly, association and movement) and 21 (right to life and personal liberty). The Delhi High Court dismisses the PIL, opining that purely academic issues had been raised therein. The same year, it dismissed a review petition against its order as well. But in April, 2006, the Supreme Court allows the challenge to both these orders by *Naz Foundation* and remits the matter back to the High Court for fresh consideration on merits.

The Delhi High Court in July 2009, in *Naz Foundation v. Govt. of NCT of Delhi*<sup>17</sup>, decriminalises consensual same-sex sexual relations between adults, opining that the provision "grossly violates homosexual individuals' right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual acts between adults in private." It ruled

that Section 377 violates Articles 14, 15 and 21 of the Constitution of India, observing, "Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution."

After few years in December 2013, a two-judge Bench of the Supreme Court in *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors.*<sup>18</sup> upheld the constitutional validity of Section 377. It then ruled that Section 377 would apply to same-sex couples irrespective of age and consent, observing, "Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation." In doing so, the Apex Court asserted that the High Court had overlooked the fact that "a minuscule fraction of the country's population constitute lesbians, gays, bisexuals or transgender" and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that "this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."

In the same year in *Kishore Samrite v. State of U.P. and others*<sup>19</sup> and *Umesh Kumar v. State of Andhra Pradesh and another*<sup>20</sup>, the Supreme Court observed that reputation is an element of personal security and protected by the Constitution with the right to enjoyment of life and liberty. This right, as per the petitioners, is being denied to the LGBT persons because of Section 377 IPC as it makes them apprehensive to speak openly about their sexual orientation and makes them vulnerable to extortion, blackmail and denial of State machinery for either protection or for enjoyment of other rights and amenities and on certain occasions, the other concomitant rights are affected.

Petitions were filed by a few LGBT citizens for consideration of the issue by a larger bench and in June 2016, a two-Judge Supreme Court bench referred a petition against the provision to the Chief Justice of India to decide whether a Constitution Bench should hear it. And in January, 2018 the Chief Justice referred the petitions to the Constitution Bench. While referring the matter court noted that Section 377 IPC, in so far as it destroys individual choice and sexual orientation, cannot be regarded as a reasonable restriction on the exercise of one's fundamental rights. A bench comprising Chief Justice Dipak Misra, Justice A.M Khanwilkar, Justice D Y Chandrachud, Justice R F Nariman and Justice Indu Malhotra begins hearing the petition on 10 July, 2018. Meanwhile in the case of *Shakti Vahini v. Union of India and other*<sup>21</sup> and *Shafin Jahan v. Asokan K.M.*<sup>22</sup> the Supreme Court clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution.

E: ISSN No. 2349-9435

### Highlights of The Recent Judgment of The Supreme Court

Supreme Court gave its verdict on 6<sup>th</sup> September 2018 on the issue of Validity of Section 377, in the writ petition filed by Navtej Singh Johar<sup>23</sup> declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India and further declaring Section 377 of the Indian Penal Code Unconstitutional. Issue considered in this case was the non-recognition in the fullest sense and denial of expression of choice of sexual partner by a statutory penal provision (Section 377 IPC) and giving of stamp of approval by a two-Judge Bench of SC to the said penal provision in Suresh Kumar Koushal Case<sup>24</sup> overturning the judgment of the Delhi HC in Naz Foundation Case<sup>25</sup>.

#### I am what I am

In the judgment Emphasizing the need of recognizing the rights of each and every member of the society Chief Justice Deepak Mishra, and A.M. Khanwilkar, J.began by quoting these words of Johann Wolfgang von Goe the "I am what I am, so take me as I am" and also the words of Schopenhauer who had said, "No one can escape from their individuality." With these words embarking on the journey to explore and clear the way forward for the LGBT community Judges wrote that "What nature gives is natural. That is called nature within." Non-acceptance of it by any societal norm and punishment by law on some obsolete idea and idealism leads to the destruction of individual identity which would be against the values of privacy, choice, freedom of speech and expressions.

#### Contentions of the Petitioners

Homosexuality, Bisexuality and other sexual orientations are equally natural and reflective of expression of choice and inclination founded on consent of two persons who are eligible in law to express such consent and it is neither a physical nor a mental illness, and to make it a criminal offence is offensive of the well-established principles of individual dignity and decisional autonomy, a great discomfort to gender identity, destruction of the right to privacy, unpalatable to the idea of freedom and a trauma to the conception of expression of biological desire, which leads to the violation of Article 14, 15 19(1)(a), 19(1)(b) and 21 of the constitution because individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution and sex occurring in Article 15 includes sexual orientation<sup>26</sup>. Petitioners contented that LGBT being the minority needs more protection than the majority because rights are not determined on the basis of percentage of populace but on a real scrutiny of the existence of right and denial of the same and the majority perception or view cannot be the guiding factor for sustaining the constitutionality of a provision or to declare a provision as unconstitutional.

Petitioners advocated that there is no difference between persons who defy social conventions to enter into inter-religious and inter-

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caste marriages and those who choose a same sex partner in the sense that the society may disapprove of inter-caste or interreligious marriages but this Court is for enforcing constitutional rights, thus the Court as the final arbiter of the constitutional rights, should disregard social morality based upon which the decision was pronounced in the Suresh Kumar Kaushal Case and uphold and protect constitutional morality which has been adverted to by this Court in several cases, for that is the governing rule.

#### Contentions of the Respondent Government

Union of India submitted that so far as the constitutional validity of Section 377 IPC, to the extent it applies to 'consensual acts of adults in private', is concerned, the respondent leaves the same to the wisdom of this Court. But regarding other ancillary issues or rights which have not been referred to this Bench for adjudication should not be dealt with by the court as in that case, the Union of India expressed the wish to file detailed affidavit in reply and arguing and adjudicating the same without giving an opportunity to the Union of India to file a counter affidavit will not be in the interest of justice.

#### Contentions of Other Interveners

Submission on behalf of intervener-NGO, Trust God Ministries were that there is no personal liberty to abuse one's organs and that the offensive acts proscribed by Section 377 IPC are committed by abusing the organs which is against the constitutional concept of dignity, which is against constitutional morality. Legal rights to Transgender community have already been given under NALSA judgment<sup>27</sup> so no further reliefs can be granted to them. Persons indulging in unnatural sexual acts are more susceptible and vulnerable to contracting HIV/AIDS so the right to privacy may not be extended in order to enable people to indulge in unnatural offences and thereby contract AIDS. Also if Section 377 is declared unconstitutional, then the family system which is the bulwark of social culture will be in shambles, the institution of marriage will be detrimentally affected and rampant homosexual activities for money would tempt and corrupt young Indians into this trade.

Mr. Suresh Kumar Koushal, intervener, submitted therein that since fundamental rights are not absolute, there is no unreasonableness in Section 377 IPC and decriminalizing the same would run foul to all religions practiced in the country, and, while deciding the ambit and scope of constitutional morality, Article 25 also deserves to be given due consideration, also it is no ground to say that it has been decriminalized in other countries as each country has different political, economic and cultural heritage.

Other contentions which were raised were that in the event consenting acts between two same sex adults are excluded from the ambit of Section 377 IPC, then a married woman would be rendered remediless under the IPC against her bi-sexual husband and his consenting male partner indulging in any sexual acts. It was also suggested that the problem created by section 377 can be curbed by adding an explanation to the effect that sexual act

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between consenting partners be brought out of the ambit of section 377.

Raza Academy, intervener submitted that homosexuality is against the order of nature and Section 377 rightly forbids it, if a male is treated as a male, a female as a female and a transgender as a transgender, it does not amount to discrimination and since carnal intercourse between two persons is offensive and injurious, it is well within the State's jurisdiction to put reasonable restrictions to forbid such aberrant human behavior by means of legislation.

Apostolic Alliance of Churches and the Utkal Christian Council submitted that Section 377 IPC is not violative of Article 15 of the Constitution as the said Article prohibits discrimination on the grounds of only religion, race, caste, ex, place of birth or any of them but not sexual orientation. The word sexual orientation, as per the applicant, is alien to our Constitution and the same cannot be imported within it for testing the constitutional validity of a provision or legislation. The applicant also contended that if the prayers of the petitioners herein are allowed, it would amount to judicial legislation, for the Courts cannot add or delete words into a statute. It is stated that the words 'consent' and/or 'without consent' are not mentioned in Section 377 IPC and, therefore, the Courts cannot make such an artificial distinction. Further the contention of the applicant was that decriminalization of Section 377 IPC will have cascading effect on existing laws such as Section 32(d) of the Parsi Marriage and Divorce Act, 1936; Section 27(7)(1A) A of the Special Marriage Act, 1954 which permits a wife to present a petition for divorce to the district court on the ground,—(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; Section 10(2) of the Indian Divorce Act, 1869 and Section 13(2) of the Hindu Marriage Act, 1955.

#### **Constitutional Values**

Linking the concept of Transformative constitutionalism with the rights of LGBT community signifying change, alteration and the ability to metamorphose and treating the Constitution as an organic charter of progressive rights emphasized upon the need to construct and develop constitutional provisions in such a manner that their real intent and existence percolates to all segments of the society court highlighted that the times have changes since the inception of section 377 in 1860 and in many spheres, the sexual minorities have been accepted. Also court favored the concept of constitutional morality so paving the way that treatment to LGBT community must not violate the Constitutional Morality, so if does so then it will have to be declared unconstitutional as the constitutional courts exists to uphold the constitution. The Court also kept the Perspective of human dignity in consideration under The Universal Declaration of Human Rights, 1948 which is the Magna Carta of people all over the world and as enshrined under Article 21 of the constitution.

#### **Sexual Orientation**

Taking the chance, the court defined various terms related to this case like Homosexual, Lesbian,

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Gay, Gender Identity, Intersex, LGBT, LGBTIQ and MSM. While defining the term Sexual Orientation court said that Sexual orientation, as a concept, fundamentally implies a pattern of sexual attraction. It is as natural a phenomenon as other natural biological phenomena. If an individual has the tendency to feel sexually attracted towards the same sex, the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity. That apart, on occasions, due to a sense of mutuality of release of passion, two adults may agree to express themselves in a different sexual behavior which may include both the genders. To this, one can attribute a bisexual orientation which is just as much ingrained, inherent and innate as heterosexuality. The Court mentioned various scientific researches that indicates that to compel a person having a certain sexual orientation to proselytize to another is like asking a body part to perform a function it was never designed to perform in the first place, Homosexuality is neither mental illness nor moral depravity, Nor is homosexuality a matter of individual choice, homosexual orientation is in place very early in the life cycle of an individual, possibly even before birth.

#### **Individual's Rights on a Higher Pedestal than Majority Opinion**

Judgment also stood firm to protect the fundamental rights of each citizen by rejecting the contention of upholding social norms, it lays down that if only majority was to be considered then all provisions in Part III of the Constitution would have contained qualifying words such as 'majority persons' or 'majority citizens'. Instead, the provisions have employed the words 'any person and any citizen' making it manifest that the constitutional courts are under an obligation to protect the fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get violated, so whatever be the percentage of gays, lesbians, bisexuals and transgender, this Court is not concerned with the number of persons belonging to the LGBT community. What matters is whether this community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book.

#### **Law Cannot Discriminate between Homosexual and Heterosexual Relation**

Then Judgment also does the Comparative analysis of Section 375 and Section 377 IPC that Section 375 IPC is gender specific as it states that rape can be committed against a women only, it specify the absence of a willful and informed consent for constituting the offence of rape, the element of absence of consent is firmly ingrained in all the descriptions contained in the latter part of Section 375 IPC and the absence of a willful and informed consent is sine qua non to designate the act contained in the former part of Section 375 IPC as rape but on the other hand Section 377 is gender neutral and define it an offence as against the order of nature but order of nature has neither been defined in Section 377 IPC

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nor in any other provision of the IPC and Section 377 criminalizes even voluntary carnal intercourse not only between homosexuals but also between heterosexuals. Legislature under Section 375 IPC has not employed the words "subject to any other provision of the IPC". The implication of the absence of these words simply indicates that Section 375 IPC which does not criminalize consensual carnal intercourse between heterosexuals is not subject to Section 377 IPC. So it may result in a situation where in a heterosexual couples who indulges in carnal intercourse with the willful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC. Section 377, so far as it criminalizes carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 IPC clearly stipulates that carnal intercourse between a man and a woman with the willful and informed consent of the woman does not amount to rape and is not penal.

#### **Section 377 violating various Fundamental Rights**

Judges then clearly states in the judgment that we have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse but Section 377 to withstand against the article 14 (all like should be treated like) it must fulfill 2 condition that the classification must be founded on an intelligible differentia and the said differentia must have a rational nexus with the object sought to be achieved by the provision. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 IPC have already been designated as penal offences under Section 375 IPC and under the POCSO Act. The presence of this Section in its present form has resulted in a distasteful and objectionable collateral effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owing to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

Then highlighting the violation of Article 19 by section 377 judgments lays down that we need to check whether public order, decency and morality as grounds to limit the fundamental right of expression under article 19 including choice can be accepted as reasonable restrictions to uphold the validity of

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Section 377 IPC because Section 377 takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults in privacy a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice.

#### **Unconstitutionality**

Thus the Judgment concluded that Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman) cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 IPC is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between the individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

#### **Way Forward For The Rights Of Homosexuals**

Supreme Court in NALSA Judgment had recognized the existence of Third Gender, and held that they should also be taken into account while considering any issues related to gender along with male and female, now under Navtej Singh Johar Judgment Supreme Court has struck down the statutory provision (Section 377) which was prohibiting those Sexual relationships which were not heterosexual and had rendered especially Third Gender unable to enjoy sexual activities of their choice, protecting them from being criminally held liable for being themselves. But still there is long way forward, only recognition and decriminalization of Third Gender has been done, India still have to give rights and social acceptance to them. To protect and provide for the rights of all Individuals irrespective of their Gender there is a need to develop Gender Neutral Personal and Criminal Laws, by developing a framework under Personal law for Marriage, Divorce, Property, Adoption, Maintenance and similar matters, and under Criminal Law a framework for Domestic Violence, Rape, Sexual Abuse, Molestation, Outraging Modesty and Adultery. As far as social acceptance is concerned, the government is required to take certain affirmative step to eliminate discriminations against these minorities and to educate people so as to stop suicides committed under social shame and pressure.

#### **Conclusion**

In the world where the natural essence of the nature is preferred over all the man made norms, the factum of homosexuality is not much desired and

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acceptable. The country like India has a history and present of homosexual society but yet it is not directly recognized by law. This attempt of the judiciary is an advanced and progressive step towards not only providing equal rights to homosexual society but also strengthening their position by permitting the same sex relationship as legal. Somehow some conscious measures must have been taken in execution of this judgment so that unwanted conclusions can be avoided. The Supreme Court has legalized the voluntary same sex relations not the forced one. Section 377 is still an offence for non voluntary and forced same sex relations. No where the acts of Sodomy and Bestiality are legalized but they are still punishable under section 377 IPC. The need is to convey the message in a legal and better sense rather than in a casual sense. More important part is the acceptance of society which is gradually opening its mind doors for such issues. Still, there is long way to go.

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