Vol 6 Issue 6 July 2016

ISSN No : 2230-7850

International Multidisciplinary Research Journal

Indian Streams Research Journal

Welcome to ISRJ

RNI MAHMUL/2011/38595 **ISSN No.2230-7850**

Indian Streams Research Journal is a multidisciplinary research journal, published monthly in English, Hindi & Marathi Language. All research papers submitted to the journal will be double - blind peer reviewed referred by members of the editorial board.Readers will include investigator in universities, research institutes government and industry with research interest in the general subjects.

Address:-Ashok Yakkaldevi 258/34, Raviwar Peth, Solapur - 413 005 Maharashtra, India
Cell : 9595 359 435, Ph No: 02172372010 Email: ayisrj@yahoo.in Website: www.isrj.org

ISSN: 2230-7850 Impact Factor : 4.1625(UIF) Volume - 6 | Issue - 6 | July - 2016

Indian Streams Research Journal
International Recognized Multidisciplinary Research Journal
ISSN No : 2230-7850 Impact Factor : 4.1625 (UIF) [Yr. 2016]

Indian Streams Research Journal

HOMOSEXUALITY IN INDIA: THE SOCIO-LEGAL PERSPECTIVE AND JUDICIAL APPROCH

Dr. Anil Kumar Dubey
Asst.Professor,School of Law,GGU,Bilaspur,C.G.

ABSTRACT

The judgement of the Supreme Court in Suresh Kumar Koushal v. Naz Foundation[1] setting aside the verdict of the Delhi High Court delivered in Naz Foundation v. Government of NCT of Delhi[2], that decriminalized carnal intercourse against the order of nature between consenting adults in private under Section 377 of the I.P.C., caused a great dissatisfaction among LGBT persons and provoked intellectual beings to think over the issue. A critical analysis of the matter has been made in this paper.

KEYWORDS :*Homosexuality , Socio-Legal Perspective , homo sexual , hormone-treatment.*

CONNOTATION

LGBT is abbreviation of Lesbian, Gay, Bisexual and Transgender respectively. According to "Oxford Advanced Learner's Dictionary of Current English [3] ", "Lesbian" means homosexual woman, "Gay" means homosexual person and "homosexual" means person sexually attracted only to the people of same sex as oneself. Clearly, the term homosexual denotes both- the homosexual man and the homosexual woman. But, after the recognition of homosexual woman as lesbian in the beginning of the 19th century on the name of Sappho and her place of birth Greek island "Lesbos" , where she wrote poems largely about her emotional relationship with young women[4] , the term gay is generally used to refer to homosexual man. "Bisexual" indicates two senses-(1) person, sexually attracted to both- men and women and (2) person, having both male and female sexual organ. In the second sense, it is synonymous with word "hermaphrodite" that means person or animal that has both male and female sexual organs or characteristics.

_____

1.The Supreme Court of India, December11, 2013, downloaded from internet.

2.The High Court of Delhi, July2, 2009, downloaded from internet.
3.Fourth Edition 1989, Third Impression 1993.
4.Douglas Harper (2001), "Lesbian", Online Etymology Dictionary, Retrieved 2009-02-07 and Douglas Harper (2001), "Sapphic", Online Etymology Dictionary, Retrieved 2009-02-07 referred in History of Homosexuality, from Wikipedia and "Lesbian, Define Lesbian at Dictionary.com", Retrieved 24 August, 2010 referred in Homosexuality, from Wikipedia.

The term "Transgender" is used for the people whose gender identity, expression or behaviour is different from those typically associated with their assigned sex at birth[5]. People who are identified as transgender are usually the people who are born with typical male or female anatomy, but feel as if they have born into the wrong body. For example, a person identified as a transgender may have typical female anatomy, but feels like a man and seeks to become male by taking hormones or selecting to have reassignment surgery[6]. The researches have revealed that brain differences are responsible for the complexity in the behaviour of Transgender and brain changes in response to hormone-treatment[7]. Transgender, transsexual and hijra are synonyms.

SOCIAL PERSPECTIVE

The study on the topic reveals that the homosexuality was prevalent in all societies in all periods throughout the world either in the form of usual human activity or tradition or prohibition. Homosexual relationships or acts have been admired or condemned depending on the form they took and the society in which they occurred[8].

There are many theories on the origin of homosexuality, its social and personal meaning and its implications. It is understood as sinful act in religion. But, with the advent of Science, various aspects of homosexuality were considered and it was justified from various points of view giving particular theories for its causes.

The shift in ideas from a religious understanding to considering it a pathological state occurred in the late 19th and early 20th centuries. Early theories included genetic, endocrine and anatomical differences which were considered responsible for a particular sex orientation. The Medical Science continued to debate the biological and psychological factors relating to

_____

5.Transgender Terminology downloaded from internet.
6.Frequently Asked Questions downloaded from internet.
7.Transgender, Causes of Transsexualism- Brain based study, from Wikipedia.
8.Homosexuality, History of Homosexuality and Homosexuality in India, from Wikipedia; Vatsyayankrit Kamsutra, Part Two, Chapter Nine, Subject Nineteenth, translated by Dr. Gangasahay Sharma, 12th Ed. 2007, Vishva Books and Manusmriti, Ashtam Adhyay Shlok 368, Ekadash Adhyay Shlok 67 and 174, edited and presented by Suresh Jaiswal 2008 ed. Sadana Publications.

homosexuality[9].

The Science has observed the causes of homosexuality and more generically the causes of human sexual orientation with general conclusions being related to biological and environmental factors. The biological factors, that have been researched, are genetic and hormonal, particularly, during the fetal development period that influences the resulting brain structure and other characteristics such as handedness. There are a wide range of environmental factors such as sociological, psychological or early uterine environment that may influence sexual orientation[10].

Classical theories of psychological development hypothesize the origin of adult sexual orientation in childhood experience. However, recent research argues that psychological and interpersonal events explain the sexual orientation throughout the life[11].

Anthropologists have documented significant variations in the organization and meaning of homosexual practices across the cultures. The prevalence of homosexuality is difficult to estimate for many reasons including the associated stigma and social repression[12].

Anti- homosexual attitudes have been changed over time in many social and institutional settings in west, while community and religious leaders in India reflect the existence of prejudice in India. Religious leaders, who interpret ancient texts literally, view such liberal ideas as a variation from religion and morality.

Mental health professionals and researchers have recognized that being homosexual poses no inherent obstacles to leading a happy, healthy and productive life; and that the vast majority of gay and lesbian people function well in the full array of social institutions and interpersonal relationships. The longstanding consensus of research and clinical literature demonstrate that homosexual romantic attractions, feeling and behaviour are normal and positive variations of human sexuality[13].

_____

9.K.S. Jacob, "Homosexuality, Medicine and Psychology" published in The Hindu, July 25, 2009 at editorial page.

10.Homosexuality, "Causes", from Wikipedia.

11.Supra note 9.

12.Ibid.

13.Homosexuality, "Psychology", from Wikipedia.

The study reveals that human sexuality is complex and diverse. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to the biological sex of the individuals involved in them relating to each other. Complex personality characteristics, biological and environmental influences combine to produce a particular sexual preference. Thus, the sexual orientation is integrally linked to the intimate personal relationships that human beings establish with others to fulfill their deeply felt needs for love, attachment and intimacy.

LEGAL PERSPECTIVE

Carnal intercourse against the order of nature is criminalized as unnatural offence under Section 377 of the Indian Penal code, 1860- the law of crime in India. The provision is as follows: "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." According to explanation to the provision, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

Clearly, following are the ingredients of the offence under this Section- (1) The act of carnal intercourse with man, woman or animal; (2) The act should be against the order of nature; (3) The act should be voluntarily and (4) penetration.

The expression "carnal" denotes "of the body", "sexual" or "sensual". Reasonably, the phrase carnal intercourse is broader than sexual intercourse. Explicitly, oral intercourse, anal intercourse (which is termed as buggery or sodomy) and bestiality (intercourse by a man or woman carried out in any way with a beast or animal) fall in the ambit of this Section; because orifices of mouth or anus and

beast or animal are not meant for sexual intercourse according to nature. In other words, any form of carnal intercourse other than penile- vaginal attracts this Section, because penile- vaginal intercourse is the only carnal intercourse according to nature.

Section 377 is silent about the age and consent between the parties. In such a situation, to fix the liability regarding age, the courts have to rely on the relevant provision in the I.P.C. and other laws dealing with age. In the absence of mention about consent, it is not a defence unlike the crime of rape under Section 375. Most of cases decided on this Section refer non-consensual and coercive situations where women and children were victims[14].

In view of scheme of criminal law and social phenomena regarding sexuality, it becomes necessary to trace back the legislative history relating to consent covered under "general exceptions" and Section 377 in order to find out the true implication of the provision.

Justifying the consent as general exception, the framers of the I.P.C. observed as follows:

We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm.... The reason on which the rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health and their own comfort..... It is difficult to conceive any law which should prevent a man from capriciously injuring his own health....[15]

In view of the aforesaid observation, it is clear that consent or lack of consent is relevant in determining criminal liability. Consent as general exception is outlined in Section 87-92 of the I.P.C. which is confined to certain offences falling under Chapter XVI "Of Offences Affecting Human Body. " Section 90 explains the term "consent", while Section 87-89 and 91, 92 articulate proposition of law pertaining to consent as an extenuating factor.

Reasonably, the offence caused with consent under Section 377 exempts from criminal liability. The expression "voluntary" in Section 377 also indicates the willingness of one party and unwillingness of another party in carnal intercourse to constitute the offence under the Section. If the stipulated act under this Section is committed at the will of another party, the act cannot be said committed voluntarily that is

---

14.Khanu v. Emperor, AIR 1925 Sindh 286; Lohana Vasantlal Devchand v. The State AIR 1968 Guj. 252; State of Kerala v. Kundumkara Govindan 1969 Cr LJ 818; Fazal Rab Chaudhari v. State of Bihar (1982) 3 SCC 9; Calvin Fancis v. State of Orissa, 1992 (2) Crimes 455; State v. Bachmiya Musamiya, 1993 (3) Guj. LJ 2456; Bhikari Charan Sahu v. State, 1992 Cr LJ 488 etc referred in Supra note 1 at 69-77 para 38.

15.Draft Indian Penal Code, Note B, 107, 108 quoted in Syed Shamshul Huda, The Principles of the Law of Crimes, (reprinted with new introduction 2011, EBC Lucknow) at lxxxiii.

one of the ingredients to constitute the offence. In other words, consensual carnal intercourse against the order of nature does not constitute the offence under Section 377. It also implies that the commission of act stipulated under this Section with a minor or with an animal is sufficient to constitute the offence, as a minor or an animal is considered not capable of giving consent.

The legislative history of Section 377 is traced back to the respective history of Common Law in England, as the I.P.C. was enacted in the colonial period. At the Common Law in England, the first records of sodomy as a crime were chronicled in the Feta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. The act of sodomy later became criminalized by

hanging under the Buggery Act of 1533 which was re-enacted in 1563 after which it became the Charter for the subsequent criminalization of sodomy in the British colonies. Oral-genital sexual acts were removed from the definition of buggery in 1817. The death penalty for buggery was abolished in England and Wales in 1861 with the enactment of the Offences against the Person Act, 1861 and it was declared punishable with imprisonment from 10 years to life[16]. The consensual buggery, in private between those who have attained the age of 18 years, was made beyond the purview of criminal law by Section 1 of the Sexual Offences Act, 1967 and the buggery without consent was placed in the category of rape under Section 1 of the Sexual Offence Act, 2003[17].

The gradual change in the nature of crime of sodomy and its punishment in Common Law at England reveals that there is also an urgent need for amendment in the criminal law of India with respect to unnatural offences under Section 377. It is remarkable to mention here that the Law Commission of India in its 172nd report focused on the need to review the sexual offences laws, and inter alia, recommended deletion of the Section 377 by effecting the recommended amendment in Section 375 to substitute the existing provision with marginal note Sexual Assault that includes acts stipulated in the Section 377 as unnatural offence in addition to acts stipulated in Section 375 against the will or without the consent of other person[18]. In other world, the Law Commission recommended deletion of Section 377 by placing carnal intercourse against the order of nature caused against the will or without the consent of

_____

16. Supra note 1 at 65-66 para 36 and Supra note 2 at 3-4 para 2.
17. K.D. Gaur, Criminal Law: Cases and Materials (6th ed. 2009, Lexis Nexis) at 564.
18. Supra note 2 at 67-69 para 83.

another person to constitute the offence under Section 375.

JUDICIAL APPROACH

The validity of Section 377, to the extent it criminalizes consensual sexual acts between adults in private, was challenged in Naz Foundation v. Government of NCT of Delhi and others on the plea that, on account of covering sexual acts between adults in private, it infringes the fundamental rights guaranteed under Articles 14,15,19 and 21 of the Constitution of India[19]. Limiting the plea, it was submitted that Section 377 should apply only to non-consensual penile non-vaginal sex and penile-non-vaginal sex involving minors[20].

The petitioner claimed to have been impelled to bring the litigation in public interest on the ground that HIV/AIDS prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by State agencies towards gay community or trangendered individuals under the cover of enforcement of Section 377, as a result of which the basic fundamental rights of the such persons stood denied and they were subjected to abuse, harassment and assault from public and public authorities[21]. In this regard, it was submitted that by criminalizing consensual same sex between adults in private, Section 377 serves as the weapon for police abuse (detaining, harassment, forced sex, payment of hush money etc) and perpetuates negative and discriminatory beliefs towards same-sex relations which consequently drive the activities of homosexual persons underground thereby crippling HIV/AIDS prevention efforts[22].

About the nature of Section 377, the petitioner argued that it is based upon traditional Judeo-Christian moral and ethical standards which conceive of sex in purely functional terms for the purpose of procreation only and non-procreative sexual activity is, thus, viewed as being against the order of

nature[23].

On the issue of violation of Article 14, it was submitted by the petitioner that legislative objective of Section 377 of penalizing unnatural sexual acts has no rational nexus to the

_____

19.Id at 2 para 1.
20.Ibid.
21.Id at 6-7 para 6.
22.Id at 7 para 7.
23.Ibid.

classification created between procreative and non-procreative sexual acts and is, thus, violative of article 14. Regarding the issue of violation of article 15, it was submitted that the expression "sex" as used in Article 15 cannot be read restrictive to "gender", but includes "sexual orientation" and, thus, read equality on the basis of sexual orientation is implied in the said provision against discrimination. Criminalization of predominantly homosexual activity through Section 377 is discriminatory on the basis of sexual orientation and, therefore, violative of Article 15. It was submitted on the issue of violation of Article 19 that the prohibition against homosexuality under Section 377 infringes the fundamental rights guaranteed under Article 19 (1) (a), (b), (c) and (d); as an individual's activity to make personal statement about one's sexual preference, right of association/ assembly and right to move freely so as to engage in homosexual conduct are restricted[24].

On the issue of violation of Article 21, it was submitted that the right to privacy is implicit in the right to life and personal liberty guaranteed under Article 21 and the pursuit of happiness encompassed within the concept of privacy, human dignity, individual autonomy and human need for an intimate personal sphere require that privacy in order to be meaningful. Prohibition of certain private consensual sexual relations under Section 377 unreasonably abridges the right of privacy and dignity within the ambit of Article 21 and this right can be abridged only for a compelling State interest[25].

Accepting the plea of petitioner, a Division Bench comprising Chief Justice Ajit Prakash Shah and Justice S. Muralidhar declared Section 377 as violative of Articles 14, 15, and 21 in so far as it criminalizes consensual sexual acts between adults in private and held that the provision of Section 377 will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. Everyone who is 18 years of age and above was considered adult by the Court[26].

_____

24.Id at 9-10 para 9.
25.Id at 8 para 8.
26.Id at 105 para 132.

On the issue of violation of Article 14, the Court observed as follows:

Section 377 makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to any body. Thus, it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people[27].

Regarding the issue of violation of Article 15, the Court held sexual orientation as a ground analogous to sex and discrimination on the basis of sexual orientation not permitted by Article 15[28]. According to the Court, the purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning normal or natural gender roles[29]. The prohibition of sex discrimination under Article 15 implies the right to autonomy and self-determination which places emphasis on individual choice[30]. In this regards, the Court further observed that Section 377 in its application to sexual acts of consenting adults in private discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that goes counter to the equality guaranteed under Article 14 and 15 under any standard of review[31].

In the light of findings on the issue of infringement of Articles 14, 15 and 21, the Court found it unnecessary to deal with the issue of violation of Article19.[32]

Taking into account several foreign cases decided on the issue of dignity and privacy and development of law of privacy in India, the Court observed on the issue of infringement of right

---

27.Id at 75 para 91.
28.Id at 85 para 104.
29.Id at 83 para 99.
30.Id at 89 para 108.
31.Id at 91-92 para 113.
32.Id at 101 para 126.

to dignity and privacy enshrined under Article 21 as under:

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right to privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality and, thus, violates Article 21 of the Constitution[33].

The Union of India, one of the respondents in the present case, contented that Section 377, in the shape it stands at present, serves the purpose of public morality, public health and healthy environment[34].

The contention was rejected on the ground that morality by itself cannot be a valid ground for restricting the rights under Articles 14 and 21. Public disapproval or disgust for a certain class of persons can, in no way, serve to uphold the constitutional validity of a statute[35]. The Court observed in this regard that enforcement of public morality does not amount to a compelling State interest to justify invasion on the zones of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others[36]. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of morality that can pass the test of compelling State interest, it must be constitutional morality and not public morality[37]. Thus, to stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality[38].

33.Id at 39-40 para 48.
34.Id at 12-13 para 13.
35.Id at 21-22 para 24 (1).
36.Id at 61 para 75.
37.Id at 64 para 79.
38.Id at 65 para 80.

Section 377 was also held as an impediment to public health on the ground that sexual practices in gay community are hidden, because they are subject to criminal sanction[39] and a need was felt that compelling State interest rather demands that public health measures should be strengthen by decriminalization of such activities so that they can be identified and better focused upon[40].

Rejecting the other stand taken by the Union of India for retention of Section 377 that it is to protect children and women, the Court held that whatever its present pragmatic application, it was not enacted keeping in view instances of child sexual abuses or to fill the lacuna in a rape law. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness, and legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private[41].

On the issue of impact of criminalization on homosexuals, the Court observed that the study conducted in different parts of the world including India shows that the criminalization of same- sex conduct has a negative impact on the lives of these people. They are reduced as gay men or lesbian women referred to as unprecedented felons, thus, entrenching stigma and encouraging discretion in different spheres of life[42]. The criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in a shadow of harassment, exploitation and humiliation, cruel and degrading treatment at the hand of law enforcement authorities[43].

About the nature of the homosexuality, the Court held that there is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or disorder and is just another expression of human sexuality[44].

39.Id at 51 para 62.
40.Id at 72-73 para 86.
41.Id at 75-76 para 92.
42.Id at 41 para 50.
43.Id at 43 para 52.
44.Id at 55 para 67.

An analysis of judgment of the Delhi High Court reveals that the Court reasonably considered each and every issue involved and it can be considered as a landmark judgement in the history of criminal law jurisprudence of India.

Appeals were lodged to the Supreme Court in Suresh Kumar Koushal v. Naz Foundation and others against the order of the Delhi High Court. A Bench of the Supreme Court comprising Justices G.S. Singhavi and S.J. Mukhopadhya held that Section 377 does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of Delhi High Court is legally unsustainable[45]. Nonetheless, in the light of plain meaning and legislative history of the Section377, it would apply irrespective of age and consent[46]. The Court justified its finding on the following grounds:

While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a minuscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted (as per the reported order) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that Section ultra- vires the provisions of Articles 14, 15 and 21 of the Constitution[47].

Along with this reasoning, the Court also left the matter to be finally settled by the legislature in spite of compelling need and sufficient ground, as is clear from the following direction:

.... Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General[48].

Evidently, in this verdict, an extra ordinary deference is shown by the Court to Parliament which amounts to abdication of constitutional duty of the Court to review the constitutionality of the legislation. It has been held that the Court should ordinarily defer to the wisdom of legislature unless it enacts a legislation about which there can be no manner of doubt about its

_____

45.Supra note 1 at 97 para 54.
46.Id at 77 para 38.
47.Id at 83 para 43.
48.Id at 97-98 para 56.

unconstitutionality[49].

In deferring to the will of Parliament in a matter that involves testing of a statute, the Court was legally wrong and disingenuous. Widely used in common law jurisdictions, cases, where courts defer to the government, usually involve questions of government policy or high technical matters where the court recognizes its own limitations[50].

No doubt, this judgment of the Supreme Court can be said a set back in the history of adjudication of the Court, as it is based on erroneous and absurd ground, and is deficient in its reasoning. The Court adjudicates legal and moral questions on an everyday basis that affect the lives of millions of people. It makes value judgements, uses its discretion to fill gaps in law and makes choices in preferring one agreement over another. The Supreme Court is the highest forum for the settlement of the matter. The Court is expected to do always right. This expectation is unarguably a testament to the Court itself and its long history of rectitude and progressiveness.

Within nine days of the judgement, a batch of petitions were filed for a review of the judgement on the ground that the judgement suffers from errors apparent on the face of record and is contrary to well established principles of law laid down by the Apex Court enunciating the wide range and ambit of fundamental rights under Articles 14, 15 and 21 of the Constitution51. It was submitted by the petitioners that there was a sea change, not just in India, but all over the world, on the law of homosexuality. A majority of countries have legalized homosexuality. Even in India, Section 377 was introduced not as a reflection of existing Indian values and traditions, but rather it was imposed upon Indian society due to the moral values of the colonizers. Referring to the Court's observation that Parliament had failed to amend Section 377, it was said: "Whether a law is constitutional or not is certainly not dependent upon whether the legislature has thought it fit to retain a provision in the statute or not. It depends on whether that provision in effect violates the provisions of the Constitution." According to petitioners, the observation of the Court that only a minuscule had been penalized so for under the law is irrelevant when it

49.Government of Andhra Pradesh v. P. Laxmi Devi, (2008) 4 SCC 720 para 57 referred in Supra note 2 at 95 para 116.
50.Arghya Sengupta, "The Wrongness of Deference" published in The Hindu, December 16, 2013 edito rial page.
51.The Hindu, December 21, 2013 at front page.

comes to deciding an issue of constitutionality[52].

The standing for filing review petition was justified on the ground that it would avoid grave miscarriage of justice to thousands of LGBT persons who have been aggrieved by the order of the Court and have been put at risk of prosecution and harassment upon decriminalization of their sexual identity[53].

But, the Court declined to review its judgement on the ground: "We see no reason to interfere with the order impugned[54]."

Thereupon, Naz Foundation and gay activists filed a curative petition on April 4, 2014 to correct the judgement[55] which is pending till writing of this paper. It is expected that the Court will consider the issue in proper perspective and do right at the last occasion in this regard.

Position in Various Countries

In 1967, in England and in 1980, in Scotland, sodomy between consenting adults in private was decriminalized[56].

In 1982, in Northern Ireland and in 1993, in Ireland, sodomy between consenting males in private was decriminalized in pursuance of decisions of the European Court of Human Rights (ECHR) in Dudgeon v. United Kingdom [45 Eur. Ct. H.R. (Ser. A) (1981)] and Norris v. Republic of Ireland [142 Eur. Ct. H.R. (Ser. A) (1988)] respectively[57]. For the first time, human rights cases concerning the privacy on same sex relations were successfully considered in these cases where the criminalization of such practices were deemed a violation of privacy protection in Article 8 of the ECHR. In Dudgeon case, the Northern Irish law, insofar as it criminalized homosexual acts between consenting adults in private, was declared as impinging on the privacy right under Article 8. Similarly, in the Norris case, an Irish law was challenged in the same manner. The appellant succeeded in ECHR[58]. Laws prohibiting homosexual activity between

52.Id at 11.
53.Ibid.
54.Review Petition Nos 41-55 of 2014, January 28, 2014 Downloaded from internet.
55.The Hindu, April 5, 2014 at 4.
56.Supra note 2 at 47 para 58.
57.Ibid.
58.Id at 44 para 53.

consenting adults in private were eradicated within 23 member States that had joined the Council of Europe in 1989 and out of 10 European countries that had joined since (as at 10th February 1995), nine had decriminalized sodomy laws either before or shortly after their membership applications were granted[59].

In Australia, all the States, with the exception of Tasmania, had decriminalized sexual acts in private between consenting adults by 1982 and had also passed anti-discrimination law which

prohibited discrimination on the ground, inter alia, of sexual orientation. Tasmania repealed offending sections in its criminal law in 1997 in view of the decision of United Nations Human Rights Committee in Toonen v. Australia[60] (No. 488/1992 CCPR/C/50/D/488/1992, March 31, 1994) in which it was held that the continuous existence of Tasmanian sodomy law violates Article 17 of the International Covenant of Civil and Political Rights[61].

In Canada, consensual adult sodomy and so called gross indecency were decriminalized by statute in 1989 in respect of such acts committed in private between 21 years and older which was subsequently brought down to age of 18 years or more[62].

In United States of America, the sodomy laws insofar as between consenting adults in private were struck down in Lawrence v. Texas [539 US 558 (2003)] [63].

The High Court of Hongkong in its judgement in Leung T.C. William Ray v. Secy for justice (dated 24th August 2005 and 20th September 2006) struck down similar sodomy law[64]. To the same effect is the judgement of the High Court of Fiji in Dhirendra Nandan v. State (Cr. Appeal case No. HAA 85 & 86 of 2005 decided on 26th August 2005) [65]. Nepalese Supreme Court has also struck down the law criminalizing homosexuality in 2008

_____

59.Id at 47-48 para 58.
60.Ibid.
61.Id at 45 para 55.
62.Ibid.
63.Ibid.
64.Id at 48-49 para 58.
65.Ibid.

(S.C. of Nepal, Division Bench, Initial Note of the Decision 21-12-2007)[66].

The South African Constitution of 1996 has unique provision in its Bill of Rights. Article 9 provides equality before law and equal protection and benefit of the law, and enjoins the State as well as all persons not to unfairly discriminate against anyone on several grounds including sexual orientation. In 1998, the Constitutional Court of South Africa unanimously invalidated provisions of several criminal laws, which made punishable homosexual conduct between consenting adult males in private, as violative of Equality Clause67 and right to privacy and dignity in The National Coalition for Gay and Lesbian Equality v. The Minister of Justice (decided on 9th October 1998) [68].

On the 18th December 2008, the UN General Assembly was presented with a statement endorsed by 66 States from around the world calling for an end to discrimination based on sexual orientation and gender identity. UN High Commissioner for Human Rights, who addressed the General Assembly via a video taped message, stated as under:

Ironically many of these laws, like Apartheid laws that criminalized sexual relations between consenting adults of different races, are relics of the colonial era and are increasingly recognized as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all[69].

On the issue of problems faced by homosexuals, UNAIDS, inter alia, recommended as follows: "Respect, protect and fulfill the rights of men who have sex with men and address stigma and discrimination in society and in the work place by amending laws prohibiting sexual acts between consenting adults in private;.... [70]"

In India also, conferences have been organized on the issue to address the problems faced by

homosexuals[71] and countless affirmations of support for LGBT community from every walks

66.Ibid.
67.Anil Dhavan, "Human Rights versus Section 377" published in The Hindu, October 12, 2006 at edito rial page.
68.Supra note 2 at 45 para 56 and at 35 para 40.
69.Supra note 2 at 49-50 para 59.
70.Id at 53-54 para 64.
71.Id at 54-55 paras 65-66.

of life have been noted[72].

Evidently, there is a global trend against criminalizing consensual sexual activity between adults in private and attempts have been made all over the world to decriminalize it.

CONCLUDING OBSERVATION

In view of the social perspective, judgement of the Delhi High Court and position in various countries, criminalizing consensual penile non-vaginal intercourse between adults in private under Section 377 cannot be said to be justified from any point of view. Only non-consensual penile non-vaginal intercourse between adults and consensual penile non-vaginal intercourse involving minors can be considered justified as a crime. Hence, it will be expedient to amend the criminal law so as to put consensual penile non-vaginal intercourse between adults in private beyond the purview of Section 377.

In this regard, the recommendation of the Law Commission in its 172nd report is relevant in which deletion of Section 377 is recommended by way of amendment in Section 375 placing non-consensual penile non-vaginal intercourse between adults and consensual penile non-vaginal intercourse involving minors in the category of rape. It is also worth mentioning here that non-consensual penile non-vaginal intercourse along with other kinds of sexual activities with a woman committed against her will or without her consent or under the circumstances stipulated in the provision falls under the category of rape in new definition of rape substituted by Section 9 of the Criminal Law (Amendment) Act, 2013. In such a situation, a consensual penile non-vaginal intercourse with a man remains as the crime under Section 377, while the same with a woman does not amount to crime under Section 375.

Consequently, it becomes inevitable to amend the criminal law either deleting Section 377 and effecting amendments in Section 375 as recommended by the Law Commission or putting consensual penile non-vaginal intercourse between adults in private beyond the purview of Section 377 so that the harmony be established in both provisions and the law under Section 377 be justified, and justice be done to LGBT persons.

72.Siddharth Dube, "Going against the tide of history" published in The Hindu, December 16, 2013 at 7.

Dr. Anil Kumar Dubey
Asst.Professor,School of Law,GGU,Bilaspur,C.G.