IS PROSCRIPTION OF SECTION 377, THE PROSCRIPTION OF HOMOSEXUALITY?

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Abstract

Contrary to the Human Rights Jurisprudence which treats all human-beings equally, the reading of Sec.377, IPC is such that it has been, is and would be, if the status quo is maintained, targeting homosexuals under the guise of "unnatural sexual activity". Therefore, the principal quest of this paper is to determine whether, the criminal proscription under Sec.377 is confined to "unnatural" acts or homosexuality in general and to venture into the same, the paper has been divided into four parts. Part I traces the judicial interpretation of Sec. 377-ranging from Queen Empress v. Khairati uptil Suresh Kumar Koushal v. Naz Foundation, as to how the Courts have circumscribed the scope of 377 only to the implication of same-sex sexual intimacies and have excluded heterosexual adult consensual sexual intimacies from its purview which, has legitimised police harassment and torture on the LGBT Community over the years. Part II retorts at how the Supreme Court's reliance and its failure to consider relevant issues in the case of Suresh Kumar Koushal v. Naz Foundation has been lethal for the rights of the LGBT Community. Part III argues that, the Suresh Koushal decision in so far as it criminalises consensual sexual activities of adults in private is in violation of Articles 21, 14 and 15 of the Constitution. Lastly, Part IV of the paper is the concluding remark at how the decriminalisation of gay sex would have a concurrent effect at bestowing the homosexuals with the Right to a dignified life.

I. INTRODUCTION

Like Hilary Clinton rightly said,

> "*Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights. … No matter what we look like, where we come from, or who we are, we are all equally entitled to our human rights and dignity.*"

Given the fact that the dignity and human rights of lesbians and gays are just as important as those of other human beings, it becomes essential that sexual conduct, intimate relationships, and homosexuality should be treated as a part of the basic index of human needs, worthy of protection and respect by the states. Rendering the 'Right to Privacy' of LGBT community important, the famous Wolfenden Committee Report that led to the decriminalisation of homosexuality was based on the principle that, it was not the function of Law to interfere in the private life of citizens, or to seek enhancement of any particular pattern of behaviour.[2] The case of Dudgeon v. United Kingdom[3] followed soon after wherein, the European Court of Human Rights found Northern Ireland's legislation that criminalized the same-sex sexual activities to be an unjustified interference with the petitioner's private lives.

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[2] Report of the Committee on Homosexual offences and Prostitution (1957).

[3] Appl. No. 7525/76, Council of Europe: European Court of Human Rights (ECHR), 22 October 1981.

Then, on March 31st 1994, the United Nations Human Rights Committee in the case of Toonen v. Australia[4] held that, Sections 122(a) &(c), and 123 of the Tasmanian Criminal Code, which criminalized all forms of sexual contact between consenting adult men in private (similar to Sec. 377 IPC), violated the right of privacy and the right of non-discrimination under the International Covenant on Civil and Political Rights (ICCPR), to which India had also acceded on April 10, 1979. This was the first time when any United Nations Body had unequivocally stated that fundamental human rights should be extended to lesbians and gay men which, not only had impacted Australia but, had proved to be a significant victory for lesbian and gay rights advocates beyond Australia too.

But the Indian reading of the law seems to have a regressive approach as compared to its global counterparts. Under the Indian Penal Code, the Sec. 377[5] incriminates 'carnal intercourse against the order of nature'. Although, implication under this section requires more than just the reputation of being a confirmed sodomite, for which there must be distinct evidence of the time when, the place where, and the person (known or unknown) with whom he committed the offence.[6] But, lately, the LGBT Community has been facing the most debilitating reality in the form of police harassment, custodial rapes and violation of basic human rights under the garb of 377.

1.1. **The Judicial interpretation of Sec. 377 over the years**

The objective of Sec. 377 has remained the subject-matter of deliberation which is clear from the different parameters adopted by the Indian Courts for gauging "unnatural sex" under Sec. 377. However, the moot question which remains unanswered is: Whether the purpose behind its enactment is the prosecution of people who actually commit sodomy or criminalisation of those who appear to be likely to commit the offence? Though superficially neutral, the section predominantly outlaws sexual activity between same-sex people which is by its very nature penile non-vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling.

The foremost parameter for the criminalisation under Sec. 377 was the "criminalisation of the identity and not the act" as it was believed that usually the homosexuals or the transgender persons were the ones who were associated with the sexual practices proscribed under Sec. 377. Such criminalisation of identity dates back to the times of Queen Empress v. Khairati[7], Noshirwan v. Emperor[8] or DP Minwalla v. Emperor[9], when the Courts created an association between the sexual acts and a certain class of individuals, who were more likely to commit the

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4 CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

5 Section 377 of IPC, 1861 reads: **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.

6 Kharati v. Emperor, ILR.

7 1884 ILR 6 ALL 204. The only set of incriminating evidence was that Khairati habitually wore women's clothes, sang and danced and the orifice of her anus was distorted into the shape of a trumpet- a mark of a habitual sodomite.

8 AIR 1934 Sind 206. The Judge reprimanded the accused persons as "despicable" specimen of humanity for being addicted to the "vice of a catamite" on their own admission.

9 AIR 1935 Sind 78. In a desperate attempt to redeem himself, Minwalla had submitted a medical examination to convince the court that his anal orifice was not shaped like a "funnel", which was the sign of a habitual sodomite.

offence – thereby, giving a character and face to sodomy in the form of a homosexual. Khairati, Noshirwan and Minwalla all belonged to that one class of individuals who could most likely be the perpetrators of such an offence.

This was followed by the "procreative test"[10] that covered under the ambit of Sec.377, those acts which did not have the possibility of conception of human beings. The rationale behind this test was that the heterosexual marriages especially marriages, were clothed with a veil of legitimacy, as the Apex Court excluded the act of having connection with a woman in the mouth, out of the ambit of "unnatural offences".[11] The parameter then evolved into an "imitative test" wherein the acts of oral, anal and thigh sex[12] became imitative of and replaced the desire of sexual intercourse. This was the time when the Gujarat High Court in the case of Lohana Vasantlal Devchand v. State[13], opined that acts of oral sex done as a prologue to coitus would not be covered under Sec. 377, as the rationale flowing from the assumption suggested that following oral sex as a prelude, a couple would engage in penile-vaginal sexual intercourse, which was impossible in homosexual sex.

Such measures concluded finally into the "test of sexual perversity/ immorality/ depravation of mind"[14] after the Judgement in the case of Fazal Rab Choudhary v. State of Bihar[15] wherein the Supreme Court while dealing with an application for mitigating the sentence for a conviction, held that an offence under Sec.377 implied "sexual perversity".[16] This junction between sodomy and perversity along with the failure to take into account the consummation of consensual acts in private was approved in the case of Pooran Ram v. State of Rajasthan[17], wherein, the court while holding that "perversity" that led to sexual offences might result either in "homosexuality or in the commission of rape"[18] had equated a homosexual to a rapist.

Thus, the unnatural carnal intercourse has been, at different points, referred to as being an act of men of "depraved morality"[19] and one that was "abhorred by civilized society"[20]. Refusing to grant encouragement and propagation, the Courts have termed homosexuality a crime and a horrified condemnation which may be carried out clandestinely and in privacy by few.[21] After such recognition by the Indian Judiciary, homosexuality has gained the face of the general discourse on perversity.

Adding to the misery is the Supreme Court Judgement in the case of Suresh Kumar Koushal v. Naz Foundation[22] (Hereinafter referred to as "Suresh Kumar Koushal Judgment") which has been successful in earning for itself the title of ADM Jabalpur 2, just like its predecessor, which

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10 Khanu v. Emperor AIR 1932 Cal 487 at ¶¶ 2.
11 Govindarajulu in re (1886) 1 Weir 382.
12 State of Kerala v. K Govindan 1969 CrLJ 818.
13 AIR 1968 Guj 252.
14 Fazal Rab Choudhary v. St. of Bihar, AIR 1983 SC 323 at ¶¶ 3; Mihir @ Bhikari Charan Sahu v. St. of Orissa, 1991 Cri LJ 488 at ¶¶ 6 & 9; Khanu v. Emperor at ¶ 262.
15 AIR 1983 SC 323.
16 The Court also observed that "neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking".
17 Pooran Ram vs State of Rajasthan 2001 CriLJ 91.
18 *Ibid*, ¶¶ 31.
19 Mirro v. Emperor AIR 1947 All 97.
20 Mihir @ Bhikari Charan Sahu v. St. of Orissa, 1991 Cri LJ 488 at ¶¶ 2.
21 Azadi Bachao Andolan v. All India Radio & Ors., India: Metropolitan Magistrate Delhi, 13 October 1997.
22 Suresh Kumar Koushal v. Naz Foundation Civil Appeal No.10972 of 2013, India: Supreme Court (SC), 11 December 2013. **[Hereinafter referred to as " SURESH KUMAR KOUSHAL JUDGEMENT"].**

authorised the government to detain without trial, similarly, the Supreme Court through Justice Singhvi and Justice Mukhopadhaya unanimously decided, that the state is entitled to criminalise (and imprison for life) consenting adults who engage in victimless sexual acts in private.

1.2. The Letter of Sec.377 serves as a weapon of Police Harassment

Even though the Criminal Tribes Act, 1871[23] stands repealed, its presence can well be traced in the contemporary judgements; the anachronistic understanding of the 'unnaturalness' of non-procreative sex; custodial rapes and harassments by the police, like in the case of Kokila, a transgender who was raped by ten men on the eve of June 8th 2004 in the city of Bangalore. For her, it did not end at just losing her dignity to petty thieves because she was yet to be brutally physically and mentally tortured by the Police to whom she had approached for legal assistance.[24] Furthermore, a gay man was picked up from a bus-stand by two policemen who started beating him up and asked for sexual favours, the denial of which led to forced anal and oral sex.[25] Also, the case of one Pottai is worth mentioning here, who originally was arrested on charges of theft, but committed suicide in the police custody due to the harassment and torture at the hands of police officers who tried forcing their *lathi* up his anus.[26] Adding to the list, an undercover police posed as a gay man on a website which was used by gay men to engage in internet chatting, and entrapped one man and then forced him to call others and arrange a meeting where they were arrested.[27]

By incriminating private, consensual same-sex conduct, Sec. 377 IPC serves as the weapon for police cruelty; detaining and questioning, extortion, harassment, forced sex, payment of hush money; and perpetuates negative and prejudiced attitude towards same-sex relations and sexual minorities; which consequently cripples HIV/AIDS prevention efforts. Also, the Judicial interpretation of Sec.377 in the Suresh Kumar Koushal Judgement has been regressive in upholding the constitutionality of the law and overturning a Judgement[28] by the Delhi High Court in 2009 that decriminalised sexual activity between two consenting adults.

II. FROM DECRIMINALISATION TO RECRIMINALISATION : SC ON THE ISSUE OF SECTION 377

In the name of upholding democracy, India witnessed a disparaging impact on the human rights adjudication under the guise of Suresh Kumar Koushal v.Naz Foundation.[29] By breathing life into Sec. 377, the Apex Court of the Country affixed a badge of stigma on the body of the

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[23] Under this law, the local government was required to keep a register of the names and residences of all eunuchs who were "reasonably suspected of kidnapping or castrating children or committing offences under Section 377 of the Indian Penal Code".

[24] Retrived from <http://indiatoday.intoday.in/story/lgbt-community-supreme-court-gays-lesbians-transgenders-rape gangrape/1/331166.html> on 23rd February 2014 @ 12:00 hrs.

[25] Annexure R13 of the Counter affidavit in SLP (C) No. 15436/2009 in the case of Suresh Kumar Koushal v. Naz Foundation. Retrived from < http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf> on 23 February 2014 @ 12:00 hrs.

[26] Jayalakshmi v. State of Tamil Nadu (2007) 4 MLJ 849.

[27] *Ibid*, Human Rights Watch India: Repeal Colonial Era Sodomy Law, 2006. Annexure R16 to the Counter Affidavit of Respondent No. 11 in SLP(C) 15436/2009.

[28] Naz Foundation v. Union of India, WP(C) No.7455/2001, Delhi High Court, 2 July 2009. **[Hereinafter referred to as "NAZ FOUNDATION JUDGEMENT"]**

[29] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21.

Constitution. The judgment unleashed a veritable firestorm of protest in the public space along with a heated and vitriolic debate on the issue of homosexuality in the media, as well as television, with public opinion, mainly, being critical of the judgment because, for the LGBT Community, it was nothing less than their fundamental right to live with dignity that was at stake. The reversal of the progressive, egalitarian, inclusive and constitutionally-wise decision of the Delhi High Court invited critical appraisal from all sections of the Indian Society on the following grounds:

1. Ignoring the Possibility of Consent.

By upholding the constitutional validity of Sec. 377 which makes same-sex an offence punishable with up to life imprisonment, the Supreme Court's abhorrence is generalised into a law on who can pleasure whom and how, irrespective of consent.[30] By attaching irrelevance to consent, the Supreme Court has imposed a blanket prohibition on all penile-non-vaginal-sexual acts. At the heart of this deliberation is the question as to whether homosexual activity with mutual consent is a normal deviance– a difference in sexual orientation - or a pathological entity.

Although, Sec. 377 does not exclude consensual activities, however the use of the term "voluntary" in the language of 377 makes consent irrelevant.[31] The failure of the courts to tell apart "two extremely different situations", one of non-consensual sex and the other, of consensual sex indicates that men who forcibly rape other men and male homosexuals indulging in consensual sexual activities are all one and the same thing. Therefore, the articulations of oral, anal, thigh sexual intercourse along with mutual masturbation would carry a punishment even when two consenting adults may indulge into such acts within a personal space.

In this process, the Court has failed to take into account the impact of the amendment in the offence of rape in Sec. 375, IPC on Sec. 377. After the Criminal Law (Amendment) Act, 2013, presently, Sec. 375 prohibits both penile vaginal and penile-non vaginal sexual acts between man and woman, without consent. By such an implication, consensual penile non-vaginal acts of heterosexual couples are not criminalized anymore, otherwise the amendment in Sec. 375 would become meaningless. Currently, in effect, Sec. 377 discriminates against homosexual men and transgender persons by criminalising all forms of penetrative sex, i.e., penile-anal sex and penile-oral sex, between man and man, which makes it violative of Article 14. The amendments came into force in February, 2013, way before the pronouncement of the judgment in December, 2013, but the Court failed to notice the import of the statutory amendments and their effect on Sec. 377.

2. Reducing the LGBT Community to a "Minuscule Minority".

Upendra Baxi in his Article "Naz 2: A Critique" argues that, the SC has not merely denied the right to perform same sex acts but also their status as minorities, describing them as "minuscule"[32], ruling as "not proven" and holding laconically that theirs was not a complaint against denial of identity rights but an unsustainable plea for immunity for the performance of

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[30] Retrieved from <http://kafila.org/2013/12/16/suresh-koushal-v-naz-foundation-pratiksha-baxi/> on 28 February 2014.

[31] Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, ECONOMIC & POLITICAL WEEKLY, Vol. LXXII, No. LXXVII, ¶ 4818, (4817-4823) 18 November 2006.

[32] Upendra Baxi, *Naz 2: A Critique*, ECONOMIC & POLITICAL WEEKLY, Vol. XLIX, No. 6, ¶ 12, (12-14) 8 February 2014.

acts contrary to "nature".[33] Such a ruling implied that only numerically preponderant body populations could enjoy the right to equality thereby, overwriting equality jurisprudence by the insidious politics of numbers.

In a contradicting Judgement[34] by the Supreme Court in April 2014, the transgender people were granted the status of a "third gender" category and recognised as socially and economically backward classes, thereby being granted the privileges thereof. Although, all identity documents such as birth certificates, passports and driver's license would now have a third gender box, but the ruling does little to change the status quo established by the Suresh Kumar Koushal Judgement. That is because while everyone would have a right to choose their own gender, but not sexuality as "sex against the order of nature" generally interpreted as "gay sex" is criminalised under law.

3. Restrictive reading of the Power of Judicial Review.

The Court's understanding of the separation of powers, democracy, judicial self-restraint and deference in the practice of adjudicating the fundamental rights of the LGBT Community provides a wide template for criticising the Judgment. In the instant case, the Apex Court has relied upon the decisions in the cases of Commissioner of Sales Tax, Madhya Pradesh, Indore and Ors. v. Radhakrishan and Ors.[35], R.M.D. Chamarbaugwalla v. The Union of India[36] and reiterated that "there is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution"[37] In the same manner, the Court also upheld the decision in Namit Sharma v. Union of India[38], thereby observing that the "Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional".[39]

Thus, it chose to exercise self-restraint guided by the presumption of Constitutionality even when it was empowered to review the constitutionality of Sec. 377 IPC and strike it down to the extent of its inconsistency with the Constitution. But, the Court forgot that the Constitution could not be circumscribed to narrow readings of legal doctrine, law digests or precedents. Rather, it has been a living law ever since, which has struggled to inscribe equality, justice and the right to life in the minds and souls of our Justices. Moreover, the IPC was drafted in the 19th Century with provisions such as Sec. 377, which are completely repugnant and obsolete as per the modern emerging trends and thus, it is difficult to believe that in an advanced society like today's, discriminating provisions like the Sec. 377 prevail.

4. Putting the onus on Parliament.

In another fallacious reasoning, the Supreme Court held that, "it was left open for the Parliament to amend the law, but even in 30-odd amendments to the IPC and the clear recommendation of

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[33] *Ibid.*
[34] National Legal Services Authority v. Union of India & Ors. ,W.P. (C) NO.400 of 2012, SC,14 April 2014.
[35] 1979 AIR 1588.
[36] 1957 AIR 628.
[37] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 31.
[38] (2013) 1 SCC 745.
[39] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 30.

the 172nd Law Commission Report to delete the Sec. 377, the Parliament did not deem it proper to delete the provision".[40]

But at the same time, the Apex Court failed to reason that, the Union Parliament's decision to not amend Sec. 377 was not an endorsement of the same but only a restraint to not deal with a matter already sub-judice in the Apex Court. Also, that the Government of India itself argued before the SC that it "does not find any legal error in the judgment of the High Court and accepts the correctness of the same"[41] and that the Government never filed any appeal against the judgment of the High Court are reasons that, in the instant case, at stake was the question of the fundamental and human rights of which the Court has been the final arbiter, thus, shifting the onus on the Parliament was not a wise deduction.

5. No reliance on Foreign Jurisprudentia.

The Delhi High Court in the case of Naz Foundation v. Union of India had relied upon foreign Court Judgements like, Lawrence v. Texas[42]; Dudgeon v. UK[43], Norris v. Republic of Ireland[44]; The National Coalition for Gay and Lesbian Equality v. The Minister of Justice[45]; and, other jurisprudentia like the Wolfenden Committee Report, 172nd Law Commission of India Report, the address of the Solicitor General of India before United Nations Human Rights Council, the opinion of Justice Michael Kirby[46] to read down Sec.377. While holding that only constitutional morality could pass the test of compelling state interest and not popular morality or public disapproval of certain acts, the Delhi High Court was unable to accept the retention of Sec. 377 IPC to cover only consensual sexual acts between adults in private on the grounds of public morality.

In a highly insular move, the Apex Court criticized this reliance on foreign precedents and Judgements of other jurisdictions to read down Sec. 377. The Court observed that, "Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, they could not be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature".[47] To substantiate this otherwise inward-looking argument, the Apex Court referred to Jagmohan v. State of U.P[48]. wherein, during the course of hearings on the challenge to capital punishment, the Court had rejected references to the U.S. case law, holding that Western experience cannot be transplanted in India.[49] In this process, the Apex Court relied upon Surendra Pal v. Saraswati Arora[50] where the English doctrine of presumption of "undue influence" was applied in a case where parties were engaged to be married. The Court therein had ruled that since, Family law under Indian and English Law was different, therefore, social norms and considerations were also different.[51]

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[40] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 32.
[41] *Ibid.*
[42] 539 U.S. 558 (2003).
[43] Application No.7525/1976, Council of Europe: ECHR, 22 October 1981.
[44] Application no. 10581/83, Council of Europe: ECHR, 26 October 1988.
[45] Case CCT 11/98, South Africa: Constitutional Court, 9 October 1998.
[46] Former Justice of the Australian High Court.
[47] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 52.
[48] 1973 AIR 947.
[49] *Ibid*, ¶¶ 14.
[50] 1974 AIR 1999.
[51] *Ibid*, ¶ 697.

But, the Apex Court failed to notice that the foreign precedents were never cited hastily by Delhi High Court to decide the validity of Sec. 377, but to testify to the comparative constitutional change ushered in by the Foreign courts. Going by the Apex Court decision on this point which completely ignores the commonalities of LGBT experience and state morality, the implication comes out to be that Indian social conditions and morality differ from the west and so western judgments cannot be used as a point of comparison.

6. No concluding remark at the difference between "non-procreative sexual activity" and "unnatural offences".

Along with the aforementioned fallacies, the Supreme Court also observed that, "Section 377 IPC does not criminalize 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".[52] But, in a country like India, where there exists no communally acceptable norms outside the system of heterosexuality, same-sex orientation becomes a matter of "gender identity" even though Sec.377 doesn't stand to criminalise homosexuality, as held by the Apex Court.

Furthermore, the Court, without any hesitation of contradiction, held that, "the orifice of mouth was not, according to nature meant for sexual or carnal intercourse and viewing from that aspect, the act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature"[53], especially when it recognised as true that, "the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory"[54]. Thus, the Judgement misdirected in holding that any non-procreative sexual activity was "against the order of nature" even though homosexuality exudes socio-scientific and anthropological proof.

Scientifically, it's proven that homosexuality is no disorder but a sexual orientation wherein, one is attracted and drawn to his/her own gender. Further, in 1992, the World Health Organization removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10) by holding that, "disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category".[55] Even on the social front, empirical researches on homosexuals have concluded that gay men and lesbians in the United States tend to be better adjusted psychologically to the extent that they identify with and feel part of such a community.[56] And historically, if one looks at the temple imagery of Khaujuraho, at images of either women erotically embracing other women or men displaying their genitals to each other, or sacred narratives of Ramayana and Mahabharata with occasional references to same sex-intercourse and stories of men turning into women and vice-versa, or the scriptures like Manusmriti and Kamasutra, one would find that though Ancient India never approved of homosexual activities, but acknowledged their existence. But, such disapproval of homosexual activities is not a valid reason for upholding Sec.

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[52] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶ 77.
[53] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶ 71.
[54] *Ibid.*
[55] Gene Nakajima, *The emergence of an International Lesbian, Gay, and Bisexual Psychiatric Movement*, JOURNAL OF GAY AND LESBIAN PSYCHOTHERAPY, Vol. VII, No. I, 21 Oct 2008, ¶ 180.
[56] W. Edward Craighead, Charles B. Nemeroff (Editors), The Concise Corsini Encyclopedia of Psychology and Behavioural Science at Flag V, Vol. I.

377 as the very Ancient India that censured homosexuality, also had one point in time, institutionalised caste-system and made women subservient to men.

7. Failure to appreciate the evidence adduced.

Lastly, the Court failed to appreciate the evidence of discrimination[57], harassment and torture faced by LGBT persons that was adduced by the respondents in the form of FIRs, personal affidavits, fact-finding reports, official statistics, peer reviewed articles, and the reported judgments[58]. Instead the Court held that the respondents "miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them."[59] And declared that "harassment, blackmail or torture" of LGBT persons is "neither mandated by the section nor condoned"[60] by Sec.377 IPC. In other words, the Supreme Court gaily disregarded that *unwritten* precedents of injustice (arrests, illegal detentions, harassment, blackmail or torture) underlie the *written* precedents of injustice (orders and judgments).

III. CRIMINALISATION OF SECTION 377: DENIAL OF THE "RIGHT TO DIGNIFIED LIFE" TO HOMOSEXUALS

The Sec. 377 insofar as it criminalises consensual sexual acts of adults in private is in violation of Articles 21, 14 and 15 of the Constitution and the Supreme Court by upholding its constitutional validity in Suresh Kumar Koushal Judgement has reaffirmed that the LGBT Community is too small a community to be protected. After having deciphered the Supreme Court on its fallacious reasoning, the next question at stake is: Whether the rights of the LGBT Community as valid as the rights of others in the Modern India?

1. Violation of Article 21[61]

1.1. Violation of "Right to live with dignity"

The right to life, guaranteed by Article 21, goes beyond just the guarantee of physical survival or a bare animal existence; instead it comprises a guarantee of the right to live with human dignity. The existence of a law like Sec.377 which punishes a form of sexual expression for gay men is a palpable invasion of their dignity such that it degrades and devalues them in the broader society and smacks at the root of human need and impulse, and prevents the creation of private bonds between human beings that accomplish the human requirement for love, attachment and intimacy. That is because, the criminalisation of such sexual intimacy between consenting adults of the same sex deprives homosexuals of the right to participate in a fundamental human experience.

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[57] Aligarh Incident: On 9.02.2010, Professor Ramchandra Shrinivas Siras, a 64 year old Reader & Chairman, Aligarh Muslim University (AMU) was filmed having consensual sex with a rickshaw puller and subsequently suspended by the Aligarh Muslim University. The LGBT community proclaimed it to be a violation of their Right to Privacy. Retrieved from <http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf> on 25 March 2014.

[58] Desmond Hope v. State of Goa, Crim. Misc. App. (Bail) No. 55 of 2007; Jayalakshmi v. State of Tamil Nadu, (2007) 4 MLJ 849.

[59] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 40.

[60] **SURESH KUMAR KOUSHAL JUDGEMENT,** *Supra* note at 21, ¶¶ 51.

[61] Article 21 of the Indian Constitution reads: **Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law.

There have been a majority of litigations in the country wherein, the Courts have held that the acts which degrade or destroy a person's personality or have the effect of dehumanizing him and violating his personhood, impair his dignity.[62] Even the Delhi High Court in the impugned Judgement held that as Sec. 377 stands, it denies a gay person a right to full personhood, which is implicit in notion of life under Article 21 of the Constitution.[63] As a result, while some LGBT persons are forced into marriages which remain unconsummated and unhappy[64], many conceal their original identity by leading double lives[65] seeking to arrive at conciliation between their emotional and sexual desires, and the stigma with which they are labelled by society. Other lead lonely lives, scared to bring too much attention to themselves.

The US Supreme Court, in Lawrence v. Texas[66], held that adults may choose to enter a relationship with a person of the same sex in their private lives and still enjoy the dignity of being free and not being equated to being "criminals". Further, the High Court of Fiji, in Dhirendra Nadan & Anr. v. State has been of the view that the criminalisation of certain sexual acts between consenting adult males or females in private is viewed as a severe restriction on a citizen's right to build relationships with dignity which cannot otherwise be justified as necessary.[67]Also, the Hon'ble Supreme Court has in the case of Suchita Srivastava v. Chandigarh Administration held, that the respect of a person's right to privacy, dignity and bodily integrity requires that there be no restriction whatsoever on a person's decision to participate or not to participate in sexual activity.[68]

Just because there is no other socially acceptable norm outside the regime of heterosexuality in the Indian Society, being a homosexual shapes into a "gender-identity"- fit for prosecution under Sec.377, as a result of which, almost all sexual penile penetrative acts between homosexual men come under the purview of "offences. Resultantly, each homosexual man is ripped off his Right to a Dignified Life.

1.2. Violation of "Right to Privacy"

Article 21, apart from the Right to a dignified life, also grants liberty to a person to enter into intimate relationships with another in the privacy of their homes and their private lives and still retain dignity as free persons. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.[69] Right to privacy is also an entrenched part of international human rights law like the

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[62] D.K. Basu v. State of West Bengal, AIR 1997 SC 610 at ¶¶ 11; Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526.

[63] **NAZ FOUNDATION JUDGEMENT,** *Supra* note at 27, ¶¶ 48.

[64] R. Raja Rao and Dibyajyoti Sarma, (editors), *Whistling in the Dark: Twenty-One Queer*, SAGE PUBLICATIONS, 2009, ¶75.

[65] Shakuntala Devi, *The World of Homosexuals*, BELL BOOKS, New Delhi, 1977, ¶ 107.

[66] *Supra* note at 41.

[67] Dhirendra Nadan & Anr. v. State, Criminal Appeal Case Nos.: HAA 85 & 86 OF 2005, High Court of Fiji, 26 August 2005.

[68] Suchita Srivastava v. Chandigarh Administration,(2009) 9 SCC 1.

[69] R. Rajagopal v. State of T.N., (1994) 6 SCC 632.

Article 12[70] of the Universal Declaration of Human Rights (1948); Article 13[71] of the International Convention of Civil and Political Rights (to which India is a party); European Convention on Human Rights[72].

Thus, the Right to Privacy is an essential ingredient of personal liberty; it is the right to be let alone. But this "right to be let alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with one's own life, their personality and make fundamental decisions about their intimate relations without penalisation.[73] In the case of District Registrar and Collector, Hyderabad v. Canara Bank[74], the Hon'ble Supreme Court expanded this right to privacy after relying upon Griswold v. State of Connecticut[75] to mean that the individual has the right to determine the most intimate of life choices, make decisions and choices from unwarranted interference from the state and a right of protection against intrusive observation of the State.

Therefore, the question here is not whether one has a fundamental right to engage in carnal intercourse against the order of nature but, whether the protection under Art. 21, of one's zone of privacy, available to those consenting adult persons who may have carnal intercourse against the order of nature; and in the case of non- availability of an undisturbed right, whether such intrusion is due to some necessary/compelling state interest or one that's related to the accomplishment of a permissible State policy.

Coming under the ambit of Privacy is also, sexual intimacy which is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. Blackmun J. in the case of Bowers v. Hardwick[76] took inference from Paris Adult Theatre I v. Slaton[77] and observed that, the way in which one gives expression to their sexuality is at the core of the area of private intimacy and if in expressing their sexuality, they act consensually and without harming one another, invasion of that precinct will be a breach of their privacy. Thus, the scope of privacy draws light from the concept of identity and is based on the notion of what is essential to have one's autonomous identity, his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community. Ruling on similar lines of violation of Privacy, the News Broadcasting Standards Authority slapped a fine of Rs. 1 lakh rupees on the news channel TV9 for airing an extremely incendiary and invasive programme titled "Gay Culture rampant in Hyderabad" which conducted a "sting operation" to "expose" the city's gay culture. The Authority held that the

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[70] Article 12 of the UDHR reads: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[71] Article 13 of the ICCPR reads: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

[72] Article 8 of the ECHR reads: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority except such as is in accordance with law and isnecessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

[73] Blackmun, J. in his dissent in Bowers, Attorney General of Georgia v. Hardwick et al, 478 US 186 (1986).

[74] A.I.R. 2005 S.C. 186.

[75] 381 U.S. 479 (1965).

[76] 478 US 186 (1986).

[77] Paris Adult Theatre I v. Slaton, 413 US 49 (1973), ¶ 63.

channels had violated the rights to privacy of individuals of "alternate sexual orientation" and stated that homosexuality was "no longer considered a taboo or a criminal act".[78]

Further, the United Nations Human Rights Committee in Toonen v. Australia[79] has been of the opinion that, though this right to privacy is available to everyone and not to particular sections of society, it becomes more significant when certain private adult consensual sexual acts are proscribed by law, even when there is no compelling State interest involved. Therefore, Sec. 377 suffers from the violation of Right to Privacy of homosexuals insofar as it invades the sphere of privacy and prohibits certain private consensual sexual acts and criminalises homosexuality and not the unnatural sexual act.

2. Violation of Article 14[80]

The Supreme Court in its interpretation of Article 14 has laid down two tests: the Test of Permissible Classification and the Test of Arbitrariness.

2.1. Violation of the Test of Permissible Classification

The Indian Judiciary is of the opinion that only kind of permissible classification is one which is (i)based on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.[81] Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14.

The effect of Sec.377 is such that it creates the classification of "procreative" and "non-procreative" sexual activities and stands to criminalise 'sexual intercourse against the order of nature'. Here, it fails the test of Permissible Classification in the sense that, the legislative objective of penalising unnatural sexual acts has no rational nexus with the aforesaid classification sought. Firstly, because, for any act to prosecuted under Sec.377, it must be 'unnatural' which again is a grey area for, no indication has been supplemented with the section and a bare reading of the provision with the Court's interpretation in various judgements[82] imposes a blanket prohibition on all penile non-vaginal sexual acts; And Secondly, because after the amendment of Sec. 375 under the Criminal Law (Amendment) Act, 2013, Sec. 377 does not criminalise consensual penile non-vaginal acts of heterosexual couples anymore and in effect, discriminates only against homosexual men and transgender persons by criminalising all forms of penetrative sex, i.e., penile-anal sex and penile-oral sex, between man and man, which makes it violative of Article 14.

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[78] Retrieved from <http://privacy-india.org/2011/03/25/news-broadcasting-standards-authority-censures-tv9-over-privacy-violations/> on 12th March 2014.

[79] CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

[80] Article 14 of the Indian Constitution reads: **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 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[81] Budhan Choudhry v. State of Bihar AIR 1955 SC 191, Hanif v. State of Bihar AIR 1958 SC 731; Harakchand Ratanchand Banthia v. Union of India 1969 (2) SCC 166, Pathumma v. State of Kerala AIR (1978) 2 SCC 1, Babu Ram v. State of Uttar Pradesh (1995) 2 SCC 689.

[82] Queen Empress v. Khairati 1884 ILR 6 ALL 204, Noshirwan v. Emperor AIR 1934 Sind 206, D.P.Minwalla v. Emperor AIR 1935 Sind 206, Khanu v. Emperor AIR 1925 Sind 286, Fazal Rab Chaudhury v. State of Bihar AIR 1983 SC 323, Pooran Ram v. State of Rajasthan 2001 CriLJ 91.

Thus, it is evident that the incongruent grouping in Sec. 377 IPC does not take into account relevant factors such as consent, age, place and the nature of the act or the absence of harm caused to anybody and the classification created by Sec. 377 of 'unnatural sexual offences' lacks intelligible differentia.

2.2. Violation of the "Test of Arbitrariness"

According to the second test, a classification will not be justified if it is palpably arbitrary.[83] Reiterating its ratio in the case of E.P. Royappa v. State of Tamil Nadu[84] that "from a positivistic point of view, equality is antithetic to arbitrariness"[85], the Supreme Court placed sufficient emphasis on the test of arbitrariness in the case of in Maneka Gandhi[86] where it was held that the State has to avoid arbitrariness in any form.

Thus, the right to equality has not only been construed to mean the right not to be discriminated against, but also the right to be protected against arbitrary and irrational acts of the State. This viewpoint was avowed by the Constitution Bench in Ajay Hasia v. Khalid Mujib Sehravardi[87], where it was held that "what Article 14 strikes at, is arbitrariness because any action that is arbitrary must necessarily involve negation of equality".

Thus, to avoid such arbitrariness, for prosecution under Sec. 377, the state must take into account the requisite *mens rea* that one harbours for, he cannot be criminalised for something that he has no control over. Moreover, it is a matter of fact that, criminal intention is attributed when there is lack of consent in a sexual act, whether it is heterosexual or homosexual. Since, it is now scientifically proven that homosexuality is no mental disorder[88] but, an innate, natural variant of human sexuality, and is as 'natural' as heterosexuality, and Sec. 377 criminalises all homosexual acts even if they are consensual based on the assumption that these acts are 'unnatural'.

Moreover, Sec. 377 assumes that the natural sexual act is one which is performed for procreation, thereby ruling out all non-procreative sexual acts and presuming that "sex could only be done for procreation". Resultantly, homosexuals fall within the ambit of the term 'carnal intercourse against the order of nature' as used in Sec. 377. Hence, the very object of the section is vague and unreasonable and hits the provisions of Article 14. Because, if such a presumption is accepted, then the policies of family planning and contraception stand defeated.

3. Violation of Article 15[89]

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[83] Re Special Courts Bill (1979) 1 SCC 380.
[84] 1974 AIR 555.
[85] Ibid, ¶¶ 85.
[86] Maneka Gandhi v. Union of India, 1978 AIR 597.
[87] 1981 AIR 487.
[88] *Supra* 54.
[89] Article 15 of the Indian Constitution reads: **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:**
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
(a) access to shops, public restaurants, hotels and palaces of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.

The Delhi High Court in the impugned Judgement, while declaring Sec.377 unconstitutional, observed that, along with Articles 14 and 21, it was also violative of Article 15. The Article 15 prohibits discrimination on several enumerated grounds, which include 'sex'. The rationale behind such a deduction flowed from foreign Jurisprudentia that, the meaning of "sex" in Article 15 should be read expansively to include a prohibition of discrimination on the ground of sex-discrimination. The purpose underlying the fundamental right against sex discrimination was to prevent behaviour that treated people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles for which, sexual orientation formed a stereotypical ground.

In Toonen v. Australia[90], the Human Rights Committee, while observing that certain provisions of the Tasmanian Criminal Code which criminalised various forms of sexual conduct between men violated the ICCPR[91], held that the reference to "sex" in Article 2, paragraphs 1 and 26 (of the ICCPR) was to be taken as inclusive of "sexual orientation". Despite the fact that Section 15(1) of the Canadian Charter did not expressly include sexual orientation as a prohibited ground of discrimination, the Canadian Supreme Court in the case of Vriend v. Alberta[92], held that sexual orientation was a ground analogous to those listed in Section 15(1) keeping in mind the "historical, social, political and economic disadvantage suffered by homosexuals". The South African Constitutional Court recognised in Prinsloo v. Van Der Linde[93], that discrimination on unspecified grounds is usually 'based on attributes and characteristics' attaching to people, thereby impairing their "fundamental dignity as human beings". In Harksen v. Lane[94], the Court elaborated on what it meant by "potential impairment of dignity", by holding that, "In some cases it related to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features".

Thus, sexual orientation should be read as a ground analogous to sex and going by that rationale, criminalisation of consensual adult sex suffers from the vice of arbitrariness and discrimination under Article 15.

IV. CONCLUSION

> *"Fear of discrimination from the population at large leads to the concealment of true identity and is potential harm to the dignity of any gay or lesbian."*[95]

After having discovered how the criminalisation of sodomy would not only proscribe a mere sexual activity but expose a certain section of the society to the most debilitating reality of harassments and torture along with an outright denial to them of their liberty and freedom to

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(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

90 CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994.

91 International Covenant on Civil and Political Rights (ICCPR) recognises the right to equality and states that, "the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social region, property, birth or other status".

92 The Supreme Court of Canada, [1998] 1 S.C.R. 493.

93 The South African Constitutional Court, 1997 (3) SA (CC)

94 The South African Constitutional Court 1998 (1) SA 300 (CC),

95 The Supreme Court of Canada in Vriend v. Alberta, *Supra* note 91.

express their sexuality, it is time that the Indian courts realise that under the guise of Sec. 377, what lies is the biggest affront to the dignity of homosexuals and humanity at large. Now that the Supreme Court has accepted to hear the Curative petition filed by the Gay Rights Activists against its December 2013 verdict on Homosexuality, the Court has again assumed a critical role in respect of the rights and the dignity of the LGBT Community and the Human rights at large. Other than leaving the status quo undisturbed, i.e., recreating the position back to the one established in the Suresh Kumar Koushal Judgement, it has three options before itself: Either, to uphold the Constitutionality of the Law and request the Parliament to change the Law after taking into account the rights of the LGBT Community, or to declare the Law unconstitutional and ultra vires the Constitution of India, or to add a new meaning to the Law, by holding that only "non-consensual penile non-vaginal sex" is unnatural and not otherwise. A Resort to any of these options would put an end to the suicides committed and the acts of concealment of identity by the homosexuals who would, then be accepted by the society with a sense of comfort, confidence and pride. Also, such a decision would prevent many more Khairatis, Pottais and Kokilas from getting prosecuted and harassed at the hands of our police forces thereby, allowing for more opportunities of a relatively more equal civil society.