



Human Rights Violations Against Sexual Minorities: Problems and Perspectives

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Abstract

The discrimination and human rights violations against the sexual minorities are a shocking reality in all societies. In most of the jurisdictions, there is no legislative recognition to their rights, and where it is recognized their problems are not adequately addressed. International human rights documents adopted by the UNO and regional organization, theoretically recognized their rights, as they are members of the human family. Unfortunately, all these efforts are ineffective with respect to the protection of sexual minorities from wide ranging abuses. For centuries, the Indian Society has learned to tolerate with the existence of sexual minorities as distinct social group, paradoxically their existence and personality are not legally recognized. Reasons are many, ranging from deep rooted societal prejudices to predominately hostile penal laws.

Keywords: Sexual Minority, LGBT Rights, Sexual Orientation, Discrimination, Human Rights, Unnatural Offences.

Introduction

Human rights are those basic rights, which enable a man to live with human dignity. The concept is very wide and far-reaching. The human rights are available to all humans irrespective of their sex, race, religion etc simply because of the reason that they are humans. This essay attempts to reveal some socio-legal problems associated with the recognition of rights of sexual minorities in India, and recommends certain constitutional and statutory changes, which are indispensable to emancipate them from gross human rights abuses. The recent studies show, the knowledge that a person is homosexual or that he belongs to sexual minority would render him vulnerable.¹

¹ A fact finding report of Peoples Union for Civil Liberties-Karnataka on "Human Rights violations against sexuality minorities in India", available at [http://www.pucl.org/Topics/Gender/2003/sexual-minorities .pdf](http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf), accessed on 12/1/2013

Sexual Minorities: Who are they?

Sexual minorities includes those people who are discriminated against because of their sexual identity or orientation or gender identity. A study conducted by Peoples Union for Civil Liberties-Karnataka (PUCL-K) in the year 2001 identifies that sexual minority include lesbian, gays, bisexual, hijaras, kothis, transgender etc. homosexuals include Lesbians and gays. A woman who shows sexual or romantic interest with another woman is called as lesbian and, a male who prefers another male for romance or sexual gratification is termed as gay. Bisexuals are the persons who are equally attracted to both males and females. Hijras are those transgender persons having biological and genetic features of a male, but takes on the gender role of a woman. Kothi is a term, which as used in south Indian Context indicates a gay who plays a passive role in sexual activities. Transgenders are those persons who are born in a particular sex but voluntarily undergone a sex reassignment surgery or hormone treatment because of their comfortness with a different gender. There are two types of transgender, viz., transsexual man and transsexual woman. A transsexual man or female –to-female (FTM) is a person, who has anatomical features of a female at the time of birth and due to the gender identity, transitions to live completely as a man. Likewise, a transsexual women or a male-to-female (MTF) is a person who has born with anatomical features of a male, but to the gender identity, transitions to live completely as a women.² The word LGBT (Lesbian, Gay, Bisexual and Transgender) describes a group of individuals who have different sexual orientation unlike the heterosexuals in a society.³

Discrimination and Human Rights Violations against the LGBT Communities: An Overview

From time immemorial all religions except Hinduism, considered homosexuality as a sin.⁴ The Quran declares Islam to be “a religion of nature”. The purpose of sex is procreation and homosexuality is considered as an aberration of Allah’s will, which threatens Muslims with extinction. According to Shari’s law homosexuality is both a sin as well as a crime, therefore, no place for homosexuality and homosexuals in Islam.⁵ Since the practice of homosexuality is prohibited by the text of Quran, the homosexuals are often subjected to gross, brutal and inhuman treatment in all Muslim societies. In some countries such as Sudan, Saudi Arabia, the United Arab Emirates and Yemen where Islamic penal laws are in practice, the homosexuality is an offence punishable with death. However, in some other Muslim countries, the

² Mithilesh Narayan Bhatt, “Transsexuals Needs Gender Neutralization in Marital Laws” in “Women Rights Human Rights Rathin Bandyopadhyay (et.all), R. cambray & Co. Private Ltd., p. 121.

³ Id., at p.6

⁴ Ruth Mazo Karraz, *Common Women: Prostitution and Sexuality in Medieval England*”, Oxford University Press, New York 1996, p.3

⁵ Nicole Klingerman, ‘Homosexuality in Islam: A Difficult Paradox’, *Macalester Islam Journal* (2007), p.53

punishment is not harsh, to say imprisonment from three years to life.⁶ Christianity also considers the homosexuality as unethical as well as unbiblical. Hebrew and Christian scriptures denote LGBT as moral transgressors and persons who stand outside the circle of human rights.⁷

In the USA during 1900's, the sexologists treated homosexuality as an organic aberration and recommended its deletion from the list of crimes, and in 1930's they considered it as a psychiatric problem and categorized it as a form of psychopathic personality disorder. Notably in 1970's the American Psychiatric Association enlisted homosexuality in the category of "sexual orientation disturbance" and later in "ego-dystonic homosexuality" category. At last, in 1986, the homosexuality was finally removed from the list of mental disorders.⁸

Anthropologists viewed that the sexual hierarchy based on sexual orientation resembles a caste system in which different sexual identities are categorized and ranked. The ranking and views of legitimacies and illegitimacies in a sexual hierarchy is very instrumental in analyzing and identifying how a culture evaluates a particular sexual behavior. In all societies, the members, of low ranked sexual hierarchy are subjected to harassment, discrimination and gross human rights violations. The sexual minorities are always trying not to be identified as special groups, why because they may be subjected to wide ranging discrimination and abuses such as removal from employment, eviction from their houses, denial of parental rights, and much more.⁹ It has been pointed out that more than 10,000 of American soldiers were prosecuted and discharged under the law passed in the year 1993 on the ground of being lesbian, gay or bisexual service members, even though there was urgent necessity of armed personnel to be deployed in war fields.¹⁰ Christine E. Pettett, who conducted a survey in American schools, says that verbal harassment that aims at insulting someone's sexuality is very common among school children. She further adds that verbal harassment or teasing aimed at insulting someone's sexuality is as dangerous as that of inflicting bodily injury, because it affects one's self esteem. Moreover, these abuses may lead to certain grave psychological disorders. In another study, it is found that young lesbians and bisexual girls are more than twice as likely as heterosexual girls to be touched or grabbed in a sexual way, and four times as likely to have experienced physical sexual harassment including rape.¹¹ It is an undeniable fact that, lawmakers and judges always keep some deeprooted

⁶ Id., p.61

⁷ Christopher W. Blackwell, Janice L. Ricks and Sophia F. Dziegielewski, 'Discrimination of Gays and Lesbians: A social Justice Perspective', 19(4) Journal of Health & Social Policy (2004), p.31

⁸ Nancy Levit, 'Theorizing and Litigating the rights of sexual minorities', 19 Colum. J. Gender & L 50 (2010)

⁹ Shuck Stewart, *Homosexuality and the Law: A Dictionary*, Oxford, London 2001, p.229; See also Nancy Levit, n. 4 at p34.

¹⁰ Stacey L. Sobel, 'The mythology of a human rights leader: How the United States has failed sexual minorities at home and abroad', 21 Harv. Hum. Rights J. 204(2008)

¹¹ Herdt, Gilbert H; Howe, Cymene 21st Century Sexualities: Contemporary issues in Health, Education, and Rights", Routledge Taylor and Francis Group, London & New York, 2007, p. 29

prejudices towards sexual minorities, and treated them as aberrant, dangerous or criminal per se.¹² This attitude leads to the denial of their existence as human beings having rights and status. Even in those jurisdictions where their rights have received legislative recognition, their conditions have not yet improved. For instance, the violence of “corrective rape” is rampant in South African townships. The term “corrective” rapes denotes, where a male rapes a lesbian in order to coerce her to be heterosexual. The victims will always be subjected to grievous assault, brutal rape and sometimes these acts may compel them to commit suicide. There are instances where victims are prone to HIV/AIDS because of such assault.¹³ Even in developed countries will well recognized personal freedoms such as USA, the gross and frequent human rights violations against the sexual minorities is a shocking reality.¹⁴ Most of the legal systems considers all sexual orientations except heterosexuality as unnatural; hence, it is fit to be punished. If the argument that not all sexual orientations except heterosexuality are a choice is taken in to consideration, one cannot find fault in them. So their natural rights as a human being are violated everywhere. Say for instance, if we take the marriage situations of transgender, MTFs want to marry with males and FTM’s with females since they consider themselves as females and males respectively. However, most of the legal systems treat once male as always male, that means they cannot alter their sex legally and therefore they cannot enter into a valid marital relationship and it is a same sex marriage in the eye of law. Nevertheless, in some jurisdictions, the same same sex marriage has been legally recognized and thereby some sort of protection is afforded with respect to the martial rights of LGBT communities. At the international level, the human rights treaties, adopted at both the UN and regional level, are capable of giving some sort of protection to the rights of LGBT. However, the domestic applications of such rights are still a controversial issue. Let us analyse some key international human rights treaties and its ambit and scope in protection of LGBT in a realistic way.

The Protection of Sexual Minorities under International Law

1) International Treaties or Conventions

In fact, there are no international treaties or conventions, which are directly applicable to the protection of rights of sexual minorities. However, some of them could be employed to address the issues.¹⁵ The Committees entrusted with the compliance of various international human rights conventions have

¹² Mary C. Dunlap, ‘The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy, 30 Hastings L.J., p. 1146 (1978)

¹³ Esther Leburgue , ‘South Africa: Corrective rape or how to set lesbians straight’, http://lorenzonalaprize.eu/wp-content/uploads/2011/04/2010_en-le-viol-correctif-ou-comment-soigner-les-lesbiennes.pdf, accessed on 15/1/2013

¹⁴ A report submitted by Indiana University School of Law in the year 2006 to the United Nations Human Rights Committee on the occasion of its consideration of the second and third periodic reports of the United States of America pursuant to article 40 of the International Covenant on Civil and Political Rights <http://indylaw.indiana.edu/humanrights/shadowreports/USA%20Sexual%20Minorities.pdf>, accessed on 16/1/2013

¹⁵ Say for example, International Covenant on Civil and Political Rights, 1948; the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 etc.

repeatedly emphasized that, the privacy and equality rights of sexual minorities are to be recognized in certain defined circumstances.¹⁶ Notably, Article 12 of the Universal Declaration of Human Rights recognizes the privacy rights of individuals. It reads:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attack.”

Since the declaration itself lacks legal sanctity this essay seems to be ineffective in protecting the privacy rights, especially with respect to sexual minorities.

A) The International Covenant on Civil and Political Rights, 1948

As stated earlier, the ICCPR also has no direct reference with respect to the rights of sexual minorities. Nevertheless, Article 2 of the ICCPR prohibits all forms of discriminations.¹⁷ Likewise, Article 26 of the Covenant provides for the equality and equal protection of laws irrespective of sex, language, religion etc.¹⁸ Finally, Article 17 of the Covenant could also be interpreted in favor of sexual minorities as it deals with rights of privacy and reputation.¹⁹ Due to the absence of positive interpretation in this respect, the provisions under the Covenant with respect to the rights of sexual minorities remained uncertain, for two decades after its enactment.²⁰ However, in the year 1992, the Human Rights Committee, the monitoring mechanism constituted under the Covenant, held that sexual orientation should be considered as a status protected against discrimination under the ICCPR's Articles 2, 26 and 17.²¹ This decision can be treated as the first universal recognition of the rights of sexual minorities.

¹⁶ James D. Willets, 'Conceptualizing Private Violence against Sexual Minorities as Generated Violence: An international and Comparative Law Perspective', 22 Human Rights, p.27 (1995)

¹⁷ Article 2 of the ICCPR states that : “Each State party to the present Covenant undertakes to respect and to ensure to all individuals in its territory and subjects to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.

¹⁸ According to article 26 of the Covenant, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

¹⁹ Article 17 of the Covenant states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.”

²⁰ Emma Mittelstaedt, 'Safeguarding the right of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations', Chi J. Int' L 353(2008), p.360

²¹ Toonen v Australia, Commun No 488/1992 UN Doc CCPR C/50/D/488/1992 (1994). In this case, a communication was received by the Human Rights Committee from an Australian Citizen, who claimed himself to be victim of violations by Australia of articles 2, paragraphs 1, 17 and 26 of the International Covenant on Civil and Political Rights alleging that two provisions in the Tanzanian Penal Code (Sections 122 (a) and (c) and 123 0 which penalizes al forms of adult homosexual acts in private is violative of the above mentioned articles of the Covenant.

B) The UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Like other international human rights instruments, CEDAW also does not explicitly provide for the rights of the sexual minorities. The Convention cannot be applied as such for the protection of LGBT because it addresses sex-based discriminations, specifically against women. It generally recognizes the rights of sexual freedom, which international human rights groups read to include the rights of sexual minorities. However, in its concluding observations the Committee on CEDAW, which is the body responsible for monitoring and interpreting the member nations' compliance with the Convention, considered that sexual orientation is a valid ground for seeking asylum.²² In addition, the Committee recommended the re-conceptualization of lesbianism as a sexual orientation, and that the same must be decriminalized.²³

II) Regional Treaties

Human Rights treaties concluded at the regional levels also prohibit various forms of discrimination. The African Charter on Human and People's Rights, the American Convention of Human Rights and the European Convention on Human Rights, articulated certain rights, which are in essence applicable to the sexual minorities as well.

A) The African Charter on Human and People's Rights

The African Charter on Human and People's Rights is typically known as "African Charter" came into force on 26 October 1986 recognizing the equality before law and freedom from discrimination. Article 28 of the Charter incorporates the principle of non-discrimination, which reads:

"Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

However, the Charter inherently suffers some serious problems and especially with respect to the enforcement of non-discrimination provisions. The failure of the charter in protecting the rights against discrimination is attributed to three reasons. First, the Charter contains certain provisions which allows

²²UN CEDAW, concluding observations of the Committee on the Elimination of all Forms of Discrimination against Women: Sweden, UN DOCA/56/38 (2001)

²³ Ibid, pp.127-128

the state parties to evade their responsibility.²⁴ Secondly, the state parties' compliance with the Convention is not so coercive.²⁵ Third problem is the lack of sufficient funding and resources.

B) The American Convention of Human Rights

In the year 1961, the Organization of American States (OAS) adopted the American Convention on Human Rights, typically known as "American Convention" which imposes an obligation upon the state parties to ensure to all persons subject to their jurisdictions the free and full exercise of freedom without any discrimination for reason of race, sex etc.

Article 1 of the Convention provides:

"The states parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reason of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition."

The convention makes it obligatory on the state parties to make specific legislation to give effect to the obligation contained under the Convention, if they have no corresponding right exist at the national level.

Article 2 of the Convention provides:

"Where the existence of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the states Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

C) The European Convention on Human Rights

The European Convention on Human Rights also includes similar provisions, which recognize and protect basic human rights. Such rights include privacy²⁶ and freedom from interference of public authorities.²⁷

²⁴ Say for instance, article 6 of the Charter provides that, "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." The article impliedly provides that an individual's liberty and freedom can be deprived of it is previously provided by law. Therefore, the state parties can take the refuge under any law, which is previously laid down to avoid the Conventional obligation.

²⁵ The state parties are not obliged to report to the African Commission on Human and People's Rights (the body responsible for monitoring the state parties compliance with the Covenant) on a regular basis. As per article 62 of the Convention, "Each state party shall undertake to submit every two years, from the date the present charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present charter." So the parties' obligation is biannual and there is no enforce mechanism to make the falling state parties to submit the reports.

Yogyakarata Principles

As stated earlier, there is no international treaty, which directly provides for the protection of sexual minorities. However, it should be noted that, in the year 2006 in response to a thorough study conducted in various countries with respect to the different types of abuses against the sexual minorities, a panel of international human rights experts' convened in Yogyakarta, Indonesia set out certain international principles relating to sexual orientation and gender identity. As a result, they have given a set of principles called "Yogyakarata principles" to be adopted by the states for the protection of human rights which promise " a different future where all people born free and equal in dignity and rights, can fulfill that precious birthright."²⁸

Judicial and Legislative Recognition to the rights of sexual minorities in different Jurisdictions

It should be noted that there are some jurisdictions who have given judicial as well as legislative recognition to the rights of sexual minorities. Still the gulf between theory and practice is too wide. Even in jurisdictions where the rights of sexual minorities are legally recognized, they are still being discriminated and subjected to different forms of hatred.

In June 2003, the United States Supreme Court struck down the law penalizing sodomy as unconstitutional.²⁹ In November 2003, the highest court of the state of Massachusetts, quoting the Lawrence decision, held that there is no valid constitutional reason denying same sex marriage.³⁰ Now a number of nations like Australia, New Zealand etc have recognized same sex marriage through respective legislations.³¹

Australia

In Australia one of the most important requirements to constitute a valid marriage under the Marriage Act, 1961 is that, the parties must be a male and female at the date of their marriage. However, in a landmark

²⁶ Article 1 of the European Covenant on Civil and Political Rights states: "Every one has the right to respect for his private and family life, his home and his correspondence."

²⁷ Article 2 of the European Convention on Human Rights states: "There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the protection of health or morals for the protection of the rights and freedoms of others"

²⁸ See the Yogyakarta principles, http://www.icj.org/dwn/img_prd/YogyakartaPrinciples_English1234.pdf, accessed on 15/1/2019

²⁹ Lawrence v . Texas, 539 U..S. 558(2003).

³⁰ Goodridge v. Department of Public Health, 798 N.E. 941, 948 (2003). As a result of this decision more than 6000 same sex couples got married.

³¹ Say for example, The Civil Marriage Act, 2005 (Canada); Australian Marriage Amendment Act, 2004 (Australia); The Civil Partnership Act, 2004 (U.K.); The Civil Union Act, 2004 (N.Z) are certain legislations which have given legal recognition to same sex marriage.

judgment,³² the court considered whether a person who had undergone a sex re-assignment surgery was a man. The court held that the fundamental task of law is to divide all human beings into male and female to include them in one category or other and this categorization includes those individuals whose characteristics are not uniformly those of one or other sex.

In *Young vs Australia*³³, the Human Rights Committee of the United Nations held that denying pension benefits to the surviving same-sex partner is violative of anti-discriminative principles enumerated in International Covenant on Civil and Political Rights.

It should also be noted that in the year 2004, Australia enacted the Australian Marriage Amendment Act which provides for the right of same sex marriage.

United Kingdom

In United Kingdom, the Civil Partnership Act which came in to force on 18 November, 2004 gives the right to both lesbians and gays to register civil partnerships³⁴ and they can have the same rights as that of heterosexual married couples in areas relating to tax, social security, inheritance and workplace benefits. The Act also gives an option to the transgender to dissolve their present marriage and then enter into a civil partnership.

Sexual Minorities in India

In criminal law of India section 377 of Indian penal code 1860 deals with the homosexuality and it is considered as in violation with the constitutional provision and being a supreme law every law has to be in compliance with the constitution. ***Section 377 – Unnatural offences*** – *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

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

This provision provides the sanction for the prosecution of certain kinds of sexual acts deemed to be unnatural. It is important to note that regardless of consent these sexual acts are liable for prosecution provided they are seen as carnal intercourse against the order of nature, with man, woman, or animal and, thus satisfy the requirement of penetration.

³² In *Re Kevin* (2001), Fam CA 1074, ‘X’, a post-operative female-to-male transsexual, married ‘Y’. His Sex indicator had been changed in all legal documents including his birth certificate. Therefore, the court had to give answer to the question, whether this ‘X’ was a man for the purpose marriage under the law prevailing at that time.

³³ U.N. Human Rights Comm., Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003)

³⁴ Section 1 of the Act says that civil partnership is a relationship between two people of the same sex (civil partners)

It is perceived that a homosexual person or transsexual person have only 'anal' intercourse and this propagated the narrow-minded view that sodomy and homosexuality is one and the same. The consequence being that homosexuality is criminalized solely due to manner of intercourse. This indicates that no thought has been given to emotional attachment, affection and bond between two people of the same sex.

This section is unconstitutional as it violates fundamental rights guaranteed by the *Constitution of India in Part III* which gives the *Right to Privacy* under *Article 21 (Kharak Singh v. Union of India)*.³⁵ It involves unconstitutional intrusion into the privacy of a person as it does not distinguish between consensual and coercive sex. Thus cases of abuse and voluntary sex between two consenting adults can be prosecuted under this provision. As held by U.S. Supreme Court in a case of *Moore v. East Cleveland*³⁶, where Justice Stevenson was of the view that, *Right to Privacy* should be protected not just because it contributes in some direct and material way, to the general public welfare, but because it form so central a part of individual's life the concept of privacy embodies the '*moral fact that a person belongs to himself and not others nor to society as a whole.*'

This provision also applies even to the heterosexuals as it prohibits anal sex between husband and wife. State should not intrude into the privacy of a person and violate his right to privacy. Similar view was given by the U.S. Supreme Court in the case of *Griswold v. Connecticut*.³⁷

The principle was reiterated in the case of *Lawrence v. Texas*³⁸ where U.S. Supreme Court held that the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon their relationships in the confined boundaries of their home and their own private lives and still retain their dignity as free persons.

In the U.S. Supreme Court, in another case of *Bowers v. Hardwick*³⁹ it was contended that the fact that a state's governing majority has traditionally viewed a particular practices immoral is not sufficient reason of upholding a law prohibiting the practice and individual decisions concerning the intimacies of physical relationship, even when not intended to produce offspring, are a form of liberty protected by due process of law.

In this case it was also held that liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home and there are other

³⁵ AIR 1963 SC 1295

³⁶ 431 U.S. 494, (1977)

³⁷ 381 U.S. 479.85 S.Ct.(1965)

³⁸ 539 U.S. 558 (2003)

³⁹ 478 U.S. 186 (1986)

spheres of our lives and existence, outside the home, where the State should not be of dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

The IPC is self contradictory and the laws laid down in this code are based on abstract notion and orthodox morality which is well evident from the exceptions fifth and sixth of the Section 375⁴⁰ of IPC, 1860, states that when consent for sexual intercourse is given in state of unsound mind or intoxication and if the girl is less than 16years of age, respectively then it is not considered as an offence under Section 375. Thus, consent plays a vital role under section 375 in determining whether it is an offence or not. Similarly, if consent is read into section 377, then the Court must qualify it like in Section 375 and sodomy shall not be considered as an offence under Section 377. The term "voluntarily" in Section 377 bears the same meaning as under Section 39⁴¹ of the IPC. Furthermore the IPC defines an offence as "*a thing made punishable by this Code*" and that the petitioner seeks a declaration that certain acts cease to be an offence under Section 377.

The definition of "unnatural offences" is obsolete. It invites questions such as what is "*the order of nature? As conceived by whom?*" Previously, it was considered that the order of nature was that the sexual act be performed only for the sake of reproduction. But today it would not be considered "against the order of nature" if people have sex mainly for pleasure. Moreover, homosexuality and bisexuality is widespread in the Indian society covering a large section of people belonging to different regional, linguistic, and religious backgrounds and social strata. Section 377 denies these people a right to their sexuality. By natural, one

⁴⁰**Section 375 – Rape** – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

First: - Against her will.

Secondly: -without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: - With or without her consent, when she is under sixteen years of age.

Explanation: - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: -Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape].

⁴¹ A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

means a power to procreate, the natural objective of sexual intercourse is that there should be the possibility of conception of human being (*Calvin Francis v. State of Orissa*)⁴²

In the case of *Fazal Rab Choudhary v. State of Bihar*⁴³, two men were engaged in a consensual sexual relationship. The Supreme Court of India observed that: The offence is one under Section 377 of the IPC, 1860 which implies sexual perversity. No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality ceases to be an offence has influenced our thinking. The Supreme Court sentenced the men to six months rigorous imprisonment. The sheer fact that the court did not take into account was that what the adults in question did was with a mutual consent.

It violates right to liberty guaranteed under article 21 of the Indian constitution, which covers private consensual sexual relations.

The fundamental right to liberty under Article 21⁴⁴ prohibits the state from interfering with the private personal activities of the individual. The concept of privacy is so broad that no comprehensive and encompassing definition of the term can be given. The South African Constitutional Court held in a case of *National Coalition for Gay and Lesbian Equality v. Ministry of Justice*⁴⁵ that, “Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.”

Even at the international level, the right to privacy has been recognized in the favor of lesbians and gays. In the 1980's, the European Court of Human Rights was the first international body to hold that the laws criminalizing consensual, private sexual activity between adults violated the Right to Privacy as protected by the Article 8 of ECHR. Most recently the European Court of Human Rights decided in case of *ADT v. U.K*⁴⁶, that the criminalisation of sexual activities between men when more than two men are present also violated the right to privacy. Thus consensual private sexual relations come within the purview of the right to privacy guaranteed under Article 21 of the Constitution.

The fundamental right to liberty (under Article-21) prohibits the state from interfering with the private personal activities of the individual. The concept of privacy is so broad that no comprehensive and all encompassing definition of the term can be given. In the case *National Coalition for Gay and Lesbian*

⁴² 1992 (2) Crimes 455 (Ori.)

⁴³ AIR 1983 SC 323

⁴⁴ Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law

⁴⁵ 1999 (1) SA 6

⁴⁶ (2001) 31 EHRR 33

*equality v. Ministry of Justice*⁴⁷, the South African court held that, “Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community”. In India for the first time there has been a demand (through the written submission by petitioners in a suit pending before the Delhi High Court challenging Section 377 of IPC at page 21) that there should be a recognition of the fact that central to the concept of “personhood” is the universal need for an intimate personal sphere where the ‘pursuit of happiness’ may be fulfilled. It follows logically that to be meaningful ‘the pursuit of happiness’ must ensure that the individuals are given the right to choose how to achieve personal happiness and more so what constitutes personal happiness for them in the first place; that it should uphold individual autonomy. This in turn goes on to ensure a private sphere within which the right to life and liberty may be enjoyed. The privacy-dignity claim concerning private consensual sexual relations is entitled to protection as a fundamental right as it falls within both aspects of right to privacy- ordered liberty and individual autonomy. Even at the international level, the right to privacy has been recognized in the favour of lesbians and gay man. In the 1980’s, the European Court of Human Rights was the first international body to hold that the laws criminalizing consensual, private sexual activity between adults violated the right to privacy as protected by the Article 8 of ECHR. Most recently the European Court of Human Rights decided in *ADT v. U.K.*⁴⁸, that the criminalization of sexual activities between men when more than two men are present also violated the right to privacy. Thus consensual private sexual relations come within the purview of the right to privacy guaranteed under Article 21 of the Constitution⁴⁹.

Criminalization of homosexual conduct is unreasonable and arbitrary

Infringement of, the right to equal protection before law requires the determination of – whether there is a rational and objective basis to the classification introduced. There should be a just and reasonable nexus between the classification and the object sought to be achieved by the legislation. Section 377 of IPC, its legislative objective is to criminalize all the sexual activities which are “*against the order of nature*”, thus punishing the “*unnatural sex*”. Section 377 assumes that –“*natural sexual act is that which is performed for procreation.*” Hence, it thereby labels all forms of non-procreative sexual act as unnatural. This gives a very narrow view to the distinction between the procreative and non-procreative sexual act. Hence, the legislative intent of creating a public code of sexual morality has no rational nexus with the classification created.

⁴⁷ 1999 (1) SA 6

⁴⁸ (2001) 31 EHRR 33

⁴⁹ **Article 21 in The Constitution Of India 1949**

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

Further the very object of the section is vague, unreasonable, and arbitrary and based up on the stereotyped notion that sex is only for procreation. Now if this presumption is accepted is correct then, what justifies the policies of family planning and the use of the contraceptive devices? Moreover homosexual activity can never be termed as unnatural. Modern understanding of psychiatry and psychology, no longer views homosexuality as a disease or a disorder. Thus the very objective of the section is facile, unscientific and based upon prejudice alone. Therefore the section, which is talking about criminalizing the homosexual conduct, is in violation of Article 14⁵⁰ of the Constitution.

Same-sex marriages are not invalid under Indian laws

The marriage laws of India necessitate marriage as an institution of ‘persons’; and not of a man and a woman only⁵¹. The Hindu Marriage Act does not mandate in words that a marriage can be solemnized between a man and a woman alone⁵². The Special Marriage Act, 1955, which is a uniform code, says that marriage between any two persons may be solemnized⁵³.

The argument that though these legislations do not use the words “man” and “woman” and use “persons” instead is of no importance as legislative intent is to be seen and by a total reading of the Acts the scheme can only be seen as mandating a marriage between a man and a woman is also not tenable as the right to marry is a basic human right⁵⁴, guaranteed as a fundamental right by various nations⁵⁵ and recognized as a

⁵⁰ **Article 14 – Right to Equality** – Equality before law – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

⁵¹ § 5, Hindu Marriage Act, 1955; § 4, Special Marriage Act, 1954; § 4, Indian Christian Marriage Act, 1872.

⁵² “Section 5. Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party,-
 - (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity or epilepsy;
- (iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;
- (vi) (Omitted)” Hindu Marriage Act, 1955

⁵³ S.4, Special Marriage Act, 1954

⁵⁴ Art.16, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948); Art.12, European Convention on Human Rights; Art.23, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; Art.10, Intl. Covenant on Eco..

fundamental right in India⁵⁶. The Delhi High Court, in guaranteeing the right to marry even to a foreigner⁵⁷ noted that:

*“There is also no denial of the legal position that even a foreign national while in carinated has certain fundamental rights and is entitled to protection and enforcement thereof. The right to marry can be said to be one of those rights. Consequently, the appellant has the right to marry either an Indian or foreign national.”*⁵⁸

Now if we interpret the law in light of the argument that the scheme of the Acts obviates marriage as an institution of man and woman, these laws would deny this fundamental right to the citizens, and homosexuals are no doubt citizens, and thereby we would come to anomalous situation where all of India’s marriage laws would be unconstitutional. However, it is a normal canon of construction that the interpretation which would not render a law invalid is accepted as opposed to one which renders the law invalid or unconstitutional⁵⁹. Clearly here that interpretation would imply that the Acts see marriage as an institution of persons and not of a “man” and a “woman”. The studies conducted by the PUCL-K reveals that state is one of the most powerful institutions which discriminate against the sexual minorities in India. The state’s discrimination is very apparent and even some statutes are antagonistic to them.⁶⁰

Homosexuality: The Arguments

This is true that the conflict between homosexuals and heterosexuals can be witnessed in the institution of marriage not only in India but across the world where sodomy law is applicable. This conflict is arising on

Soc. and Cul. Rights, 6 I.L.M. 360; Art.9, Charter of Fundamental Rights of the European Union; U.K. Declaration of the Rights of People with HIV & AIDS.

⁵⁵ *Loving v. Virginia* 388 US 1; *Skinner v. Oklahoma* 316 US 535, *Meyer v. Nebraska* 262 US 390; *Maynard v. Hill* 125 US 190; *Zablocki v. Radhail* 434 US 374; *Turner v. Safely* 482 US 78; *Eisenstadt v. Baird*, 405 U.S. 438

⁵⁶ *Gobind v. State* AIR 1975 SC 1378, para.24; *Rajgopal v. State* AIR 1995 SC 264.

⁵⁷ *Hegedus Lal Csaba v. Union of India* 2005 Cri LJ 2486 [Hereiafter *Csaba Case*]

⁵⁸ *Id* at para.5

⁵⁹ “First attempt should be made by the courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted.” *B.R. Enterprises v. State of UP* (1999) 9 SCC 700

⁶⁰ As stated above, best example is section 377 IPC, 1860. There are so many other legislations also. Say for example section 45 of Army Act, 1950 penalizes all unbecoming acts, which is wide enough to include homosexual act. Section 55 of the Navy act penalizes indecent acts. The concept of moral turpitude described under sections 292 and 294 of the Indian Penal Code implicit the acts of homosexuality. It is also to be noted that there is no legal recognition for the sexual minority unions in India. The rights of sexual minorities are not recognized for the purpose of insurance claims, compensation under Workman’s Compensation Act, nomination for the purpose of gratuity benefits etc. so approaching from any point of view the legislative discrimination is apparent against the sexual minorities in India.

account of the reason given in support as well as against the two different types of marriages which involves very delicate issues for social and legal recognition of sexual minority that is whether the social and legal recognition should be given or not and the same has been tabulated below:

Homosexual marriages should not be legalised	Homosexual marriages should be legalised
The institution of marriage is traditionally the union between man and women.	There is no moral ground on which to support the tradition of marriage as a heterosexual institution. For e.g. slavery once existed but now abolished on humanitarian ground.
Institution of marriage involves procreation and rearing of children	If it was so than there would have been attempt to prohibit unions between a sterile women and a fertile man or vice versa. Nor does legislation exist which requires a married couple to have children. It is true that homosexuals cannot procreate within their union but there are many options available which enable them to have children, including adoption and artificial insemination.
The traditional nuclear family comprises of eight primary relations (Husband, wife, Father, Mother, Son, daughter, Brother, Son).	The traditional view of family as consisting of a mother, father and children is no longer representative of today's society.
The absence of sexual complementarity in these unions creates obstacles in the normal development of children who are placed in the care of such parents. They would be deprived of the experience of either fatherhood or motherhood. Also this is gravely immoral and in open contradiction to the principle, recognized by the United Nation Convention on the rights of children, that the best interest of the children as the weaker and more vulnerable party are to be of paramount consideration in every case.	Scientific studies and psychologists are of the opinion that the love and commitment of the parents make difference not the gender. The children raised by homosexual partners are just as good as those of straight couples.

Marriage is a sacred institution. The homosexual inclination is however 'objectively disordered' and homosexual partners are 'sins gravely contrary to chastity'.	Religion is not an obstacle. Many sects of Buddhism celebrate gay relationship freely. Instances of homosexuality are available in all major religious mythology.
Same sex marriages is an untried experiment.	Homosexual marriages is not an untried experiment. In Denmark since 1989 homosexuality is legally permitted. The result of the experiment suggests that homosexual marriages has actually been civilizing and strengthening, not just the institution of marriage but the society as a whole. So perhaps we should accept the fact that some one else has already done the experiment and accept the result as positive.
Same sex marriages would start us down a slippery slope towards legalised incest, bestial marriages, polygamy and all kinds of other horrible consequences.	If the argument were true than it would have already happened in countries where legalised gay marriages already exists.
Gay marriages would mean forcing businesses to provide benefits to homosexual on the same basis as Heterosexual sex couples.	There is no contradiction to the argument as all are equal and have equal fundamental rights.
Homosexual marriages are unnatural. Hence Sodomy law needs to be more strict.	Homosexuality is natural. There is substantial agreement amongst researchers that sexual orientation is due to genetic factor and is determined by age five or six.
Homosexual marriages are the outcome of today complex individualised post modern industrial utilitarian society.	Instances of homosexuality can be seen even in ancient, medieval and modern India. Its not the development of post modern society.
No rights exists that can compel a state to recognise any relationship contrary to the definition of traditional marriages.	Denial of legal recognition infringes the rights of citizens.
Decriminalised homosexual marriages will lead to an increase in homosexuality and this in turn will undermine the whole institution of marriage and family.	Sexual orientation is due to genetic factor and it is unlikely that an increase in the incidence of homosexuality will occur as a consequence of decriminalisation.
Societal attitude is that people oppose it, hate it, even fear it. That is people are not comfortable with the idea of homosexual marriages.	Homosexual marriages have the potential to reject hierarchical concept of gender. They challenge patriarchy and the male supremacy derived from it and

	are consequently punished for not participating fully in daily maintenance of women oppression.
Heterosexuality has the advantage of slowing the speed of sexually transmitted disease.	Laws regulating and/or penalizing homosexual activity impede public health programs as it drive underground many people at risk.
The human species will be in danger of dying out if homosexuality is legalised due to lack of reproductive power in homosexuals.	In fact gays are giving big favour by not bringing more hungry mouth into this excessive overpopulated world. At the same time the continuity of species can never be in danger due to sexual minority which represent not even 10% of the total world population.
The principle of respect, non discrimination and the people autonomy to support legal recognition of homosexual unions of the individual is not reasonable to invoke. It is something quite different to hold that activities which do not represents a significant or positive contribution to the development of the human in society can receive specific and categorical legal recognition by the State.	Section 377 of IPC violates the right to life and personal liberty, the right to equality and the right to freedom guaranteed to all citizens as Fundamental Rights under Chapter III of Indian Constitution
Sodomy was illegal and was until very recently.	In countries where homosexuality is legalised sodomy law is repealed and has been considered obsolete taking into account the social dynamics.
Homosexuality is a disease. The Indian Psychiatric Society also acknowledges that homosexuality is a kind of mental illness.	The American Psychiatric Association has removed homosexuality from its list of mental illnesses in 1973 and the World Health Organization did the same in 1981.
Decriminalization may be a step towards removing some of the stigma associated with homosexuality and may have positive repercussions on relationship between homosexual and their families.	Criminalisation reinforces negative societal attitude regarding homosexuality which in turn results in greater discrimination and thus impact adversely on the self esteem of many homosexuals which often leads to deception and friction within families.

Human rights and criminalization of homosexuality

“All persons are born free and equal in dignity and rights”⁶¹

The main principles guiding the rights approach on sexual orientation relate to **equality** and **non-discrimination**. Human rights advocates, lawyers and other activists seek to ensure social justice and guarantee the **dignity** of lesbians, gays and bisexuals.⁶²

Homosexuality is not any extraordinary act nor something that people need to feel shameful of. It's just a way of living of an individual. The world need not view these people from the point of tolerance or forced acceptability. Who are we to accept them or not accept them? These are just as human as the heterosexuals are. Why is that we have no rights for them? Why is their lifestyle penalized and not acceptable to the society? These people do not demand any special status or reservations or additional rights but the grant of same rights as those of heterosexual persons. We see not point even in giving them a degrading treatment. What for should they be looked down upon? Just for being different! After all at the end of the day we all struggle to be different from the crowd. These people are denied their basic civil, political, social and economic rights.

The following violations have been documented in all parts of the world:

The *right to non-discrimination* and to be *free from violence and harassment* is usually denied by omitting sexual orientation in anti-discrimination laws, constitutional provisions or their enforcement.

The *right to life* is violated in states where the death penalty is applicable for sodomy. The *right to be free from torture or cruel, inhuman or degrading treatment* is infringed upon by police practices, in investigations or in the case of lesbians, gays and bisexuals in detention.

Arbitrary arrest occurs in a number of countries with individuals suspected of having a homo/bisexual identity.

The *freedom of movement* is denied to bi-national couples by not recognizing their same sex relation. The *right to a fair trial* is often affected by the prejudices of judges and other law enforcement officials. The *right to privacy* is denied by the existence of 'sodomy laws' applicable to lesbians, gays and bisexuals, even if the relation is in private between consenting adults.

The rights to *free expression* and *free association* may either be denied explicitly by law, or lesbians, gays and bisexuals may not enjoy them because of the homophobic climate in which they live.

The *practice of religion* is usually restricted in the case of lesbians, gays and bisexuals, especially in the case of churches advocating against them. The *right to work* is the most affected among the economic rights, many lesbians, gays and bisexuals being fired because of their sexual orientation or discriminated in employment policies and practices.

⁶¹ Article 1: Universal Declaration of Human Rights

⁶² Sexual orientation and Human rights retrieved from http://www.hrea.org/index.php?base_id=161,visited on 15.01.13 at 9:30 pm.

The rights to *social security, assistance and benefits*, and from here - the standard of living - are affected, for example when they have to disclose the identity of their spouse.

The *right to physical and mental health* is at conflict with discriminatory policies and practices, some physicians' homophobia, the lack of adequate training for health care personnel regarding sexual orientation issues or the general assumption that patients are heterosexuals.

The *right to form a family* is denied by governments by not-recognizing same sex families and by denying the rights otherwise granted by the state to heterosexual families who have not sought legal recognition, but still enjoy several rights. Children can also be denied *protection against separation from parents* based of a parent's sexual orientation. Lesbians, gay and bisexual couples and individuals are not allowed to *adopt a child*, even in the case of the child of their same sex partner.

Conclusion

The sexual minorities are not seeking for any special right instead, they are striving for basic human rights. It is also noteworthy that they cannot be classed together with sexual predators like rapists and pedophiles. Many core international human rights documents provide certain inviolable rights such as right to privacy, equality and non-discrimination, which are equally applicable to the sexual minorities as well. However, it is always up to the mercy of state parties to such convention to apply those principles in to the municipal law through constitutional amendments or incorporation. The NGOs and human rights organizations could be instrumental in bringing the social change by constantly demanding for protective legislations. Above all, it is necessary to change our attitudes. However, changing existing laws are time consuming and cumbersome, more complicated is to change the societal attitude. That is why enacting law is more appropriate in bringing about a radical change in recognition of the rights of sexual minorities.