

EQUALS SHOULD BE TREATED EQUALLY UN-EQUALS SHOULD BE TREATED DIFFRENTLY

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ABSTRACT.

In today's world homosexuality has become an inseparable part of our fast growing society; we human beings have had many times debated over the topic of homosexuality but still it is considered to be a "taboo" in our so called civilized and cultured society.

Human beings have developed a lot in past many years and have developed in many ways but still the question on the legality of being a homosexual remains the same, today also in many parts of the world including many fast growing countries still being homosexual is considered to be a crime and practicing homosexuality leads to penal punishments as well.

Humans have become civilized in each and every way possible as they have set a proper code of conduct for themselves which is commonly known as "law" but these laws in various ways and in various forms forbid the act of homosexuality still in this fast growing era of 21st century.

We have established the United Nations general assembly to resolve various international issues regarding mankind such issues which effect the whole human race and one such issue which even is being recognized by the general assembly is being homosexual.

The burning issue of homosexuality is also being written and dealt about in the Universal Declaration of Human Rights, as those universal human rights also recognize the right of a person to choose the partner of their opposite sex as per their own will and choice and as per the various laws, rules or regulations binding on them.

Various nations of the world whether they are completely developed, under developed, or developing they all have shown different way of approach and concepts towards this burning issue of homosexuality being prevailing in their country hence now it is high time for the whole human race to recognize homosexuality as a part of our culture and conduct.

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INTRODUCTION.

India being one of the largest democracy in the world, country with fastest growing population, as the total population of the country is around 25 billion people and with such a huge population it becomes hard and difficult for the government as well as for the people to deal with sensitive issue like the LGBT community, homosexuality or having a life partner of the same sex and gender.

India has adopted the British drafted Indian Penal Code to penalize various crime being committed in country, Indian Penal Code recognizes the act of being Gay, Lesbian or homosexual as a criminal offence hence we have section 377² in the IPC. This deals with the unnatural offence being committed by humans with human or of humans committing it with animals. Hence by the virtue of the said section any unnatural offence being committed can be penalized according to the described punishment.

India also being a secular country hence doesn't follow any one religion instead it allows every citizen of the country to choose their own religion and to profess their own religion and religion as we know is the concept based thinking of an individual based on various customs, traditions these traditions have been into practice since the era of Mahabharata and Ramayana and hence they have been very stubborn but people still believe them to be as much practical as they were during that time. Hence customs and traditions have been a big rolling stone into the practice of homosexuality.

Even the constitution of India provides various rights to each and every citizen of India which if interpreted properly can give a legal right to the homosexual's in this country, and not only those articles of constitution but the cases which have been decided by the apex court of India also indicate the freedom to be left alone. Hence now is the time to evaluate the concept of an individual's freedom regarding their life between four walls should be specifically drafted.

² Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

INDIAN PENAL CODE SECTION - 377.

The Indian penal code had been drafted and came into force back in 1860 the time when there almost didn't exist anything like being gay or lesbian, or even if they existed it was in a much small section of the society but the situations and the scenarios prevailing in today's society are quite a different as today we have a considerable number of people in our society being homosexual hence it is high time for the supreme court of India as well as for the legislatures to quash section 377 and bring new laws regarding the homosexual in the country.

If we interpret the language used by the then legislature then it terms that 3 main ingredients should be satisfied in order to constitute an unnatural offence which are:

- 1) There should be a 'voluntarily intercourse', which means that the consent of both the parties who are indulged into such activities is necessary as they must enter the act with their own consent, their own will hence the very first ingredient which has been talked by in this section restricts any kind of homosexual activity as being a gay or lesbian requires voluntary consent with each other hence the very first ingredient itself considers the any kind of homosexual act under the purview of these section. Although even if 2 consenting adults want to enter into a physical relation of their own will still they can't as the act of having sex with same gender will drag them to the result of harsh punishment. Hence this section completely restricts any kind of homosexual act irrespective of the fact that the act was done with the consent of parties.
- 2) Another ingredient of the section concentrates on the part of having 'carnal intercourse' with the person your into relationship with, the meaning of carnal intercourse³ is "sexual intercourse between a male and a female in which there is a degree of penetration of the women's vagina by the man's penis is called carnal intercourse". Hence these being a very basic substance of this section as there should be a carnal intercourse between 2 parties. In order to invoke this section it is not necessary that human sperm has to be collected, in various cases decided by the Supreme Court it has been noted down that mere penetration

³ U.S law's legal dictionary.

would amount to carnal intercourse⁴. Hence this section doesn't allow any kind of physical relation only mere penetration can invoke this section.

- 3) One of the most important component of these section is that it defines that the carnal intercourse should be the one 'against the order of nature' it means that such sexual act which includes un-natural ways or a sexual relation which is not normal in accordance with the natural and normal act of being in a sexual relationship. But the exact interpretation of the word against the order of nature has not been defined anywhere in the Indian law not with the meaning of the section neither in the general clause act, nor do we have perfect definition of the term against the order of nature as practically it is impossible to define such a term which has a wide scope and which varies in different forms hence it becomes practically next to impossible as to what do the legislature mean by the act against the order of nature. But the simple understanding of a common man through the rule of literal interpretation it can be termed that such act which includes those organs of the human body which are not meant for the purpose of having sexual pleasure and still if being used for such sexual pleasure then such an act can be termed as the sexual/physical act against the order of nature, even the supreme court of India has no where defined the above said term neither in its basic definition nor in any of the case which has been dealt on this issue so far. Hence the legislature along with the supreme court of India should interpreted such un-interpreted words and should try to give a definite meaning and purpose to such words so as to make law more clear and to provide more stability to section 377.

If we analyze the exact nature of the criminal offence which are being covered by this section then in specific the homosexual act under section 377 can mainly be of 2 type in nature 1] sodomy 2] bestiality.

1] Sodomy - the word sodomy means intercourse per annus by a man with a man or with a woman, or with an animal. Sodomy can also be further classified under 2 classes – 1) homosexual – in case if the parties are of same sex it will be termed as homosexual act. 2) Heterosexual – In case if the parties belong to the different sex/gender then such activity would

⁴ Tarkeshwar shahu V. State of Bihar SCC 1036 of 2005.

amount to heterosexual act. Both of the above mentioned sexual acts in any nature or type are being considered as a criminal offence according to the IPC.

2] Bestiality – the word bestiality means the sexual intercourse either by a man or by a woman carried out in any way with a beast or bird. This section has a wide scope hence it also includes woman also of committing unnatural offence under this section.

In order to attract section 377 the proof of penetration must be produced before the court as penetration being one of the most important ingredients to attract section 377, however little it might be but the proof of penetration is must⁵ to attract section 377.

However this section is not attracted if the sexual act by a man or a woman with other man or wither woman was done using any kind of intimate object, like sex toys, or any other object other than any such part of individual body in such a case section 377 cannot Be attracted and the offence cannot be proved, Hence intimate object being one of the exemptions from the offence of homosexual/heterosexual.

This section also imposes a question mark as to how to determine that whether the act was actually done or not the sole basis of proving the offence under section 377 becomes penetration but as far as the act of lesbian is being considered it cannot be proved that penetration was being done, only if the same unnatural act was done between a man and a woman, or mean while committing the offence of rape if such an act is being done then only it can amount to penetration and in that circumstance only the act of un natural offence can be proved.

As far as protection of animals is concerned then up to that extent the object of the section can be considered to be fair enough so as to protect animals from the crime of bestiality, moreover the supreme court of India should make clear stand as to what extend and regarding what activity should section 377 be applied and how exactly the application of the section should be done as the section should be differently interpreted for the homosexuals/heterosexuals.

⁵ Norshiwani Irani V. Emperor 1935 Cr Lj 718.

CONSTITUTIONAL ASPECT.

The constitution of India is being considered to be the mother of law as all the different laws, acts, rules, regulations etc. has to be in accordance with the constitution as the constitution of India has upper hand over every other law prevailing in country⁶. Even in the constitution also it is nowhere being mentioned that homosexuality is banned in India or practicing homosexuality will lead to committing a criminal offence in fact some of the very basic and fundamental articles in Indian constitution also provides the freedom to an individual as to live his/her life on their own term without any kind of interference of law as far as they don't commit any illegal act.

Some of the important article which gives the freedom to the individual for choosing their life partner and even it is important to note here that if such rights are denied to the LGBT community then it might result into violation of these fundamental articles of constitution. which are 1) article -13 (1), 2) article – 14, 3) article – 15, 4) article – 19, 5) article – 21. These articles are being mentioned in part 3 of the Indian constitution hence they are considered to be articles of high value as the heading itself reads as 'fundamental rights' hence these are the rights which have very basic and fundamental value in a person's life and they cannot be violated in any way as because they have been fundamentally being guaranteed by the constitution itself, hence now we will briefly analyze as to how exactly these rights are being violated by not providing a legal status to the LGBT community and by still considering homosexuality as a taboo, we will also analyze as to how section 377 of the Indian penal code stands violate of fundamental articles and hence should be declared to be unconstitutional.

1) ARTICLE – 13 (1)⁷.-The language of the said article reads as all laws in force even before the commencement of this constitution so far as they are inconsistent with the provisions of chapter – 3 shall stand void for their inconsistency shall stand void. Here section 377 of the IPC needs to be interpreted as section 377 prohibits any kind of carnal intercourse against the order of nature that to even if the intercourse was being done with voluntary consent of both the parties, as Indian penal code was being drafted back in 1860 hence even being drafted and implemented

⁶ Keshavananda bharti V. state of Kerala.

⁷ All laws in force in the territory of India immediately before the commencement of this constitution so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency, be void.

before the constitution still it do falls under the ambit and per view of article 13 clause 1, now as section 377 restricts any person to accept any other human being of the same sex as his/her life partner and also restricts to have any physical relation with the human of same gender, hence it violates article 21 of the constitution which is considered to be one of the most important article of constitution as it relates to the life an individual, moreover section 377 also violates article 14,15,16 & article 19 in many ways which will be discussed further. Hence as per the remedy being given in article 13 it should be used and the supreme court of India should consider various factors and facts affecting the life of homosexuals and transgender and should uplift section 377 for the part of homosexual, and as far as other crimes related to sexual offence section 377 should be considered valid for ex: if in a case of rape the accused has done any sexual act against the order of nature then for that instance the ambit of section 377 should be considered to be lawful so as to give maximum punishment to the offender and to make sure that proper justice has been done to the complainant. Hence section 377 should not be declared to be completely void there should be some reasonable restrictions to the said section. Article 13 also has the concept of ‘the doctrine of eclipse’ which means an existing law inconsistent with a fundamental right though inoperative from the date of commencement of constitution is not dead altogether, rather “ it is overshadowed by the fundamental right and remains dormant but is not dead⁸ hence the same concept needs to be applied to section 377 as the section should remain in operation but to criminalize the same unnatural sexual act if done with the offence of rape or with any other offence so far as the question of putting a ban on homosexual/heterosexual activities, the question merely remains as to if LGBT community should be given a legal right to make a legal relation with each other and to let them enter into the institution of marriage by giving a legal existence to their marriage, which should be given by considering them to be crucial part of our society. The doctrine of eclipse can be applied to both the laws of pre as well as post constitutional commencement⁹ hence in this way section 377 can be targeted with article 113 clause 1 and section 377 using the doctrine of eclipse should be declared to be void so far as being homosexual is concerned.

⁸ Bhikhaji Narain Dhakras V. State of M.P Air 1955 sc 781.

⁹ State of Gujarat V. Ambica Mills Ltd. AIR 1974 SC 1300.

2) Article – 14¹⁰ - right to equality is recognized as one of the basic features of the constitution¹¹ article 14 applies to every person and not only to the citizens of India as article 14 carries the element of natural justice with it that is everyone should be treated equally, hence these being a very fundamental right being granted to every person living on the land of India and hence the LGBT community also do falls under the ambit of these article as article 14 uses 2 concepts to grantee the treatment of equal treatment 1] the equal protection of laws 2] equality before the law.

1] The equal protection of law – it means that law has to give an equal amount of consideration to each and every citizen of India there cannot prevail any kind of biasness or any prejudice against any person, individual or a community as whole and as against these rule the law protects the right of any adult in the country to marry any other consenting adult and to start a happy married life with that person but the primary condition being that the person should belong to the different gender. If these right of choosing a life partner at their own will is being given to the normal citizens of India then the same right should extend to the LGBT community as well as they also are normal human beings with some different physical desires which are normally uncommon in our society, and because of their physical need being one of the most important hurdle in recognizing them as legally married couple. The concept of equal protection of law means that law will and has to provide equal protection to every citizen wherever his/her right is being infringe and considering section 377 in accordance with article 14 it can be clearly seen that gay/lesbian although being the citizen of India are not being given equal protection by law as they are not allowed to exercise their legal right to marry there life partner of the same sex. Article 14 gives a right to every normal citizen to have physical relationship with each other but on the other hand restricts physical relationship between humans of same nature hence In this way the very first concept of article 14 that is to provide equal protection of law to each and every citizen of the country is being violated by section 377 as it does not provide equal right to every citizen on the contrary it restricts those homosexual who want to give a legal status to their relationship and who want to enter the institute of marriage with their life partner.

¹⁰ The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

¹¹ Indra Sawheny V. Union of India AIR 2000 SC 498.

2] Equality before the law – these concept of article 14 says that people belonging to the equal class rather same class should be given equal treatment of law, if 2 consenting adults are allowed to get married legally then other 2 consenting adults who want to marry their life partner of same sex should also be allowed, the law has to treat each and every human being on the scale of being fare, and not being one sided as against the case in India where only marriage can take place between 2 adults of different gender, therefore the underlying principle of equality is uniformity in treatment to all in all respect, in nutshell it can be stated that equals must be treated equally while unequal must be treated differently, hence there should be a perfectly drafted specific laws regarding the legal status and various legal rights being give to the LGBT community, they should not be left alone by just putting a ban on them through section 377 rather a perfect research should be conducted as their needs and there wants along with their legal remedies should be taken care of which being one of the most important duty of the government of India as well as the supreme court of India.

In order to determine whether in-equality has been done to a person or class of person relating to any one specific community then in that case the test for valid classification has to be done in that purpose 2 main aspects the test needs to be seen which are¹² 1} the classification must be founded on a intelligible differentia which distinguishes persons that are grouped together from others left out from the grouped together. In present situations being prevailing in Indian society and as per the legal situation of the LGBT community first of all there has never been any kind of imitative has never been taken by any government neither by the apex court of India as to make an intellectual diffraction for the LGBT community from other normal human beings now being the high time for the government of India to make a mark of out of the line for the LGBT community and hence should make some particular laws by making a proper classification of the LGBT community.

2} the differentia must have a rational relation to the object sought to be achieved by the statue in question¹³ hence the differentia should be created for the homosexuals/heterosexuals but it should be based upon such a concept that the primary object of legalizing the relationship of

¹² State of W.B V. Anwar Ali Sarkar AIR 1952 SC 75.

¹³ Prabodh Verma V. State Of U.P AIR 1985 SC 167.

marriage between 2 consenting adults of the same gender should get a legal status out of the new law or act being enacted for the betterment of the homosexual rights, hence not only the a different class should be created for the LGBT community but the classification should be rational in its nature and reasonable enough to create a legal status for homosexuals. Hence both of the above mentioned test has not being done for the legal rights of gay/lesbians and hence now is the high time for the supreme court to take the stepping stone towards the betterment and progress of the LGBT community and for the betterment of the whole society to conduct the test of valid classification and to create a reasonable class for the homosexuals.

In this way there various legitimate reasons as to why article 14: right to equality is being violated for the homosexuals which they should be provided with as these being there legal and fundamental right which cannot be and should not be denied to them just because they some different needs and wants as against the normal conduct of human beings, the slight of a difference in their choice about their physical relationship should not stop them from having the same equal right as everybody else has in this country.

3) Article – 15 (1)¹⁴ - article 15 talks about restricting the state from making any discrimination to any citizen based on their race, caste and sex as well, the first clause being mentioned in article talks about discrimination in any form hence it becomes necessary to know the exact meaning of the word discrimination and to make a legal interpretation to the word, word discrimination means¹⁵ ‘any kind of unfavorable treatment’ discrimination in these sense involves an element of prejudice if that prejudice is based on any of the grounds being mentioned in article 15 then such a law making such discrimination should be struck down, and declared to be inconsistent with constitutional provisions¹⁶ as in the present scenario talking about the LGBT community the people belonging to these community should be considered to be people of belonging to a particular race and also they should be considered to be people belonging to different sex, here by using the constructive rule of interpreting the words it should be seen that

¹⁴ The state shall not discriminate against any citizens on grounds only of religion, race, caste, sex or place of birth or any of them

¹⁵ Concise oxford dictionary.

¹⁶ Nain Skh Das V. State Of U.P AIR 1953 SC 384.

the word sex should not be restricted to the gender biased meaning rather this time the word should be given a broader meaning and the physical need an act of the human beings with each other also be included within the meaning of sex. In order to classify as to whether the LGBT community should be considered to be a race or not first the exact meaning of the word race should be determined as to get a more clearer picture, meaning of the word race is¹⁷ ‘a group especially of people with particular similar physical characteristic who are considered as belonging to the same type or the fact that they belong to such a group, or a group of people who share same language, history or characteristic. Now if we analyze the meaning of the word race it comes out that people having similar physical characteristic it means that those people who share common physical needs or relationship with each other can be classified together, as group of such people can be termed as a race and people belonging to the LGBT community do fall in the same group of similar physical characteristic as they have share mutual feelings of physical needs with each other hence with regards to the physical needs and characteristic of the LGBT community they can fall under the definition of race. The other aspect as to why the LGBT community should be given a status of different race is that they also have a history which they share in particular with each other since LGBT community is prevailing in many different parts of the world since many ages or it would not be morally wrong to say that it is being prevailing since the birth of mankind. Hence in this way sharing common physical needs and having a particular history amongst them the LGBT community deserves to be given the status of a different race altogether. If not taken in a broader sense then LGBT community can also be termed in the definition of caste as well people belonging to the same caste means that people having same heredity as being given from their ancestors in these situation the LGBT community can also say that they have inherited there Jens from various ancestors who formally belonged to the LGBT community hence I this way if given a proper status being in a specific race then various homosexuals can get a legal status of being in a particular race and hence then they can claim their legal right of protection against discrimination and can get a proper identity. Coming to the other part of clause 1 it states that no discrimination should be done on the basis of sex as well basically the meaning of the word sex is being interpreted as the gender of a human being as to which they belong that is whether being a man or a woman or being the third gender of the

¹⁷ Cambridge dictionary.

society¹⁸ as now the supreme court of India has given a legal status and right to the trans genders in the society as they can self identify themselves that whether they want to identify themselves as man, woman or the third gender of the society being a trans sexual human being. Hence in the same way by giving a broader meaning to the word sex in article 15 it should be interpreted in the sense of physical sex which indicates the physical relation of a human with other human and should not only be restricted to the meaning of gender only, if the supreme court of India includes physical relation in the word sex then the LGBT community can be taken under the per view of article 15 and hence they can be saved from various discrimination which they have to face and they can get ride off the biggest discrimination of not having a legal right to marry each other legally.

4) Article - 19¹⁹ - article 19 provides various basic and fundamental freedom to every citizen of India by putting a ban on the LGBT community article 19's clause 1 sub-clause (a) gets violated.

Article 19 clause 1 sub clause (a) talks about freedom of speech and expression to every citizen of India, the rights enumerated under clause 1 (a) are those great and basic rights which are recognized as the natural rights inherent in the status of every citizen²⁰ but these rights are not absolute rights they are the rights which are governed by some reasonable restrictions, these restrictions are also being imposed by the constitution but those restrictions should be the reasonable ones as the restriction must be for the particular purpose mentioned in the clause permitting the imposition of the restriction on that particular right. Hence on these basis these principle the ban imposed on LGBT community should be up held as because by putting a ban on homosexual activities it violates the right of a citizen to express ones emotions and thoughts regarding whatever he/she feels, as by not giving a legal status to the gay/lesbian activities they are being restricted to express their love, their desire, and their physical needs regarding their own choice. Hence it should be determined as to whether the restriction is reasonable or not few points have to b considered which are:

¹⁸ NALSAR V. Union Of India & Otrs.

¹⁹ protection of certain rights regarding freedom of speech, expression etc.

²⁰ State of W.B V. Subodh Gopal Bose AIR 1954 SC 92.

- 1) The restriction imposed should be in proportionality – the phrase reasonable restriction connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature, legislation which invades any of the six mentioned freedoms cannot be said to be reasonable restriction²¹ and in evaluating the restrictions imposed on the LGBT community can be said to be unreasonable as because the restriction being imposed through section 377 imposes a ban on homosexual activities in an excessive nature as it completely restricts to give any kind of legal status to the LGBT community and because of that they can't give a status to their relationship. Hence by this way it can be established that section 377 imposes an excessive restriction on homosexual activities which violates the basic freedom of right to expression being granted to a citizen. It is high time for the supreme court of India to identify section 377 in violation of such basic and fundamental rights being granted by the constitution of India.
- 2) The restriction being imposed should be reasonable in both the aspect that is A} substantive restriction which means the nature of the restriction being imposed and B} the procedure being imposed by the statute for enforcing the restriction on individual freedom²² the restriction being imposed on homosexuals is neither reasonable in nature neither reasonable in procedure as because it does not lay down any specific provisions on the LGBT community neither does it specify any valid reason as to imposing a ban on homosexual activities.
- 3) The restriction being imposed should be based on an objective concept which the restriction seeks to achieve, as the reasonable should be determined in an objective manner and from the viewpoint of keeping in mind the interest of the general public.²³ As far as section 377 is concerned it seeks no concept based restriction it only talks of criminalizing the homosexual act hence the restriction should be upheld.

²¹ Dwarka Prasad Laxmi Narayan V. State of U.P AIR 1954 SC 224.

²² Kishan Chand Aroara V. Comm. Of Police AIR 1961 SC 705.

²³ Mohd. Hanif Qureshi V. State Of Bihar AIR 1958 SC 731.

- 4) Reasonableness of the law should be seen and not of law, the court always looks upon the reasonableness of the restriction and not the law which permits the restriction a law may be reasonable but the restriction imposed may not be reasonable.²⁴

The burden of proof is always on the state to prove the reasonability of the restriction being imposed.²⁵

5) Article 21²⁶- article 21 can be termed as heart and soul of constitution as because article 21 gives the most important right to every person/citizen of India that is the right to life which means that every person on the land of India has right to life, right to live article 21 has become the inexhaustible source of many other inherent human rights²⁷. Article 21 has 3 main ingredients in it – 1] the first substance being life, the word life cannot be given a specific meaning but to define life by any provision or statute of law is next to impossible as because life is such a wide term which includes almost everything which a person goes through in his/her life, and life also includes a person's choice of selecting the person as to with whom he/she wants to live the rest of their life, as being someone's life partner constitutes the most important pillar of their life but section 377 of the Indian penal code restricts to give a legal status to their marriage moreover it also denies 2 consenting adults to live together with each other's consent. Physical relationship between any 2 individuals constitutes a crucial part of any individual's life, moreover it also amounts to the sheer privacy of 2 individuals while section 377 imposes a ban on 2 homosexuals or heterosexuals to marry and live with each other like many other normal human beings. Hence by restricting an individual to live with the life partner of their own choice violates the very concept of right to life under article 21 as without a life partner one cannot live a happy life hence the ban imposed by section 377 is completely in violation of article 21 and in context of it right to life. As physical relation as well as marrying someone whom you love do constitute important concepts of an individual's life.

²⁴ N.B Khare V. State of Delhi AIR 1950 SC 211.

²⁵ Mohd. Faruk V. State Of M.P AIR 1970 SC 93.

²⁶ No person shall be deprived of his life or personal liberty except according to procedure establish by law.

²⁷ Maneka Gandhi V. Union Of India AIR 1978 SC 597.

2] The second most important concept of article 21 is right to personal liberty to every person on the land of India. If we separate the word personal and liberty then it can be interpreted that the liberty which has been granted by article 21 is talking about 'personal' liberty, it means that a person's liberty should be granted to him not at the cost of impeachment of any law but the liberty should be granted as much as it doesn't stop one from enjoying their liberty in personal that there liberty in between four walls. The expression of the freedom in article 21 is not confined to mere freedom from bodily restraint but extends to the full range of conduct which individual is free to pursue²⁸. And in that context personal liberty amounts that a person should get enough liberty to choose the way of life which they want and to choose with what kind of people they want to associate themselves, being in love is a part of personal liberty the law cannot restrict anyone from loving someone else and if both the parties loving each other consent each other to marry each other and to live a happily married life, but section 377 stops 2 homosexual/heterosexuals from legally marrying each other, hence now is the time to interpret the phrase 'personal liberty' in its right way and give various gays, lesbians & trans genders their right to legally marry each other and to have a lawful relationship between them.

3] Now coming to the part of procedure established by law which means that the procedure laid down by the statute or procedure prescribed by the law²⁹. Accordingly the procedure which has been established also needs to be analyzed in three ways which are 1) there must be law justifying the interference with the person's life or liberty, which in the present case the justification of section 377 has been done up to the extent of putting a ban on various criminal activities, which are related to the crimes of physical or sexual harassment while the same section 377 does not give any kind of valid justification of why is it not allowing any homosexual/heterosexual activities between 2 consenting adults. 2) the law should be a valid law, which talking in context of section 377 cannot be said to be a valid law as because it does not create any valid restrictions on LGBT community moreover any specific reason also has never been stated for putting the ban neither the core objective of the legislature has never been taken into consideration that whether the intention of the legislature was to ban homosexuality in general or the intention was to stop only the criminal offences regarding sexual harassment.

²⁸ A.K Gopalan V. State Of Madras AIR 1950 SC 27.

²⁹ Bishan Das V. State Of Punjab AIR 1961 SC 1570.

3) The procedure being laid down by the law should have been strictly followed in the absence of any procedure prescribed by the law sustaining the deprivation of personal liberty the executive authorities shall violate article 21, keeping this concept in mind we can conclude that so far as in section 377 no particular procedure has not being laid down y the legislature regarding the homosexuals and heterosexuals as they are also being treated in the same way as to the criminals, hence now is the time for the supreme court to either divide section 377 into 2 parts or else to make a proper particular law for the LGBT community.

The horizon of article 21 has been expanded to various other human being in other forms have been included and protected under the ambit of the article 21 which are 1] right of prisoners³⁰. 2] right of inmates of protective homes³¹. 3] Right to know – the courts have also recognized the right of a person to be known which in the present case regarding the LGBT community they should be considered by the Supreme Court³².

Relationship between article 14, 19 & 21. - it has been established that if any law or statute if found in violation of this three article then it can be said to be in violation of constitution/ in consistence with constitution³³ as this three article constitutes the most important and basic features and principle of constitution that is right to equality which means every citizen should be treated equally, right to various basic and fundamental rights to support human rights & right to life and personal liberty. Moreover even article 13 and 15 also gets violated by not giving a special status to the LGBT community. Hence by considering all of the above mentioned reasons it can be stated that section 377 should be declared to be in consistence with constitution of India. The preamble of Indian constitution also talks about giving social justice to every citizen of India, liberty of thoughts, expression, belief and faith, equality of status and to promote amongst the citizen the feeling of fraternity assuring the dignity of an individual hence from the aspect of preamble also homosexual and heterosexuals are completely liable to claim their legal right and to get a legal status.

³⁰ State Of Maharashtra V. Prabhakar Panduranga Sanzgri AIR 1966 SC 424.

³¹ Upendra Baxi V. State OF U.P 1983 SCC 308.

³² Reliance Petrochemicals LTD. V. Proprietors Of Indian Express Newspapers Bombay AIR 1989 SC 190.

³³ Maneka Gandhi V. Union Of India AIR 1978 SC 597.

UNIVERSAL DECLARATION ON HUMAN RIGHTS.

The bill on various basic human rights which are very basic in nature was passed by the united nations general assembly on 10th December 1948, by a unanimously 48 votes, while drafting the final draft it was decided that instead of calling it an convention it should be called a declaration as because by using the term declaration leads them to formulation on biding obligations to implement these universally adopted and declared human rights³⁴.

Article – 1 of the UDHR talks about right to life, liberty and security. This article gives a very basic freedom to every human being that is every human being has a right to life and that to live a dignified life instead of just living it anyway, hence right to life concludes right to choose the life partner of their own choice as having a life partner and to marry him/her constitutes a crucial part of any individuals life, secondly it talks about giving liberty to every human being liberty means to live life on one's own terms and conditions as to whatever he/she wants to eat, wear, live, marry and also the liberty to choose life partner be him/her of same gender, hence by putting a ban on homosexuals legally marrying each other amounts to violation of UDHR's article 1, that being right to life and liberty. Hence the very basic right of choosing a life partner and marrying that life partner legally should be given to every human being globally irrespective of their nationality.

Article – 2 of the UDHR talks about equality before law and equal protection of law, this article focuses on the legal principle of natural justice as everyone should be treated equally with law, everyone should be considered to be equal in the eyes of law, and hence there should be no discrimination to any human being on any basis. And if every other normal citizen of India gets the right to marry the ones whom they choose to marry then in the case of homosexuals and heterosexuals also it should be allowed to give them a legal right and legal status to marry each other and lead a normal life just like every other normal human being.

Article – 3 of the UDHR talks about effective judicial remedy which guarantees effective judicial remedy to every human being as every person should be given the right to knock the door of the judicial institutions in their respective country so as to get a judicial remedy as against the illegal

³⁴ UN Doc E/CN 4/21 of I-7-1947.

cause being done to them these right indeed is being give to the citizens of India under article 32 of the constitution through which the citizen can direct approach the supreme court but still the Indian judicial system is not being able to give effective judicial remedy to the LGBT community as they have been given relief to much extent but still it remains an illegal act to marry the person of same gender in India.

Article – 7 of the UDHR talks about right to privacy and marriage, this article being one of the most important article and the core basis for the argument of as to why the LGBT community should be allowed to enjoy their privacy and should be allowed to marry legally, as according to this article every human being has a right to his/her private life, the word private life refers to the life of one's own choice the life which they can live on their own term, the life in which they can enjoy the freedom of their life in its true sense. But section 377 restrains an individual from having privacy of a person with other person of the same gender. Moreover due to a ban on homosexual activities even the homosexuals can not marry their life partner legally and can't have a married life like every other human being hence section 377 vitiates the core objective and intention of UDHR's article 7. As neither the LGBT community has been given right to privacy nor can they marry each other as far as India is concerned.

These articles being very practical articles which are also being reflected in Indian constitution:

Article – 1 of UDHR connects to Article -21 of Indian constitution that is right to life and liberty.

Article – 2 of UDHR connects to Article – 14 of Indian constitution that is equality of law and equality before law.

Article – 3 of UDHR connects to Article – 32 of Indian constitution that is legal measures for effective judicial remedy.

Article – 7 of UDHR connects to Article – 21 of Indian constitution that is right to life, which includes right to privacy and marriage.

INDIAN CONSTITUTION & UDHR.

India is one of the original members of the U.N; it is also a signatory to the UDHR the imprint of the UDHR can be seen in the Indian constitution as well specially in the part 3 of the constitution where the fundamental rights have been incorporated, many important articles in the Indian constitution do match with the articles in UDHR. The Indian judiciary has also taken a note of the UDHR in interpreting the constitution. In *Vishaka V. State Of Rajasthan*³⁵ it was observed by the supreme court of India that ‘any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof to promote the objective of the constitution, it is now an accepted rule of judiciary that international conventions should be taken into consideration while constructing domestic laws’. In the case of *Apparel Export Promotion Council V. A.K Chopra*³⁶ it was stressed that in cases of violation of human rights the courts must forever remain alive to international instruments and convention and should apply same to a given case. In the case of *Railway Board V. Chandirama Das*³⁷ the Supreme Court has asserted that it will apply international human rights norms while interpreting our constitution.³⁸ From above mentioned various UDHR articles and various pre decided case by the Supreme Court of India it clearly establishes the fact that UDHR has an impact on the constitution of India and the Indian judiciary has even taken a note of it by keeping this aspects in mind it is time to abolish the much contravention section 377 and to give the LGBT community its right status.

The conclusion from various international as well as domestic laws and constitution it can be very well established that each and every law is being enacted to make our society more prosperous, safe and to make it work in a particular way of development so as to make sure that the mankind as a whole can march towards development and peace and in this process if the prisoners and criminals are also being included then it becomes the duty of the law to also include the LGBT community and to give them their legal rights.

³⁵ 1997 6 SC 241.

³⁶ AIR 1999 SC 625.

³⁷ AIR 2000 SC 988.

³⁸ *Dalbir Singh V. State of U.P* 2009 2 SCC 376.

INDIAN CUSTOMS & TRADITIONS.

India is a secular country which does not have any specific religion to be followed by its citizens, it has variety in diversity with religion, in a secular country like India only one religions customs and traditions cannot be implemented hence a general view of all the religions should be taken into consideration. Mainly three main religions prevail in India which being 1] Hinduism, 2] Muslims, & 3] Christianity. Even the supreme court of India takes into the consideration the religious aspects of these three religions there are various other religions also which are parsis, jains, Buddhist etc but these religions have not show there interest towards neither legalizing homosexuality nor in support of homosexuality.

1] As far as Hinduism is concerned it is the largest religion being followed in India, Hinduism has taken various positions for homosexuals characters and themes of their culture. Rig-Veda is one of the 4 Vedas being one of the sacred texts of Hinduism says that 'VIKRITI EVAM PRAKRITI' which means that what seems unnatural is also natural which some scholars believe to be recognition of homosexuality. Another ancient text being written by Indian ancient scholars is 'KAMASUTRA' written by vatsyayana dedicates a complete chapter on erotic homosexual behavior. Indian ancient history also witnesses some of the great temples of 'KHAJURAO' which indicates various sex position being practiced by kings of ancient India in those temples also various sculptors of physical relation between king and other man as well as between queen and other women are also being shown which itself shows support for homosexuality.

2] in Muslims also it a well established fact that various Muslim rulers like Allauahdin Khilji, Aurangzeb, Humayu etc were also homosexual in their time of ruling hence even mugal empire has also witness many rulers who were gay and has practiced homosexuality many of the Muslims countries in the world also has legalized homosexuality in their countries .

3] Taking into consideration Christianity it a well established fact that many of the countries in the world who follows Christianity as their main religion has legalized homosexuality in their country. If we take a wider look at all the 3 religions it can be said that homosexuality can be legalized in Indi as well by taking into consideration these customs and tradition.

SUPREME COURT CASES.

(1) Suresh Kumar Koushal V. Naz Foundation & Others. CIV. APPE. No. 10972 of 2013:

In this case the supreme court of India overruled the judgment given by the Delhi high court in the famous case of 'Naz Foundation V. Gov. of NCT of Delhi' which was decided by the Delhi high court on 2 July 2009. In the first case public interest litigation was being filed by the Naz Foundation to strike down section 377 of the IPC and to declare it inconsistent with the constitution of India. The case came to the bench comprising of chief justice Ajit Prakash Shah and Justice S. Muralidhar, and the judgment of the case was delivered on 2nd July 2009 and it was decided by the court that right to dignity and right to privacy do fall under the ambit and meaning of article 21 right to life and liberty and held that criminalization of consensual gay or lesbian sex violates these right. Delhi high court also found section 377 in violation of article 14 and 15. The court didn't strike down section 377 as a whole the section was declared unconstitutional insofar it criminalizes consensual sexual acts of adults in private.

Against the judgment of Delhi high court Suresh Kumar Koushal an activist moved an appeal against the same order in the supreme court of India to re consider the judgment given by the Delhi high court, hence on 11th December 2013 the supreme court of India set aside the 2009 judgment by the Delhi high court stating that judicial intervention was not required in this issue this judgment of the supreme court re criminalized sexual intercourse between 2 consenting adults of the same sex. In its judgment supreme court stated that " in view of the discussion this court hold this section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the decision bench of the Delhi high court is legally unsustainable".

The apex court in this case noted that the parliament of India should debate on the topic of legalizing homosexuality in India and then should make laws related it then only the supreme court can look into the matter with the motive to de-criminalize homosexual acts in India. But the parliament has yet not taken any incentive to debate over this alarming topic affecting the society at large. Now it is high time for the parliament to look into the matter of LGBT community with at most attention, and to make proper law for them.

(2) Justice K.S Puttaswamy and Anr. V. Union of India and Anr. W.P Civil no. 494 of 2012.

In this case there was a writ petition being filed by one of the retired judge Justice K. S Puttuswamy in which there arose a substantial question of law as to whether right to privacy of a person can be included as a fundamental right under constitution or not. These judgment is a landmark judgment by the supreme court which holds that the right to privacy is protected under fundamental rights guaranteed by the constitution. Particular the right to privacy is being protected under article 14, 19 and 21. The judgment was passed by a 9 judge bench out of which the ratio came out to be of 6:3. This case has overruled the previous case of Kharakh Singh V. State of U.P and another case M.P Sharma V. Union of India. Which previously held that there is no fundamental right to privacy.

Hence now it is a well established fact that Indian constitution do guarantees right to privacy under all the 3 article of the constitution which are being violated by section 377 of the IPC, as in these judgment the supreme court has also noted that every citizen of India has a right to be left alone which means that neither the state nor the law has any authorities or power to interfere with a person's life when he/she is between the four walls, hence the supreme court has stressed upon the statement of 'right to be left alone' hence according to his ruling of the supreme court it can assumed that a person should be left alone to his/her own choice and way of living there life.

Supreme Court of India is the highest institution of India as far as judiciary is concerned whatever the supreme court says becomes the supreme law of the land as supreme court of India has upper hand over various other laws and provisions and as according to that rule these judgment of right to privacy has upper hand over section 377 of the IPC which stops ones privacy by not allowing them to have physical relation with the partner of their choice as well as stops them from marrying the person of same gender which completely hinders the privacy of person. As having a physical relation with a person of one's choice constitute privacy of a person as well the state cannot stop 2 consenting adults to legally marry each other and to allow them to spend the rest of their life with each other which unfortunately section 377 dose hence on the basic principal of right to privacy to a person the supreme court should uplift section 377 for granting the right to privacy in its true sense to the homosexuals and to the whole of LGBT community.

(3) National Legal Service Authority V. Union of India. WP CIV. No. 604 of 2013.

The NLSA being the primary petitioner in the present case which moved a writ petition to the supreme court for the legal recognition of the different section of the society popularly known as the 'Hijras' the case was decided by the 2 judge bench comprising of Justice K.S Panicker Radhakrishnan. And Justice Arjan Kumar Sikri, in its judgment the court directed center and state government to grant legal recognition of gender whether it be male, female or third gender.

In recognizing the third gender category the court recognizes that fundamental rights are available to the third gender in the same manner as they are to males and females of the society. Non recognition to third gender in both criminal and civil status such as those relating to marriage, adoption and divorce will discriminatory to the third gender. The court also directed the state and the central government to take steps to create public awareness so that transgender people can feel that they are also a part of society government should take measures to regain their respect and place in society. Moreover the Supreme Court has also ordered the state central government to take effective measures to provide this community with various socio rights and to treat this community as economically backward class and to give proper attention to their various issues.

From all the 3 cases of the supreme court of India cited above it can be noted that first there is an urgent need to react on the crucial issues of homosexuality, second the apex court itself has declared the right of privacy that is right of a person to be left alone as a fundamental right now that right should be given more specific shape in accordance with the gay/lesbian rights, and the third that now as the supreme court has given the status of third gender to transgender now is the time to recognize homosexuals as well as heterosexuals also and to give them their proper legal rights which they deserve being the part of our society. Supreme court should take a proper stand regarding the LGBT community has been noted in the NLSA case particular rules and regulations and if needed a specific law should be drafted for the betterment of the LGBT community as well as for the society as a whole.

RESEARCH & STATISTICS.

The government of India has not conducted any official census for calculating the exact number of homosexual people in India but according to the figures submitted by the government of India to the supreme court in 2012 the number of homosexuals in India were around 2.5 million gay and lesbian people, these figures are based on those individuals who have self declared to the ministry of health however the original figure of homosexuals in India can be much higher as after 2012 no other census has been conducted and moreover from a popular gay and lesbian dating website in which many users from India are also registered and according to their statistics more than 1,40,000 men are being registered from India this figure of male being related from India are much higher than various other western countries like USA and UK highest number of individuals being registered in India from various states like Maharashtra(25,564) Tamil Nadu(16,380) Karnataka(14,763) Delhi(13,441) Mumbai(11,001) Hyderabad(10,273) and Bangalore(8,000). According to a nongovernmental online survey being conducted by an NGO from December 2015 to January 2016 it was claimed that 29% of the population know someone from the LGBT community.

Many developed and powerful countries in the world have stopped criminalizing homosexual act in their country which being³⁹: 1) Argentina 2) Australia 3) Belgium 4) Brazil 5) Canada 6) Colombia 7) Finland 8) Denmark 9) France 10) Germany 11) Iceland 12) Ireland 13) Malta 14) Mexico 15) Netherlands 16) New Zealand 17) Norway 18) Portugal 19) South Africa 20) Spain 21) Sweden 22) United States of America 23) Uruguay 24) Luxembourg 25) United Kingdom.

Countries giving 10 years of imprisonment for homosexuality: 1) Dominica 2) Jamaica 3) Sri-Lanka 4) Tonga 5) Zimbabwe 6) Qatar.

Countries giving life imprisonment for homosexuality: 1) India 2) Gambia 3) Ghana 4) Tanzania 5) Barbados 6) Bangladesh 7) Guyana.

Countries giving death penalty for homosexuality: 1) Mauritania 2) Somalia 3) Iran 4) Saudi Arabia 5) Yemen 6) Afghanistan.

³⁹ www.outlife.org.uk

CONCLUSION.

It has become high time for a democratic country like India which is one of world's fastest growing populations and fastest developing nation to walk towards an open society which opens heartedly accepts homosexuals/heterosexuals as a part of society.

The topic of homosexuality has always been considered to be a shameful act in Indian society due to that reason neither the parliament of India nor the supreme court of India has yet no taken progressive steps towards making homosexuality a part of India's customs and traditions. By not giving proper attention the LGBT community the members of that community felt helpless and alone as the society as a whole looks with a shame in their eyes towards them. The members of the LGBT community are also humans and they also have their own need and wants as well demands so what if their physical needs do not fit the typical stereotype relation being prevailing in the society that alone should not be made the sole reason of not allowing them to chose the life partner of their own choice and to prevent them from marrying their life partner.

Unlike the recognition of the third gender the members of the LGBT community should also be recognized in its proper way and not section 377 should be strike down for them but a specific law should be debated upon and then drafted by the parliament to cover each and every aspect related to the LGBT community members so as to make sure that they live their life with a dignity and no short of discrimination is being done to them. The central government along with the help of state government should first of all conduct a census for calculating the exact number of homosexuals/heterosexuals in India then a proper institute should be established for them so that they can be given a proper platform to express their wish and desire and to make others believe and understood that being a gay/lesbian is not a problem neither is it a thing to be ashamed of. The government should undertake various programs to make sure that people get education related to this kind of sexual differentia.

Many great nations have already accepted the concept, culture and legal existence of the members of the lesbian/gay/bisexual/transsexual community now it's time for this great nation India to join the league.