

"Decision of Honourable Supreme Court on Section 377 of Indian Penal Code – is it just and fair?"

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DECLARATION

This Research is a presentation of my original work. Wherever contributions of others are involved, every effort is made to indicate this clearly, with due reference to the literature and acknowledgement of collaborative research and discussions^{1, 2}.

The work was done under ‘Online off Campus Summer Internship Program II’ under ‘Prof. Ranbir Singh Legal Research Centre, Shajapur (M.P)’, with the guidance of the CEO of this Centre Adv. Sonal Gupta.

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I certify that that this research is from the scholar own work and effort, and all other sources used have been acknowledged. This research has been submitted with my approval.

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¹ Sonal Gupta. (2013). Male Victims of Intimate Partner Violence in some rural part of India – An Empirical Study. Unpublished LL.M. research project report. National Law University, Delhi. The idea of Research making has been taken.

² Madaan, A. (2012). Capital Punishment in Rarest of Rare Case – Is it Just and Fair?. Unpublished Online off Campus Winter Internship Program I. Prof.Ranbir Singh Legal Research Centre , Shajapur (India).

ACKNOWLEDGEMENTS

Pursuing a Research internship for the second time is a very learning experience. It is just like climbing a high peak, step by step, accompanied with hardships, encouragement and trust of my mentor on me. The period of one month term to be as the hardest period of my life because of some personal problems I ever suffered and the work of research on other but while working, I realized that it was not possible without my mentor guidance and others who supported me. Though it will not be enough to express my gratitude in words to all those who helped me but I would like to acknowledge them.

In a worshipful manner I am grateful to

Honourable Adv. Sonal Gupta

CEO at Prof. Ranbir Singh Legal Research Centre, Shajapur, Madhya Pradesh, who accepted me as a Research Scholar under his Legal Research Centre. He is the best Researcher and one of the smartest people I know, I hope that I could be as lively, enthusiastic, hardworking and energetic as my Mentor. In between the intern he offered me so much advice, patiently supervising me, and always guiding me in the right direction as 'The Mentor', on the topic –

"Decision of Honourable Supreme Court on Section 377 of Indian Penal Code – is it just and fair?"

My especial thanks goes to Prof. (Dr.) Ranbir Singh (Vice Chancellor of National Law University, Delhi) without the permission of whom, this institution may not have given the present name.

I also thank to all the hon'ble college faculty members of School of Law, Indore (M.P).

My special thanks to my Nanaji (Late. Suresh Shridhar Garde) who taught me how to stand alone and work with honesty. And last but not the least, to my best buddy Yogendra Malviya and to my beloved who inspired me and was there with me on each and every step, thank you for your love and care. Thanks to my Mom, Dad and my brother for their support, love and blessings.

Akanksha Madaan

*I dedicate this research to Almighty, My Mentor (Adv. Sonal Gupta),
My beloved, My family and
My friend (Yogendra Malviya),
for their constant support and unconditional love.
I love you all.*

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ABBREVIATIONS

Abbreviations	Full Form
&	And
v.	Verses
AIDS	Acquired Immunodeficiency Syndrome
A.I.R	All India Report
Cr.LJ	Criminal Law Journal
ed.	Edition
ECHR	European Commission Human Rights
ECOSOC	Economic and Social Council
HC	High Court
HCHR	High Commission Human Rights
HIV	Human Immunodeficiency Syndrome
ICCPR	International Conventions Council of Political Rights
IPC	Indian Penal Code
ISBN	International Standard Book Number
LGBT	Lesbian Gay Bisexual Transgender
LGBTQI	Lesbian Gay Bisexual Transgender Queer Intersex
MANU	Manupatra
MSM	Man having sex with Man
SC	Supreme Court
SCR	Supreme Court Reporter
Sec.	Section
UK	United Kingdom
UN	United Nation
UNHRC	United Nation Human Right Commission
UNGA	United Nation General Assembly
US	United States
Vol.	Volume

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ABSTRACT

Homosexuality is one of the most ancient debated issues in almost every society. Decision of Honourable Supreme Court in Suresh Kumar Kaushal v. Naz Foundation³ case on homosexuality in Section 377 of Indian Penal Code has gathered lots of controversies in India. The intention of study is to find out that Supreme Court on homosexuality is fair or not? also on what basis our constitutional courts term homosexuality as an illegal act. The study for the research adapted is qualitative and top down approach on the different cases and human rights of same sex activities. The 1st two chapters are intended to provide introduction, history, reasons and present study to homosexuality in India and in different countries of the world. The succeeding three chapters deal with the review of literature, law reforms in India and statues regarding LGBT's. Last but not the least the main body or the heart of this research which were based on the analysis of homosexuality which deals with number of cases, human rights and biological basis of sexual orientation so that we may find out the object of the study. The study tested that all the decisions taken by the jury regarding homosexuality by comparing the decision of honorable Supreme Court decision in international scenario and human keeping in mind the public at large which conclude that Decision of Honorable Supreme Court on Section 377 of IPC is not fair as it violates human rights. The study marks though the homosexuals has been discriminated by the society and the virus HIV/AIDS has been increased after decriminalizing Section 377 in Naz Foundation v. Government of NCT of Delhi⁴ case but criminalization of homosexuality is violation of human rights also on the other hand one can control HIV with proper protection.

³ Suresh Kumar Kaushal v. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

⁴ Naz foundation v. Government of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

CHAPTER – 1

PRELIMINARY

“Homosexuality is a discovery, not a choice or sin”⁵

CONTENTS:

1.1 Poem on Homosexuality

1.2 Introduction

1.3 Researcher Interest

1.4 Domain of Homosexuality

1.5 Present Study

1.1 Poem on Homosexuality

Love is for all

“There is no great sight in this world
Than the love between two people
Any two People
Love is free, love is true
Love knows no boundaries
And so should you
Queer, odd, abnormal you say
But to them its true love in each and every way
Their singularity in contrast to this vast uncertainty
Their love against the rules of the society
It is who they are inside that is being stifled
Our ugly words and mocking faces that make them feel belittled
Like the calm before a storm
We hunt them in a swarm

⁵ Jones, V. (1997). He wrote a letter to the editor of the Maui News, Maui, Hi on February 03, 1997, titled ‘Change Breeds Fear’. Religious Tolerance. Retrieved June 12, 2014 from www.religioustolerance.org

Like an eagle in the dawning skies
No amount of tears or pain or sorrow we face
Can compare to the agony they feel to the trace
Every night and day every waking minute
Sinking slowly with a heavy spirit
Who are we to deprive them of the glee
The glee that love makes our hearts dance in quiet revelry
They are no less human than we are
For their hearts yearn for the same love and acceptance that so hold bar
The day a man can love a man with no shame
And a woman can tell another the same
The world will regain its humanity
And love will flow abundantly
Like dew from a leaf
It seeps from our veins
It is in our hearts that it holds reign
Love is the greatest gift a man can receive
It's the one sensation that makes us believe
So let us accept them for who they are
And our humanity will reach heights so far.
The End

Sexuality does not determine equality. Love is for all. Stop the discrimination”⁶

1.2 Introduction:

India, officially the **Republic of India** is a country in South Asia⁷. It is the seventh largest country by area which, stands as the most populous democracy in the world⁸. It is one of the

⁶ Paneerselvam, S. (2011). Love for all - Poem against discrimination of Homosexuality. Poem no : S101057047. Retrieved June 10, 2014 from www.socialpsychetool.blogspot.in

⁷ Kaminsky, Arnold P. & Long, Roger D. (2011). India Today – An Encyclopedia Of Life In The Republic. Library of Cataloguing publishers. ISBN: 978-0-313-37462-3. EISBN: 978-0-313-37462-0. pp 100-110.

⁸ Census Commissioner. (2011). Census of India. Government of India, Ministry of Home Affairs. Retrieved June 01, 2014 from www.censusindia.gov.in

world's oldest civilization yet a very young nation⁹ which consists of 1.2 billion people including 27 lakh gays. The constitution makers of India mentioned preamble as 'The place of pride' declares the right to equality, liberty, and fraternity to its citizen by stating "**We the people of India**" in their context¹⁰. On one hand where India guarantees Human Rights to its citizen in our fundamental rights, the debate of Lesbian, Gay, Bisexual and Transgender gathered much more attention at present time. Leading countries like Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Iceland, Portugal, Brazil etc., where gay marriage is legal, however majority of nations like India prohibits the sexual relations between adults of same sex¹¹. In 2001, the most landmark decision of Honourable High Court in the case of Naz foundation v. Government of NCT of Delhi¹² which gave relief to Lesbian, Gay, Bisexual, Transgender (LGBT) for their relation by declaring Section 377 of Indian Penal Code as unconstitutional¹³ but in 2013, the decision of High Court were challenged in the apex court, where our constitutional court set aside the order of High Court by holding that Section 377 of Indian Penal Code does not violate Article 14, 19 and 21 of Indian Constitution and term same sex relations illegal¹⁴. Also they stated that it is the duty of parliament to amend or to repeal this section but till then this type of relationship is harmful to society because of homosexuality the percentage of HIV/Aids in India grows from 1% to 8%¹⁵.

In 2011 UN Human Rights Council passed the "Human Rights, sexual orientation and gender identity" resolution which was introduced by South Africa with a vote of 23-19¹⁶. The resolution expresses it as discrimination also requested a study and panel to investigate international violence against homosexuals and trans peoples. In 2010 the UN secretary General Ban ki-moon called the countries around the world to abolish law discriminating against gay and lesbian¹⁷. Article 3 of United Declaration of Human Rights provides the right to life; dignity and security, article 2 and 7 provide freedom from discrimination also Article

⁹ Kaminsky, Arnold P. & Long, Roger D. (2011). India Today – An Encyclopedia Of Life In The Republic. Library of Cataloguing publishers. ISBN: 978-0-313-37462-3. EISBN: 978-0-313-37462-0. pp 100-110.

¹⁰ Pandey, J.N. (2011). The Constitutional Law of India. (ed.48th). Central Law Agency. pp 30-33.

¹¹ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

¹² Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

¹³ Ibid.

¹⁴ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

¹⁵ Ibid.

¹⁶ United Nation. (2011). The Universal Declaration of Human Rights. Retrieved on June 01,2014 from www.un.org

¹⁷ Ibid.

12 maintains that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honour or reputation¹⁸. Article 21 of The Indian Constitution which provides right to life and personal liberty also Article 14 which provides right to privacy to its citizens¹⁹. On the basis of appeal made by United Nation 81 countries sign the declaration regarding the resolution made for homosexuals²⁰.

The concept of homosexuality is ancient which was found in almost all countries and even in many mythologies. The biggest example of those can be found in Hindu mythology where the Hindu deities many time favour same sex relation. From the ancient time homosexuality has been favoured by many people many king and queens over the world.

In 21st century where almost all country guarantee human rights to their citizens due to that many countries legalize homosexuality but some countries like India did not did so. The researcher in its research is trying to focusing the Honourable Supreme Court decision on homosexuality and will analyze such decision with humanity and will find out does such type of relation really term to be illegal. The researcher will going to focus many landmark judgments of India as well as foreign judgements also she will going to deal the title with the history and Human Rights and will going to analyze the decision of Honourable Supreme Court for LGBT's that is just and fair?

1.3 Researcher Interest:

The debate on homosexuality in India exists with a multiple issue in legal, personal and social fields. It is an evolving theme over the world. Today in 21st century where almost all the countries of world were talking about Human Rights, the biggest democratic country like India guarantees the same in the fundamental rights to its citizens. The concept of homosexuality is highly controversial. Certain countries like Canada, Spain, South Africa, Brazil etc where same sex relationship has been declared legal but on the other hand in India such relationship does not considered normal not only by the judiciary but also by the society. India being a member of Universal Declaration of Human Rights which guarantees freedom from discrimination also provides that no one shall be subjected to arbitrary interference with his privacy. UDHR in 1948 passed a declaration in favour of same sex relationship to be legalized, which was signed by 48 member countries except India and many other nations.

¹⁸ Ibid.

¹⁹ Pandey, J.N. (2011). The Constitutional Law of India. (ed.48th). Central Law Agency. pp 30-33

²⁰ United Nation. (2011). The Universal Declaration of Human Rights. Retrieved on June 01,2014 from www.un.org

Section 377 of India Penal Code which talks about the ‘Sex against order of nature’ had been banned by the Honourable High court in Naz Foundation v. Government of NCT Delhi²¹ but the decision of High Court has been set aside by the Honourable Supreme Court in Suresh Kumar Kaushal v. Naz Foundation²² case. Researcher had gone through many cases of homosexuality found in history through news, novels, on interaction with friends and family. She found that in ancient era such type of relationships has been favoured many times in Hindu Mythology; the biggest example of such relation is the incarnation of right half male part of God Shiva and left half female part of Goddess Parvati which term as Ardhanarishvara. Many reforms and revolutions have been done by the citizen of India to make same sex relationship legal. But one big question that arises whether being homosexual is against the order of nature? , why the guardians of constitution terming such type of relation illegal or against the nature and if they were terming such type of relation criminalising then is it just and fair?. Researcher is a law student perusing B.A.LL.B (Hons.) from School of Law, DAVV, Indore, India and in her summer internship she got selected for “Online off campus research intern problem”, under “Prof.Ranbir Singh Legal Research Centre”. Her research is on “Decision of Honourable Supreme Court on Section 377 of Indian Penal Code – Is it Just and Fair?” is going under the guidance of Adv. Sonal Gupta, ‘The pioneer in the field of legal research’, ‘Gold medallist from National Law University, Delhi in 1st convocation of LL.M’ and CEO of ‘Prof. Ranbir Singh Legal Research Centre, Shajapur’ which was set up by the permission of Prof.(Dr.) Ranbir Singh (Chair Head, PRSLRC and Vice Chancellor of National Law University, Delhi).

1.4 Domain of Homosexuality:

Researcher is working on broad domain of same sex relationship and focusing on homosexuality, it is suitable to know what the focus of term ‘Homosexuality and LGBT’s’ are:

According to Oxford Dictionary, Homosexuals are those whose sexual preference is of the same sex. They also term to be as Gay or Lesbians²³.

²¹ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

²² Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

²³ Kindersley, D. (2011). DK Illustrated Oxford Dictionary. Dorling Kindersley Limited and Oxford University Press. ISBN: 978-0-1434-1621-0. pp 746

According to Black's Law Dictionary, all those people who attract people of same sex term to be as homosexuals²⁴.

The term Homosexuality comprises of two term 'Homo' and 'Sexuality'. Homosexuality term has been derived from Greek term 'Homo' which means same as and the whole word Homosexuality means love between the two people of same sex²⁵.

LGBT is an initialism which stands for Lesbian, Gay, Bisexual and Transgender²⁶.

Homophobia term to be a phobia between homosexuals. It was a fever which term as contamination; it is a religious fear which leads to cruelty²⁷.

Crimes are wrongs whose approve is punitive and is no way remissible by any private person but only by crown, if remissible at all²⁸.

According to Blackstone, crime is done against violation of public law through committing any act or omitted²⁹.

1.5 Present Study:

In the present research, the focus is on the Lesbian, Gays, Bisexual, and Transgender (LGBT) moral, social and human rights. Although in India Honorable High court in Naz foundation v. Government of NCT of Delhi³⁰ case term Section 377 of Indian Penal Code unconstitutional but the decision of Honorable Supreme Court in Suresh Kumar Kaushal v. Naz Foundation³¹ case has taken away the breath of citizens of India especially LGBT's of India by their decision in which Honorable court set aside the order of High Court in Naz foundation v. Government of NCT of Delhi³² case also Honourable Supreme Court said that parliament

²⁴ Garner, B., Newman, J., Jackson, T., MC Daniel, B. (2011). Black's Law Dictionary. West group (Law). (ed IV). ISBN: 0314275444, 9780314275448. Retrieved June 11, 2014 from www.books.google.co.in

²⁵ This meaning has been taken from an article named 'Should homosexuality should be legalised?' published on Manupatra by unknown author. Retrieved June 01, 2014 from www.manupatra.com

²⁶ The definition has been taken from the Michigan University publication which laid down some terms related to LGBT's in the topic International + LGBT. Retrieved June 04, 2014 from www.internationalspectrum.umich.edu

²⁷ Weinberg, G. (1975). Society and Healthy Homosexual. Colin Smythe Ltd. ISBN- 10: 0901072168, ISBN-13: 978-0901072160. pp 68 – 100.

²⁸ Bhattacharya, T. (2013). The Indian Penal Code. (ed VII). Central Law Agency, Allahabad. pp 8 - 10

²⁹ Ibid.

³⁰ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

³¹ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

³² Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

was authorized to set aside Section 377 of Indian Penal Code but till that the court does not legalize such kind of sexual relationship. A huge population of India was opposing the decision of Supreme Court. In the present research the focus is on the different landmark cases and the logic behind those cases that on what basis our court deem such type of relationship unconstitutional.

In the recent criminal law our constitutional courts enacted Section 377 of Indian Penal Code also term same sex relationship illegal and against nature. From the study, the researcher comes to know through its own observation and from many literatures, that such type of relationship used to be held legal from the purview of Human Rights. Hence in the present research the researcher will have a study on the topic whether the decision of Honourable Supreme Court on Section 377 of Indian Penal Code is it just and fair?

CHAPTER – 2

RESEARCH METHODOLOGY

2.1 Statement of Problem

2.2 Terminologies

2.3 Object of the Research

2.4 Research Method

2.5 Data Collection

2.6 Coverage and Scope

2.7 Hypothesis

2.1 Statement of Problem:

After the decision of Honourable Supreme Court in Suresh Kumar Kaushal v. Naz Foundation³³ where court set aside the order of High Court³⁴ by terming same section relationship illegal. Court focuses his idea by saying that such type of relation increases the AIDS from 1% to 8% also Section 377 does not violate Article 14,19 and 21. The researcher is trying to analyze the effectiveness and need to declare Section 377 unconstitutional and also trying to analyze the human rights of LGBT and the citizens of India. The researcher's full focus is to analyze that the SC decision in Suresh Kumar Kaushal v. Naz Foundation³⁵ is just and fair? Also the researcher trying to solve the below query:

- Should homosexuality be legalized?
- It violates right to liberty guaranteed under Article-21 of the Indian Constitution, which covers private consensual sexual relations.
- Does Criminalization of homosexual conduct is unreasonable and arbitrary?

³³ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

³⁴ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

³⁵ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

- By terming same sex relation illegal is the only way to remove AIDS percent in country?

2.2 Terminologies:

Definitions regarding some important terminologies supporting the topic are:

- LGBT – Abbreviation for Lesbian, Gay, Bisexual and Transgender³⁶.
- Bicurious – A strong desire for having sexual relations with same gender person. Example – Male with male, Female with female³⁷.
- Bigendered – Third gender person who has combination of man and female³⁸.
- Biphobia – The fear of discrimination against bisexuals, LGBT's community³⁹.
- Homophobia – Fear or hatred towards the people of homosexuality by the people of society⁴⁰.
- Bisexual - Attraction of a person towards male or female sexually, physically and emotionally⁴¹.
- Discrimination – when the powerful society or their members behave cruel with the less powerful society people then such behavior term to be as discrimination⁴².
- Gay – Male getting attached with another man sexually, romantically, physically and/or emotionally. This term refer to same sex men who got sexually attached⁴³.
- Gender Identity – A private sense of being male, female or other gender⁴⁴.
- Gender queer – A person who is neither male nor female but a combination of both or is between or beyond gender⁴⁵.
- HIV – Human Immunodeficiency Virus is a species of virus which causes AIDS i.e. Acquired Immunodeficiency Syndrome⁴⁶.
- Homosexual – A person attached to the same gender or wishes to have sex with same sex. It includes Lesbian, Gay, Bisexual, Transgender, Queer etc⁴⁷.

³⁶ Green, R. & Peterson, N. (2003-2004). LGBTQI Terminologies. LGBT Resource Centre at UC Riverside. Retrieved June 08, 2014 from <mailto:eli@trans-academics.org>

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

- Lesbian – Female getting attached with another female sexually, physically, romantically and /or emotionally. This term refer to same sex women who got sexually attached. The term Lesbian has been derived from the name of Greek island named ‘Lesbos’⁴⁸.
- LGBTQI – Common abbreviation of Lesbian, Gay, Bisexual, Transgender, Queer and intersexes community⁴⁹.
- Sexuality – A person’s sexual desire, sexual acts their orientation pleasure exploration⁵⁰.
- Victim Assistance – It includes activities such as providing information, appraisal, actions taken to improve medical disorder, case advocacy, system advocacy, public policy and programme for development of victims. It applies with the intention to recover the sufferers⁵¹.

2.3 Object of the Research:

In India, homosexuality is still considered to be outlawed by the civil society and this issue has been decriminalizing in the higher court. Through news stories related to Gay, Lesbian, Bisexual, homosexual and Transgender topics have made front page news and headlines after the decision pronounced by Honourable Supreme Court in Suresh Kumar Kaushal v. Naz Foundation⁵² case where the apex court set aside the order of Naz Foundation v. Government of NCT of Delhi⁵³ in which the Honourable Delhi High Court term Section 377 of India Penal Court unconstitutional.

There has not been enough understanding of the LGBT men and women or their lives. The LGBT population has still been largely invisible not only due to disregard by a dominant patriarchal society but also of fear of teasing and stigma.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Dussich, J. (2005). Victimology past present and future. 131st International Senior Seminar Visiting Experts Papers. Resource material series no.70. pp 116-119

⁵² Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

⁵³ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

In 2009 after Naz foundation v. Government of NCT of Delhi⁵⁴ Honourable High court gave a relief to LGBT but recently Honourable Supreme Court set aside the high court decision⁵⁵. After the Supreme Court decision many question arose before the researcher those are:-

- To study the nature, extent and principles of Section 377 of Indian Penal Code
- Analyze the decision of Honourable Supreme Court in Suresh Kumar Kaushal Case⁵⁶.
- To understand the method of dealing among LGBT toward their violence.
- To find that Section 377 is a stigma for the LGBTs?
- To find out that does the LGBT has right to live and enjoy their personal relations as the normal citizen does?
- To identify the neglecting fact among LGBT by the judiciary.
- To gain familiarity with a phenomenon or to achieve new insight into it.
- To test a hypothesis of a casual relationship between variables.

2.4 Research Methodology:

Researcher has adopted two types of research methods those are:-

1. Comparative Analytical Method: In this method the researcher will going to compare different judicial decisions for the research.
2. Deduction Method also called Top Down Approach: - In this method the researcher proposes to test the hypothesis after analyzing and examine various eminent lawyers report, various committee recommendations, constitutional courts judgements of both India and foreign countries, scholar reports, the situation of country or the population of victimized LGBT and especially to compare the terms proposes by judiciary for LGBT's with human rights.

The research is divided into 3 groups:

1. Method which include collection of data which include review of literature, history of homosexuals. This method will help to analyze the data available which is not sufficient to arrive at the required solution.

⁵⁴ Ibid.

⁵⁵ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

⁵⁶ Ibid.

2. A technique which are used for establishing relationships between data and the unknowns;
3. Method which will evaluate the accuracy of result obtained i.e. verification of hypothesis.

The last two groups are the analytical tools of research.

2.5 Data Collection:

All the data collected for study are secondary and are analyzed. The review and the study occurred from the various books from School of Law library and Central Library of DAVV also e-books and various cases from e-data source that is from Indian Kanoon, Manupatra e – data base online from library Sonal Gupta & Associates, Google e-books, 172nd Law commission report and various research papers also from e-data.

2.6 Coverage and Scope:

The various number of case studies which are mentioned in the research are mostly landmark case of India and foreign countries which will going to help in establishing the just and fairness of LGBT rights. Many old and latest judgements were also included in project for the fair analysis of Honourable Supreme Court judgement also the judgement has been compared with the law of other countries were LGBT relationship is legal.

2.7 Hypothesis:

- The overruling of Honourable Supreme Court over the decision of Delhi High Court in Naz Foundation v. Government of NCT of Delhi seems to be re-examined and the decision is not fair.
- There is a need of separate law for LGBT's in India.
- Section 377 is violation of Human right.
- AIDS in LGBT's can be controlled.

CHAPTER – 3

HISTORY OF HOMOSEXUALITY

3.1 History of homosexuality existing in ancient period

3.2 History of homosexuality in India

3.3 Manusmrti

3.4 Religious Art

3.1 History of homosexuality existing in ancient period:

Homosexuality was originated in all over the world from ancient period. It was observed that same sex relationship has been practiced by many kings. Homosexuality does not considered to be as crime in ancient period. Here we will going to have a look on history of LGBT in ancient era over the world:

Africa – Women in Lesotho which is situated in Africa used to engage in a relationship called Motsoalle. Motsoalle refer to a relation which includes sexual desire with each other between same sexes⁵⁷. The male in Northern Congo (locate in Africa great lakes region of Central Africa) which were term as Azande warriors took boy-wives who aged between 12 – 20 years with them at time of war, these women look after the household activities of these warrior also engaged them in femoral or interfemoral sex which is a type of non penetrative sex⁵⁸.

Egypt – In Rammeside Period of ancient Egypt the images of homosexuality was found which depict males having sex with boy who term to be as Gay⁵⁹.

America – In America the term ‘two spirit individual’ in which a common form of same sexuality centred where in the early life of these individual their parents use to give choice to them to follow their path, if their children chooses the same pattern of living as their parents had they raise them in appropriate manner earning the custom of gender they chosen. Their

⁵⁷ Morgon, R. & Wieringa, S. (2005). Tommy Boys, Lesbian, Men and Anastral Wives – Female sex Practice in India. Jacang Media Pvt Ltd. ISBN: 1770090932. Retrieved on June 05, 2014 from books.google.co.in

⁵⁸ Myres, J. (2013). Historical Dictionary of Lesbian and gay liberation movements. Scare Crow Press. pp 50 – 60. ISBN: 9780810872264. Retrieved on June 05, 2014 from books.google.co.in

⁵⁹ Dowson, T. (2006). Archaeologist, Feminist and Queers: Sexual Politics in construction of Past. University of Pennsylvania Press. ISBN: 0812239407. Retrieved June 06, 2014 from books.google.co.in

sexual life was based on same sex relation⁶⁰. In America there were third gender people found in which male assume them in feminine role and female took mescaline role. They called as Berdaches⁶¹.

Assyria – It was believed that in ancient Assyria that if a man will have sex with another man but of same status then they will have good luck. Many pictures of anal intercourse practice and many prayer of being homosexual had been found. Many kings had male lover and even Hammurabi king of Babylon use to sleep with man. He was also male lover. Many male and homosexual at that time uses to be found in prostitute business⁶².

China – From the ancient period china was famous in homosexuality. Homosexuality was a fashion in Han Dynasty nearly every emperor of this dynasty were engaged in same sex relation i.e. male with male⁶³. Even such relationship was mentioned in many Chinese literatures such as a novel called “Dream of red chamber” depicts the story of same sex affection and their intimation⁶⁴.

Japan – In the diaries of Hein many stories of same sex relationships were found. The emperors of Japans were also evolved in homosexual relationship, where they call good looking boys for their sexual relation. Japan also consist the stories of youth who fall in love with a girl who actually were boy and dressed up in female costume⁶⁵.

Greece – The development of same sex relationship came from ancient Greece. Plato in its earliest writing accepted the presence of homosexuality. Also he demanded to abolish homosexuality but Aristotle was against the idea of Plato⁶⁶.

Rome – In Rome men was free to enjoy sexual relation with other man without social status loss. Men’s homosexuality was on heights in compare to women. Even some male uses to

⁶⁰ Jacobs, E., Thomas, W. & Long, S. (1997). Native America Gender, Identity, Sexuality and Spirituals – Two Spirit People. Library of Congress Cataloguing in Publication Data. ISBN: 0252023447. Retrieved on June 06, 2014 from books.google.co.in

⁶¹ Frayser, S. & Whitby, T. (1995). Studies in human sexuality – A selected guide. United State of America Publication. ed – II. ISBN: 1563081318. Retrieved on June 05, 2014 from books.google.co.in

⁶² Birch, S. (1873). History of ancient pottery, Egyptian, Assyrian, Greek, Etruscan and Roman. John Murray, Albemarle Street: London. Retrieved on June 05, 2014 from books.google.co.in

⁶³ David, F. & Berg, G. (1988). The Construction of Homosexuality. University of Chicago Press. pp 150 – 170. ISBN: 0226306283. Retrieved on June 03, 2014 from books.google.co.in

⁶⁴ Neill, J. The Origins and role of Same Sex Relation in Human Societies. United State of America Press .pp 260 -270. Retrieved June 02, 2014 from books.google.co.in

⁶⁵ Haggerty, G. (2000). Gay History and Cultures. Garland Publishing inc. pp 468 – 498. ISBN – 0815318804. Retrieved on June 05, 2014 from books.google.co.in

⁶⁶ Dover, K. (1978). Greek Homosexuality. Library of Congress Catalogue. pp 10 – 20. ISBN: 0674362750. Retrieved on June 03, 2014 from books.google.co.in

keep male concubines⁶⁷. The famous emperor Nero celebrates male's marriage in public where once he dresses up as bride and once in the form of groom. In 2nd century BC many male rapes were also happen but the accused got rare penalty in Roman law. Male prostitutes were also found in Rome during ancient period⁶⁸.

18th – 19th Century – Pennsylvania was term to be as 1st state to repeal death penalty for sodomy. In Berlin homosexuality was found to be very open to public in the form of magazines for lesbian and gays. “Die Freundin” named magazine was started by “Friedrich Rads Zuweit” for lesbian and “Der Eigene” name magazine for gays started in 1896. Homosexuality was accepted fully in this era. A pub name “Gan Club” were especially open for gays⁶⁹.

3.2 History of homosexuality in India:

It was observed that LGBT's⁷⁰ people were found from the ancient periods. India consists of much LGBT text in its history. LGBT relation use to found from Vedic period. Several temples in India define the relationship of same sex. There are many stories in Hinduism which talks about Gods changing their gender; also they get involved in many such activities such as:

Ardhanarishvara - In Hindu mythology many god and goddess several times represented as males and females for different evident which represent character of both genders at once in a single person. The biggest example of such creation is Ardhanarishvara⁷¹. Ardhanarishvara is depicted as half male and half female, split down the middle. The right half is usually the male god Shiva and the left half consist of the female i.e. goddess Parvati. This term mean the lord whose half is a women⁷².

Iravana – A person who was a part of Mahabharata, he was the son of Arjun (Pandava Prince). Iravana also known as Aravan were worshiped among Transgender community. Aravana was died in kurukshetra war; he was a follower of Goddess Kali. Before his death he

⁶⁷ Hubbard, T. (2003). Homosexuality in Greece and Rome – A Source book of basic doc. University of California Press. Retrieved June 03, 2014 from books.google.co.in

⁶⁸ Williams, C. (1999). Roman Homosexuality. Oxford University Press. ed. II. ISBN: 9780195388749. Retrieved on June 05, 2014 from books.google.co.in

⁶⁹ Dynes, W. & Donaldson, S. (1992). History of Homosexuality in Europe and America. United State of America Press. pp 250 – 300. ISBN: 0815305508. Retrieved June 05, 2014 from books.google.co.in

⁷⁰ Lesbian, Gay, Bisexual and Transgender

⁷¹ Mathur, S and Chaturvedi, B.K. (2012). Hindu Gods and Goddess. Diamond Books. ISBN: 81-288-0802-8. pp 27 - 31

⁷² Ibid.

wishes to marry and kept such wish before Goddess kali, no women was ready to marry with him as he was on his death bed. To complete his wish Lord Krishna taken the incarnate of female name Mohini and married Aravan and gave the pleasure of marriage to him⁷³.

Ayyapan – Ayyapan also called Sastavu. He was born from two males; it uses to say that he was child of Lord Shiva and Lord Vishnu's Mohini incarnate. According to history, Shiva called Vishnu for his help to kill devil called Bhasmasur. Bhasmasur has the power to convert any person into ashes. Vishnu taken the incarnate of Mohini to escape from Bhasmasura but Bhasmasura got attracted which results into death of devil. Vishnu after killing Bhasmasura found Shiva and explained the whole story to him. Shiva asked Vishnu to take the same incarnate of female and when Vishnu did the same Shiva got attracted by Mohini's beauty and they got unite and these two become "Harihar Murti" which was a form of Vishnu and Shiva and they gave birth to a child called "Dharmasastra"⁷⁴. Ayyapan use to be worshipped in South India.

Bahuchara Devi – She is Goddess of Hindu especially among Transgender. It uses to say that when she was with her sister on journey a robber name Bapiya attack on them. Bahucharya with her sister cut their breast and become impotent. Today she uses to get worshipped by Hijra community in India⁷⁵.

Ila – Ila who was a king whose stories has been appeared in several Hindu Texts has been punished by Shiva and Parvati to be a man for one month and a woman for the another. After changing sex, Ila loses the memory of being the other gender. During one such period, Ila marries Budha. Although Budha knows of Ila's alternating gender, he doesn't enlighten the male Ila, who remains unaware of his life as a woman. The two live together as man and wife only when Ila is female. In the Ramayana version, Ila bears Buddha a son, although in the Mahabharata Ila is called both mother and father of the child. After this birth the curse is lifted and Ila is totally changed into a man who goes on to father several children with his wife⁷⁶.

⁷³ Pattanaik, D. (2010). Jaya : An illustrated retelling of the Mahabharata. Penguin Group. ISBN : 9780143104254. pp 245 – 250. Retrieved June 07, 2014 from books.google.co.in

⁷⁴ Vanita, R. (2005). Love's rite – same sex marriage in India and the west. Penguin Group Publication. pp 99 – 105. ISBN13: 9780144000593, ISBN10: 0144000598. Retrieved June 08, 2014 from books.google.co.in

⁷⁵ Abbott, E. (2001). A history of celibacy. The Luttherworth Press. pp 325 – 345. ISBN: 0718830067. Retrieved on June 06, 2014 from books.google.co.in

⁷⁶ Kalkinath. (2005). Ardhanarishwara – the god who is half women. Retrieved June 01, 2014 from www.philhine.org.uk

Bhagirath - In the famous Bengali text called *Krittivasa Ramayana* which talks about the story of two queens that conceived a child. Maharaja Dilipa, the king of sun dynasty died without giving heir to the state at that time Lord Shiva appeared before the two widow queens and asked them to make love with each other and if they did so then they will conceive a son with lord Shiva blessing. They both execute the same order and conceived a son which was born boneless but with the blessing of sage Ashtavakra the child got full health and he named him Bhagirath who was born from two vulvas and the child later become the most famous king of India⁷⁷.

Shikhandi - In the *Mahabharata* a girl Shikhandi, whose mother Draupada train and raised her daughter like a Manand and made her marry to a female⁷⁸.

Mavendra Singh Gohil – A prince who was born in 1965 at Ajmer was the son of Maharaja Shri Raghubir Singhji Rajendra Singhji Sahib. Before marriage he uses to act like gay many times due to that he married by the thought that after marriage he will be alright. After marriage he revealed his homosexuality to his wife and the marriage ended with divorce. He is the only person of royal family in Modern India who revealed his sexual orientation in public. In 2008 he adopted child to continue the responsibilities as a prince. It was the 1st known gay case who adopted child in India. In 1992 he got involved in social activities for LGBT's in Gujarat⁷⁹.

A classic Indian text which was composed in 400 BCE and 200 CE deals with all aspects of sexual life without any ambivalence and false virtue talks about adultery, marriage, group sex, homosexuality etc⁸⁰.

3.3 Manusmrti:

Under Manusmrti homosexuality has been punished but it does not considered as a heinous crime. The punishment provide as⁸¹:

⁷⁷ Vanita, R. (2011). *Born to Two Mothers, The Hero Bhagiratha*. pp 23-27. Retrieved June 02, 2014 from www.manushi-india.org/pdfs_issues/PDF%20146/Pg%2022-33.pdf.

⁷⁸ Pattanaik, D. (2000). *The Goddess in India – The Five Faces of the Eternal Feminine*. Library of congress catalogue publication. ISBN: 0-89281-807-7. pp 98-115

⁷⁹ Howard, S. (2013). *The Kamasutra Diaries – Intimate Journeys through Modern India*. Nicholas Brealey Publisher. ISBN: 9879383260942. Retrieved on June 03, 2014 from books.google.co.in

⁸⁰ Doniger, W. & Kakar, S. (2002). *Vatsyayana Kamasutra*. Oxford World Classics Paperback. ISBN: 978-0-19-953916-1. pp 161 -166

⁸¹ Das, R. (1982). *Crime and Punishment in Ancient India*. Kanchan Publication. pp 89- 100. Retrieved June 04, 2014 from books.google.co.in

- Girl having sex with girl uses to be punished with Rs. 200/- fine.
- Women having sex with a girl punished by shaving her head immediately, fingers cut off and making her ride on donkey.
- Man having sex with man – Painful heating
- Man having sex with women instead of vagina – Painful heating.

3.4 Religious Art:

Some religious art which depicts homosexuality in ancient India:

- On the walls of Khajuraho it which that two women holding each other⁸².
- In Kandariya, Mahadev temple which is situated in Khajuraho, their walls depicts that a group of three women and one man involve in indiscriminating sexual activities⁸³.
- In Ahmadabad at Shiva temple which was constructed in 1060 CE depicts the interest between two women together for sexual activities⁸⁴.

⁸² Narain, L.A. & Dube, A.N. (1986). Khajuraho Temple of Ecstasy. Lustre Press. pp 48 – 51. Retrieved on June 01, 2014 from books.google.co.in

⁸³ Allen, M. (1991). Ornament in Indian Architecture. Associated University Press. pp 201 – 215. ISBN: 0874133998. Retrieved on June 02, 2014 from books.google.co.in

⁸⁴ Mathew, B. (2013). Pilgrimage to Temple Heritage. Published in Prashant Kumar V.T on behalf of info. Kerela communication ltd. pp 478 – 489. ISBN: 8192128443. Retrieved on June 03, 2014 from books.google.co.in

CHAPTER – 4

REVIEW OF LITERATURE

4.1 Review of Literature:

(Human Rights Library, 1994)⁸⁵ United Nation Human Rights also raised voice against the protection of LGBT rights in case of Toonen v. Australia⁸⁶ where the United Nation Human Rights committee held that criminalization of homosexuality in states is violation of Article 2 and 26 of International Convention on Civil and Political Rights⁸⁷.

(Law Commission of India, 2000)⁸⁸ In 172nd report of law commission the committee members recommended the deletion of Section 377 of IPC⁸⁹ and pleaded that it is harmful to public health due to direct impact on the life of homosexual. Also they quoted that if we will ban such type of relation it results the homophobia in LGBT's which will generate the illegal way of same sex activities in privacy.

(Bharat, 2001)⁹⁰ In her research found that HIV/AIDS in between LGBT's creates much more discrimination towards them by the society.

(Public Union for Civil Liberties, 2003) in their study in Transgender i.e. kothi and hijra sex workers in Bangalore concluded that there is an urgent need of laws protecting as everywhere there is violation of transgender human rights.

(Feldblum, 2005)⁹¹ In his research talks about the equality and they found that there is a need to establish equality in same sex marriage with the support of society so that the LGBT's group may win the battle⁹².

⁸⁵ Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01, 2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Law Commission of India. (2000). Review of Rape Laws. 172nd Report. Ministry of Law. Retrieved on June 02, 2014. www.lawcommissionofindia.nic.in

⁸⁹ The Indian Penal Code, 1860

⁹⁰ Bharat, S. (2001). India :HIV and AIDS-related Discrimination, Stigmatization and Denial. Joint United Nations Programme on HIV/ AIDS (UNAIDS). ISBN 92-9173-104-8. Retrieved June 11, 2014 from <http://www.unaids.org>

⁹¹ Feldblum, C. (2005). Gay Is Good: The Moral Case for Marriage Equality and More. Georgetown university law centre and legal theory. Research paper no: 12-148. Retrieved June 02, 2014 from <http://scholarship.law.georgetown.edu/facpub/1091>

⁹² Here in the research battle term to be the fight of LGBT's for their rights in equality.

(Ray, 2006)⁹³ In his research found that among all homeless youth 20% to 40% youth consist of LGBT's and the reason behind that was the negative impact of society towards them, lack of understanding of their sexual orientation.

(Gupta, 2006)⁹⁴ in his research named "Section 377 and the dignity if Indian Homosexual" opines that Section 377 of IPC is a biggest offence to the dignity of humanity and a substantial minority to Indian citizens. Court by this section is not decriminalizing the act of sodomy but it is criminalizing the lives of actual people who are connected to such act.

(Suicide Prevention Resource Centre, 2008)⁹⁵ In their research found that the suicidal behaviour of LGBT's occur due to discrimination towards them by society, mental illness, isolation, victimization, stress full relationship. Also they found that this can be removed by supporting LGBT's and empowering their relation.

(Gentlewarrior, 2009)⁹⁶ In her research found that Sexual violence in LGBT people are on heights due to non protection, discrimination, and criminalising of such relations.

(Valentine & wood, 2009)⁹⁷ In their research found that LGBT students reported a very negative impact towards them by the society, by their colleagues in school and colleges. 15 percent of LGBT's were scared about their financial treatment by their families because they think that when their parents come to know about their sexual orientation condition they will not going to provide financial treatment to their children.

(Naz Foundation International, 2012)⁹⁸ Homosexuality is not an offence; it is just a way of pursuit of happiness, a way to achieve sexual happiness or desire. In our society people have

⁹³ Ray, N. (2006). Lesbian, gay, bisexual and transgender youth: An epidemic of homelessness. New York: National Gay and Lesbian Task Force Policy Institute and the National Coalition for the Homeless. Retrieved June 09, 2014 from <http://www.nationalhomeless.org/>

⁹⁴ Gupta, A. (2006). Section 377 and The Dignity of Homosexuals. Economic and Political Weekly. Retrieved June 01,2014

⁹⁵ Suicide Prevention Resource Centre. (2008). Suicide risk and prevention for lesbian, gay, bisexual, and transgender youth. Newton, MA: Education Development Centre, Inc. Retrieved June 10, 2014 from http://www.sprc.org/library/SPRC_LGBT_Youth.pdf

⁹⁶ Gentlewarrior, S. (2009). Culturally Competent Service Provision to Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Violence. National Online research centre on violence against women. Retrieved June 08, 2014

⁹⁷ Valentine, G, & Wood, N. (2009). The experiences of lesbian, gay and bisexual staff and students in higher education. Equality and Human Rights Commission commissioned by Equality Challenge Unit. This research was based on the survey on 4205 LGBT staff and students in England, Wales, Northern Ireland. Retrieved June 09, 2014 from <http://www.ecu.ac.uk/publications/lgbt-staff-and-students-in-he>

⁹⁸ Naz Foundation International. (2012). Section 377 : 150 years on and still continuing. Pukaar The Journal of Naz Foundation International. Issue 77. Retrieved on June 01, 2014

branded homosexuals as “queer”⁹⁹. Yet homosexuality is not new nor is it against the Indian culture, it has always existed and with much lesser prosecution, that under Section-377 of the IPC, which is based on British Offences against the Persons Act.

(Justice Shah, 2012)¹⁰⁰ In his article stated that there is a need to promote public health regards HIV/AIDS. HIV virus does not itself discriminate but the punishments, discrimination in society are the source to spread HIV. This virus can only be cure by taking proper protection and prevention, which can be made possible with a proper legal environment who works with such minorities. HIV virus needs an immediate action which can be done by legal support.

(Rao & Jacob, 2012)¹⁰¹ in their article Homosexuality and India stated that there is a need to take a fair stand on LGBT issue by the government of India to change their judgement regarding same sex people’s right without knowing facts. There is a highly need of research regarding such minorities conditions in India. Clinic services must be provided to them with the teaching of sexuality. Also there is a need to bring awareness in the society and the psychiatric regarding the issue of LGBT to provide them the opportunity and confidence to live in between them. There is a need to educate the society about the human rights and change their attitude towards the same sex people. Also they highlighted that the focus must be done people’s humanity instead of sexual orientation.

(Amnesty International, 2013)¹⁰² in their study on criminalization of same sex conduct found that the law which criminalize same sex activities violates the International Human Right law which includes right to equality, non discrimination, privacy, freedom of expression, health, torture, inhuman treatment, life, bodily integrity etc. Several countries have bad attitude towards LGBT’s which results into discrimination. This whole condition needs a change, these sexual orientation are fundamental right of International Human Right law. The change toward the acceptance of same sex relation is in a need to support their rights as a citizen.

⁹⁹ An umbrella term which embraces a matrix of sexual preferences, orientations, and habits of the not-exclusively- heterosexual-and-monogamous majority. Queer includes lesbians, gay men, bisexuals, transpeople, intersex persons, the radical sex communities, and many other sexually transgressive (underworld) explorers

¹⁰⁰ Justice Shah, A.P. (2012). De-criminalization of anti-sodomy law in India – tackling the issues of Constitutional Morality, public health and individual rights. ‘Pukar’ The Journal of Naz Foundation International Publication. Issue 77. Retrieved June 11, 2014 from www.nazindia.org

¹⁰¹ Rao, S. & Jacob, K.S. (2012). Homosexuality and India. Indian Psychiatry Society Medknow Publications. Vol 54. PMCID: PMC3339212. Retrieved June 12, 2014 from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3339212/>

¹⁰² Amnesty International. (2013). Making Love a Crime – Criminalization of Same Sex Conduct in Sub – Saharan Africa. Amnesty International UK. pp 72 – 78. Retrieved June 01,2014 from www.amnesty.org

(Amnesty International, 2013)¹⁰³ In 1994 Amnesty International publically announced that violence and abuse against LGBTs are infringement of human rights.

(Kapur, 2013)¹⁰⁴ in her article in The Hindu advocates the deletion of section 377 for effective gender neutral law.

(European Unit, 2013)¹⁰⁵ In 2013 survey of LGBT of European Unit found that there are many obstacles in the enjoyment of fundamental rights of LGBT's, the reason behind that is discrimination they face in various areas like education, life, employment. Also many times these peoples got victimized in public places.

(Rao & Jacob, 2014)¹⁰⁶ in their article the reversal of gay rights in India stated that after the decision of Supreme Court on Section 377 of Indian Penal Code, parliament and government of India has an opportunity to make laws for gay by immediately repealing section 377 of Indian Penal Code. Also they stated that 19th century law has no place in 21st century democracy.

(Verghese, 2014)¹⁰⁷ in their article writes Homosexuality is not a crime that should got punished by the judiciary also it is not a disorder that should get treated but the gay should get the freedom to live their life as they want without restrictions.

Hundreds of Gay rights activists in Delhi and in other cities came on road with black arms bands with rainbow colour flags and banner to protest the decision of Honourable Supreme Court on Suresh Kumar Kaushal v. Naz foundation¹⁰⁸ case that criminalize same sex relation illegal. In 2009 Honourable High Court in their decision declared Section 377 of Indian Penal Code Unconstitutional, this decision were set-aside by Supreme Court. The gay community

¹⁰³ Amnesty International Report. (1994). Making Love a Crime – Criminalization of Same Sex Conduct in Sub-Saharan Africa. Amnesty International Publication. pp 76-96 Retrieved June 02, 2014 from www.amnestyusa.org

¹⁰⁴ Kapur, R. (2013). The new sexual security regime. The Hindu. www.thehindu.com

¹⁰⁵ European Unit Survey. (2013). European Union lesbian, gay, bisexual and transgender survey. European Union Agency for Fundamental Rights. ISBN 978-92-9239-173-7 doi:10.2811/37741. Retrieved June 11, 2014 from <http://europa.eu/>

¹⁰⁶ Rao, S. & Jacob, K.S. (2014). The reversal on gay rights in India. Indian Psychiatry Society Medknow Publications. Vol 56. PMID: PMC3927237. Retrieved June 12, 2014 from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3927237/>

¹⁰⁷ Verghese, A. (2014). A fresh look at homosexuality. Indian Psychiatry Society Medknow Publications. Vol 56. PMID: PMC4040081. Retrieved June 12, 2014 from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4040081/>

¹⁰⁸ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

and their activists demanded to undo the Supreme Court decision also they mention that it's their fundamental rights and they will only going to decide whom they love¹⁰⁹.

¹⁰⁹ NDTV India. (2013). Gay rights protests across India against Supreme Court ruling on homosexuality. NDTV News published on December 15, 2013. Retrieved on June 01, 2014 from <http://www.ndtv.com/article/india/gay-rights-protests-across-india-against-supreme-court-ruling-on-homosexuality-459036>

CHAPTER – 5

LAW REFORM'S

5.1 Report

5.2 NAZ foundation v. Government of NCT of Delhi

5.3 Suresh Kumar Kaushal v. NAZ Foundation

5.4 Comparison of Suresh Kumar Kaushal v. Naz Foundation and Naz Foundation v. Government of NCT of Delhi

5.1 Report:

In 172nd report of law commission the committee members recommended that Section 377 of Indian Penal Code should get deleted also they pleaded that the implementation of such section will create a problem for society and it is harmful for public health as it result a direct impact on the life of homosexuals. Further they stated that banning of same sex relation will result to grow the same in privacy which will create a lot problem¹¹⁰.

5.2 NAZ Foundation v. Government of NCT of Delhi¹¹¹:

Facts of case – Honourable High Court on July 02, 2009 ended the discriminatory treatment against LGBT people in India by declaring Section 377 of Indian Penal Code unconstitutional. Section 377 is a birth of British legal system which criminalizes homosexuality. A writ petition has been bought up by an NGO named NAZ Foundation who works for HIV/AIDS sufferers who term Section 377 of IPC as a constitution violation.

Section 377 of IPC i.e. Unnatural Offences which provides that any person who has involved in activities of carnal intercourse against the order of nature with any man women or animal shall be punished with imprisonment for life or may extend to ten years, and shall also be liable to fine¹¹². Naz Foundation in their petition also submits the following¹¹³:

- It violates fundamental rights under Article 14, 15, 19 and 21 of Indian Constitution.

¹¹⁰ Law Commission of India. (2000). Review of Rape Laws. 172nd Report. Ministry of Law. Retrieved on June 02, 2014. www.lawcommissionofindia.nic.in

¹¹¹ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

¹¹² Prof.T.Bhattacharya. (2013). The Indian Penal Code (ed. VII). Central Law Agency, Allahabad. pp 606 – 608. Retrieved June 16, 2014

¹¹³ Ibid.

- Article 15 of constitution which provide non discrimination should also include non discrimination among sexual orientation.
- At last they submit that Section 377 of IPC violates right to privacy, equality and dignity.

Ministry of Home Affairs and Ministry of Health and family Welfare oppose the petition by submitting that:

- It provides sexual abuse of children by prosecuting individuals.
- It filled a gap between rape laws.
- It will result into flood gates of delinquent behaviour which may harm public

Judgement¹¹⁴ -

In 2009 the decision brings a victory towards equality, dignity and social justice. Honourable Delhi High Court declares that Section 377 of IPC is a violation of Article 21, 14 and 15 of the constitution.

5.3 Suresh Kumar Kaushal v. Naz Foundation¹¹⁵:

Facts – This case concern with the constitutionality of Section 377 of IPC which was enacted in 1860 during British rule by British legal system. Section 377 of IPC i.e. Unnatural Offences which provides that any person who has involved in activities of carnal intercourse against the order of nature with any man women or animal shall be punished with imprisonment for life or may extend to ten years, and shall also be liable to fine¹¹⁶. In 2001 Naz Foundation a NGO working in the field of HIV/AIDS filed a petition before Honourable High Court for decriminalising sexual orientation activities by declaring section 377 of IPC as unconstitutional as this section violates Article 14, 15 and 21 of Indian Constitution.

This decision was challenged in Supreme Court stating that decriminalizing of section 377 of IPB may harm to LGBT community especially the homosexual male. The submissions made before the Honourable court was¹¹⁷:

¹¹⁴ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

¹¹⁵ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

¹¹⁶ Supra Note 86

¹¹⁷ Supra Note 89

- The documentary evidence supplied in court does not prove that the LGBT's got discriminated by the law.
- Section 377 control the growth of HIV/AIDS and decriminalization would increase the rate of HIV/AIDS.
- Section 377 of IPC does not violate rights to privacy and dignity under Article 21 of Indian Constitution.
- Decriminalization of same sex activities may affect the society and will make youngster tempted towards homosexuals.

Judgement¹¹⁸ –

The case was decided by the panel of two Supreme Court judges. The Honourable Supreme Court judges set aside the judgement of High Court and ultimately declared Section 377 of IPC does not violate Article 14, 15 and 21 of Indian Constitution and dismissed the writ petition filed by the respondent.

5.4 Comparison of Suresh Kumar Kaushal v. Naz Foundation and Naz Foundation v. Government of NCT of Delhi:-

Naz Foundation which is a registered NGO works in the field of HIV/AIDS prevention and rehabilitation. Its work also focuses on homosexuals. Naz foundation in 2009 appeals before Delhi High Court and prayed to remove Section 377 of IPC by stating that it penalize sexual acts in privacy between adults with consent which is violation of Articles 14, 15, 19(1) and 21 of the Indian Constitution. Further they prayed for the grant of permanent injunction to restrain the official persons from the enforcement of Section 377 of IPC. Naz Foundation submits that Section 377 is to penalize sexual acts which are against order of nature and had values in Indian society concerning sexual relations. Article 21 protects private consensual sex under privacy and dignity. Section 377 criminalizes consensual, non procreative sexual relations which is again a violation of Article 14 of Indian Constitution. Further they stated that privacy allow person to have sexual relations without interference by any one and violation of sex will create more problem. Delhi High Court accepted all the submissions and

¹¹⁸ Supra Note 89

term Section 377 of IPC as unconstitutional as it is violation of Article 14, 15, 19 and 21 of Indian Constitution¹¹⁹.

But in 2011 the decision of Delhi High Court on homosexuals has been challenged in Honourable Supreme Court. NACO and Health ministry filed an affidavit by stating that NACO who works for prevention and control of HIV/AIDS in India in its survey of National Sentinel and Surveillance Data 2005 found estimated that HIV in homosexuals is 8% and while in general population it is 1%. In this case the petitioner said that High Court committed a serious error by declaring Section 377 as unconstitutional by saying that the respondent does not presented any tangible material which proves the unconstitutionality of Section 377 also they stated that affidavit filed by NACO that Section 377 throwing an adverse effect on controlling HIV is incorporated. Many arguments present by the challengers before Honourable Supreme Court which at last set aside the Delhi High Court decision by stating that it does not violate Article 14, 15, 19 and 21 of Indian Constitution also it is in the hands of parliament to amend or to repeal Section 377 but till that it is in force¹²⁰.

¹¹⁹ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

¹²⁰ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

CHAPTER – 6

RIGHTS REGARDING LGBT'S

6.1 International Scenario

6.2 Indian Scenario

6.1 International Scenario:

Under Universal Declaration of Human Rights¹²¹:

1. Article 3 provides the right to life, dignity and security.
2. Articles 2 and 7 provide the right to freedom from discrimination.
3. Article 12 says that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honor or reputation
4. Article 17 provide right to freedom from torture or cruel or inhuman treatment is protected by
5. Article 22 states that everyone is entitled to the realization of the economic, social and cultural rights indispensable for his dignity;
6. Article 23 talks about the right to work, to choose employment, and to form labor unions.
7. Article 25 includes a person's right to standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services ;
8. Article 27 provides the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement.
9. Article 28 and 29 include the right to a social and international order that enables these rights to be realized and refers to one's duties to one's community.
10. Article 9 provides right to freedom from arbitrary arrest is protected.
11. Article 5 provides right to join and participate nongovernmental, association or groups.

International Conventions on Civil and Political Rights¹²² -

1. Article 2 and 26 provides equality without discrimination.

¹²¹ United Declaration of Human Right. (1947). Retrieved June 16, 2014 from <http://www.un.org/en/documents/udhr/>

¹²² International Covenant on Civil and Political Rights. (1966). Retrieved 15, 2014 from <http://www.ohchr.org>

2. Article 17 provide right to privacy.
3. Article 14 talks about right to freedom from torture or cruel or inhuman treatment.
4. Article 8 says about the right to freedom from arbitrary arrest.
5. Article 12 provides right to freedom of movement.
6. Article 19 provides the right to freedom of expression.
7. Article 22 provides right to freedom of association.

In Great Britain an act has been enacted in 1975 which talks about the Sexual Discrimination Act, 1975 which promote equal opportunity to LGBT, man, women and disabled person.

6.2 Indian Scenario:

1. Section 377 of Indian Penal Code talks about “Unnatural Offences” which provides that whoever cause canal intercourse against the order of nature with women, man or animal shall be punished¹²³.
2. Article 14 provides right to equality¹²⁴.
3. Article 15 provides non discrimination¹²⁵.
4. Article 21 Right to privacy and dignity¹²⁶.

¹²³ Indian Penal Code. (1860). The India Penal Code. Easter Book Company, Lucknow.

¹²⁴ Constitution of India. (1950). The Constitution of India. Easter Book Company, Lucknow.

¹²⁵ Ibid.

¹²⁶ Ibid.

CHAPTER – 7

ILLEGALITY OF HOMOSEXUALITY IN INDIA IS IT JUST AND FAIR?

7.1 Analysis of cases

7.2 Scope of Section 377 of IPC

7.3 Human Rights and International Law

7.4 HIV/AIDS in Homosexuals

7.5 Yogyakarta Principles

7.6 Biological Basis of Homosexuality

7.1 Analysis of Cases:

The topic will going to be analyzed on the basis of below cases related to homosexuality in India and over the world.

Loving v. Virginal¹²⁷ is a landmark civil right case which was brought by Mildred Loving who is a black women and Richard Loving a white man who has been sentenced for a year, for marrying each other by stating that their marriage is a violation of Anti miscegenation statute and the Racial integrity Act, 1924 which prohibit marriage between people white and black of different races, the U.S Supreme Court held that civil man being a citizen got numerous rights in a country and marriage term to be as his one of the most important right. Human beings are free to marry or not to marry based upon their discretion with a person of any race and this decision will held in the hands of individual instead of state.

In 2003 Massachusetts Supreme Court held in Goodridge v. Department¹²⁸ of Public Health, where GLAD¹²⁹ sued on behalf of same sex couples whose marriage license has been denied. The case has been filed on behalf of seven homosexual couples who were in long term relationships with their partner and four couples were having five children. The judgement ruled in favour of health department and held that LGBT couples has right to obtain their marriage license.

¹²⁷ Loving v. Virginal, 388 U.S 1 (1967). Retrieved on June 03, 2014 from www.ameasite.org/

¹²⁸ Goodridge v. Department of Public Health 798 N.E.2d 941 Retrieved on 05, 2014 from www2.law.columbia.edu/.../Goodridge%20Decision%20edited%20Fund..

¹²⁹ Gay and Lesbian Advocates and Defenders

In *Dudgeon v. The United Kingdom*¹³⁰ case, plaintiff who was a shipping clerk also a gay activist has been interrogated about his sexual activities. He filed a complaint with ECHR¹³¹ in 1975 which had taken 30 years to the decision in international jurisdiction and held that Article 8 of ECHR which provides right to privacy and family life and Article 14 which prohibits discrimination applies to same sex activities also. The court laid its decision in favour of LGBT's and said that their rights has been violated under Article 8 of ECHR, further they stated that right to family life also includes sexual relation. This was the first case in European Court in favour of homosexuals.

In *Toonen v. Australia*¹³² case which was held by United Nation of Human Rights where it was claimed that Tasmania laws criminalising consensual sex between adult males in privacy which is a violation of ICCPR. The petitioner submits that Article 2(1) and Article 26 of ICCPR which deals with discrimination also Article 17 which deals with privacy of a person had been breached. The Tasmanian criminal code prohibits various types of sexual relation between men and men even with the consent. The petitioner submits that his right of privacy has been violated and court held that such relation comes under the privacy rights and complainant right had been violated. The Court analyzed such right under privacy and not equality. Today Article 17 of ICCPR provides sexuality as right to privacy. In 2012 the High Commissioner of United Nation Human Rights ordered 30 countries to make changes regarding the laws of homosexuality after hearing the decision of this case¹³³.

In *National Coalition of Gay and Lesbian Equality v. Minister of Justice*¹³⁴ in which the Justice stated that the common law criminalize all such sexual acts which was committed as a form of sodomy between men or the other couples which includes their age and the place and in doing such the law punishes to the act. In today's society such form of sexual activities in the eyes of people uses to be committed by homosexuals, who term all gay men as criminals. This establishes worst impact on sexual orientation people as this may create risk of arrest of

¹³⁰ *Dudgeon v United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights. Retrieved June 06, 2014 from www.refworld.org

¹³¹ European Commission of Human Rights

¹³² *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01, 2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

¹³³ Hepple, J. (2012). Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial "Sodomy" Laws. *The Equal Rights Review*, Vol. Eight. Retrieved June 08, 2014

¹³⁴ *National Coalition for Gay and Lesbian Equality and another v. Minister of justice and others*. (1998). South African CC (11/98). South Africa Constitutional Court. Retrieved 16, 2014 from <http://archive.equal-jus.eu/73/>

gay people, prosecution etc. This act of sodomy brings insecurity into daily lives of homosexuals also it devalues the gay men in society which is a violation of their dignity.

In *Noris v. Republic of Ireland*¹³⁵ the gay man brings case before the court from the fear of being arrest as the main petitioner Noris stated that he was suffering from great depression and loneliness when he realized that he is homosexual and his feelings of sexuality would make him criminal. The court accepted that and decriminalized sodomy law.

In *Lawrance v. Texas*¹³⁶ case two men has been caught in an apartment bedroom by police and they had been charged with committing illegal homosexual acts. As it was a minor offence in US still it has been recorded as sexual offender under criminal record. The accused called his lawyer only because of the way he has been treated and arrested as there it was a petty offence which consist fine of \$500. While deciding this case the Supreme Court throw a light on *Brown v. Hardwick*¹³⁷ case which has the similar facts where the court held that sodomy law does not violates the constitution. The court of Lawrance case further noted that sodomy law was term illegal only because of a particular reason i.e. to prosecute the rapist where the lack of consent exist but in this case the act done with free consent and the court decided in favour of the accused also court in their decision struck down the Texas law which prohibits homosexual acts. The court also held that declaring illegality against homosexual is a violation of their constitution.

In the landmark judgement¹³⁸ which throws a great impact on decriminalizing sodomy law in India is of *Naz foundation v. Government of NCT of Delhi* that makes deletion of sodomy law from India by their petition in the Delhi High Court but this decision within few years got overruled by the Honourable Supreme Court¹³⁹. Naz Foundation is a Non Government Organisation who works for HIV/AIDS people by supporting them. This NGO filed a petition before High Court by saying that human sexual acts are their integral part of who they are which cannot be changed. They raise voice against Section 377 of IPC and demanded decriminalizing of same sex activities by stating that this section violates Article 14 which

¹³⁵*Noris v. Republic of Ireland*. (1988).no.10581/83. European Court of Human Right. Retrieved June 09, 2014 from <http://archive.equal-jus.eu/153/>

¹³⁶ *Lawrence & amp: Garner v. State of Texas* , 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Retrieved June 03, 2014 from www.lawnix.com

¹³⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986). Retrieved on June 03, 2014 from

¹³⁸ *Naz foundation v. Govenment of NCT of Delhi* 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

¹³⁹ *Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors.* MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com.

provides right to equality, Article 15 which prohibits discrimination and Article 21 which provides the privacy rights. The Ministry of Home Affairs opposed the Naz Foundation petition who term homosexuality as unnatural and immoral act. In this landmark judgement the High Court declare that Section 377 of Indian penal code does not prohibit same sex acts among adults. The court further in their judgement held that applying section 377 to homosexual is a violation of their right to equality, privacy, non discrimination and dignity i.e. Article 14,15 and 21 of constitution of India. Even the Amnesty International on Naz Foundation decision stated that this decision will going to ensure the citizens of India to express their sexual orientation, their gender identity without fear as this British ruled harmed a lot to the country who follows¹⁴⁰.

In *Lewis v. Harris*¹⁴¹ case seven same sex couples brought a case before court stating that denial of their marriage licence application is a violation of privacy and equality before law. In this case court held that criminalising homosexuality violates the federal constitution also stated that same sex couples has all the rights to marriage also their marriage would be going to call as same sex union and declared to create a new law in favour of same sex marriage.

In *R. Rajgopal v. State of T.N*¹⁴² the question of privacy of the citizens of this country has been raised and the court held that every citizen has right to safeguard their privacy of his own, his family, his marriage, his procreation, his motherhood, child bearing and education.

The European Commission of Human Rights rejected the application of homosexuality acts with consent but in *Sutherland v. U.K*¹⁴³ where applicant Mr. Sutherland after realising that he is homosexual had his first sex in the age of 16 years. Though he had been not prosecuted but with the fear of prosecution he brought a case before court and submits that minimum age of homosexual activities is 18 years but of heterosexual is of 16 year this is a violation of his private life under Article – 8 of European convention for protection of human rights and fundamental freedom. ECHR¹⁴⁴ in its decision and held that gay man has right to do sexual acts with consent and its violation terms to be a discrimination of their right to privacy also

¹⁴⁰ Malhotra, M. (2009). "India: Historic ruling against 'sodomy' laws, the first step to equality". Amnesty International Press. Retrieved June 15, 2014 from http://www.amnesty.org.uk/press-releases/archive/2009/news_details.asp?NewsID=1829

¹⁴¹ *Lewis v. Harris*, 188 N.J. 415 (2006). Retrieved on 15, 2014 from www.princeton.edu/aci/cases-pdf/aci-update-lewisvharris.pdf

¹⁴² *R. Rajgopal v. State of T.N.* (1995). AIR 264, 1994 SCC (6) 632. Retrieved on 06, 2014 from www.indiankanoon.org

¹⁴³ *Sutherland v. UK*. Application No. 25186/94. Retrieved June 04, 2014 from www.hrcr.org

¹⁴⁴ European Commission of Human Rights

held that acts between gay man with consent term to be as discriminatory and breach of European Convention on Human Rights in two more recent judgements. The age of consent has been reduced from 21 years to 18 years in 1994 and 16 years in 2001 judgement. Now Article 8 and Article 14 of ECHR provide equal rights with equal treatment of men and women.

In *Salgueiro Da Silvz Mouta v. Portugal*¹⁴⁵ case of 1999 Mr. Mouta after having divorce with his wife grant for access of their child but his former wife did not allow him to visit their child. Mr. Mouta filed an application for the custody of child but he lost his case and court grant the custody of child to his wife. Court refuses to grant child custody to him just because he was homosexual and had sexual relation with other man. Further court held that no one can refuse for child custody to a gay man because of his homosexuality; if any person does the same then it will be a violation of Article 8 of the convention i.e. right to private life. Also it declared that discrimination on the ground of sexual orientation is violation of Article 14 of convention which prohibits discrimination.

In *Frette v. France*¹⁴⁶ which deals with the issue of adoption by homosexuals. The petitioner applied to adopt a child in France but court refuses to did so and term that it will be a risk for the child development. Mr. Frette complained to the European Court of Human Rights and submits that his right i.e. Article 8 of the convention i.e. discrimination just because he is sexual orientation as he is not allowed to adopt a child. Court dismissed the application and term that this will going to harm the interest of child but some of the judges disagreed with the majority's judgement and term that homosexual also has right to adopt child.

In *Fitzpatrick v. Sterling Housing Association Ltd.*¹⁴⁷ case the plaintiff had lived for 18 years in a homosexual relationship with Mr. Thompson who was a tenant under the Rent Act. On the death of Mr. Thompson the plaintiff applied to take over the tenancy as he is eligible to take such as in Rent act such tenancy after the death of the head use to be given to his spouse. The House of Lords held that such relationship does not term to be a family. The court rejected the idea that same sex couples constitute a family. But this decision has been overruled by *Karner v. Australia* case¹⁴⁸.

¹⁴⁵ *Salgueiro Da Silva Mouta v. Portugal*. 33290/96. Retrieved June 04, 2014 from www.refworld.org

¹⁴⁶ *Frette v. France*. (Application no. 36515/97). Retrieved June 04, 2014 from www.equalrightstruse.org

¹⁴⁷ *Fitzpatrick v. Sterling housing Association Ltd.* [1999] UKHL 42; [1999] 4 All ER 705; [1999] 3 WLR 1113 (28th October, 1999). Retrieved June 04, 2014 from www.bailli.org

¹⁴⁸ *Karner v. Australia*. no. 40016/98. Retrieved June 04, 2014 from www.equal-jus.eu.

In *Karner v. Australia*¹⁴⁹ case an Australian gay man who uses to live in his male partner apartment since 1989 that use to share the expenses of the flat. The petitioner partner died in 1994 and he designated Mr. Karner as his heir. The landlord started to terminate the tenancy with the petitioner. District and Vienna Regional Courts interpreted the term 'life companion' of the Rent Act as including same-sex partners who lived together for a long time. Supreme Court rejected the interpretation and held that it is discrimination based on sexual orientation and their convention has been breached and held that same sex partner has such rights as the individual have. This was the first ever case in regards to the rights of homosexuals which court considered.

In *Menka Gandhi v. Union of India*¹⁵⁰ a narrow and constricted meaning was given which guarantees in Article 21 of the Indian Constitution. A seven judge's bench decision held the expression 'personal liberty' in Article 21 is of wider scope and it covers a variety of rights in it.

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others*¹⁵¹ case Justice Bhagwati explained the concept of Right to Dignity in following terms and stated that “we think that right to life includes right to live with human dignity also the other needs of life such as adequate nutrition, clothing, shelter and facilities for reading, writing, expressing oneself in various forms. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights”.

In *Law v. Canada*¹⁵² the Canadian Supreme Court held that concept of dignity as human dignity term to be for an individual or group feels self respect and self worthy. Human dignity uses to be harmed by unfair treatment or a circumstance which does not relate to individual needs, capacities or merits of different individuals also human dignity is harmed when individuals and groups are marginalized mistreated or devalues and is enriched when laws recognized the full place of all individuals and groups within Canadian society.

¹⁴⁹ Ibid.

¹⁵⁰ *Menka Gandhi v. Union of India* 1978 AIR 597, 1978 SCR (2) 621. Retrieved on June 10, 2014 from www.indiankanoon.org

¹⁵¹ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others* 1981 AIR 746, 1981 SCR (2) 516. Retrieved on June 14, 2014 from www.indiankanoon.org

¹⁵² *Law v. Canada* (1991) 1 S.C.R 497. Retrieved on June 14, 2014 from www.lexisnexis.ca

In *R. Rajagopal v. State of T.N.*¹⁵³ court held the right to privacy with right to life and liberty guaranteed to the citizens of India also the citizens has right to safeguard the privacy of his own, family, marriage, procreation, motherhood, child bearing and education among other matters.

In *Modinos v. Cyprus*¹⁵⁴, the European Court of Human Rights held that such a law violates right to privacy and that even an unswerving policy of not bringing prosecutions under the law was no alternative for full repeal.

In *The National Coalition for Gay and Lesbian Equality v. The minister of Justice*¹⁵⁵ the constitutional court of South Africa deleted the sodomy laws on the ground of violation of rights of privacy, dignity and equality. Further they said that the common law prohibition on sodomy criminalize all sexual intercourse per annum between man regardless of the relationship of the couple who engage therein, the age of couple, the place of occurrence, circumstances whatsoever. In doing such act it punishes a form of sexual conduct which is identified by our society with homosexuals who term gay as the criminals.

In *Krishna v. State of Madras*¹⁵⁶ it was held that when there is ambiguity or doubts the construction of any clause in the fundamental rights, it is our duty to resolve it in favor of the freedoms so solemnly stressed.

7.2 Scope of Section – 377:

In 1835 Thomas Babington Machuley, was the president of Indian Law Commission having the responsibility to draft of Indian Penal Code¹⁵⁷. Section 377 of IPC was stood as clause 361 which provides punishment for ‘touching for unnatural lust’. Machuley dislike the idea of any debates or discussion on heinous crimes and in the introductory report of drafted bill said the clause 361 and 362 related to a revolting offence. Machuley said that they don’t want

¹⁵³ *R. Rajgopal v. State of T.N.* (1995). AIR 264, 1994 SCC (6) 632. Retrieved on 06, 2014 from www.indiankanoon.org

¹⁵⁴ *Modinos v. Cyprus*, 7/1992/352/426, Council of Europe : European Court of Human Right. Retrieved June 14, 2014 from www.refworld.org

¹⁵⁵ *The National Coalition for Gay and Lesbian Equality v. The minister of Justice* (1998) ZACC 15. Retrieved June 14, 2014 from www.refworld.org

¹⁵⁶ *Krishna v. State of Madras* 1975 AIR 297, 1956 SCR 399. Retrieved June 10, 2014 from www.indiankanoon.org

¹⁵⁷ *Bhattacharya, T.* (2013). *The Indian Penal Code*. Central Law Agency. ed-VII.

to insert such a dislikeable subject neither on text nor in notes as it may give rise to public discussion also this subject may give injury to the moral of society¹⁵⁸.

The concept of natural lust is vague and the final report of IPC was much better than the first report. There was lack of debate and discussion on the same which result into vagueness and ineffectiveness to language of anti sodomy clause¹⁵⁹. The final result of such clause result into section 377 as 'Unnatural offence' which is very similar to sodomy law which is¹⁶⁰:

- Vague and does not define specific offence of sodomy.
- It does not define carnal intercourse is also the term of order of nature.

After a decade Indian code defines section 377 as carnal intercourse which includes no procreative sexual act. It applies to both homosexual and heterosexual¹⁶¹.

Section 377 of IPC is unclear as during British India it was enacted to share bible morality. History says that imperial army does not have wives which result them to do such act like sodomy and such acts make them Gomorrah¹⁶².

In *Queen – Emprise v. Khairati*¹⁶³ case police arrest man who found dressed and singing like women. The court held that the crux of enforcement of section 377 of IPC is to criminalize the act which means to do sodomy act.

In *Noshirwan v. Emperor*¹⁶⁴ the accused neighbour saw two men going into house and in the house both committed sodomy. Petitioner force them to police station but soon the two accused released as the court held that the act of sodomy has not completed.

Section 377 of IPC thus not only applies to those persons who commit sodomy but also to those who term to be homosexual and wants to commit such act.

In *Government v. Bapoji Bhatt*¹⁶⁵ case appellate charge with section 377 of IPC who was caught doing oral sex with a minor. As such case has to be deal under child abuse but it was

¹⁵⁸ Wright, B. (1837). Bentham's Enlightened Despotic Legislator and Colonial Rule – Machuley and the IPC. Report of IPC. Retrieved on June 15, 2014 from <http://www.law.uq.edu.au/documents/research-seminar-series/Wright-IPC-UQSeminar-5mar2010.pdf>

¹⁵⁹ Narrain, A. (2004). Queer Desired Sexuality Law and Social Change. Books for Change. pp 45 – 50. Retrieved on June 15, 2014

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Bhaskaran, S. (2002). The politics of penetration – Same sex love and eroticism in Indian culture and society. Rotledge publication. pp 15 – 17. Retrieved on June 5, 2014.

¹⁶³ *Queen Emprise v. Khairati* 1884 ILR 6 ALL 204. Retrieved on 06 June, 2014 from www.indiankanoon.org

¹⁶⁴ *Noshirwan v. Emperor* AIR 1935 sind 78. Retrieved on June 06, 2014 from www.indiankanoon.org

tried under section 377. The court held according to definition of carnal intercourse against the order of nature does not include oral sex and thus case was dismissed.

In *Khanu v. Emperor*¹⁶⁶ Case the wide scope of Section 377 of IPC has been explained. In this case a minor was forced for oral sex with old man. In this case court held that Section 377 is not limited to ‘coitus per anum’¹⁶⁷ and it can be extended to ‘coitus oer os’¹⁶⁸ also said ‘the sin of Gomorrah’ is no less carnal intercourse than the sin of sodomy.

In *Grace Jeyaramani v. EP Peter*¹⁶⁹ case wife filed an application of divorce before court on the ground that her husband forced her to do sex in an unnatural way against her wish. Court held that husband is guilty of sodomy as he does such act without her consent. This was the 1st case where the importance was given to the consent by court within the meaning of sodomy though it was not a case of Section 377 of IPC.

Section 377 of IPC scope again widened as it applied to both heterosexual and homosexual couples which needs the consent for sex between married couples.

7.3 Human Right and International Law:

Human Rights maintain every individual right. It provides freedom to live freely. Right to protect homosexuals from abuse and decriminalizing of homosexuality is now the focusing topic of Human Right organization¹⁷⁰.

In 1994 report of Amnesty International, it was reported that violence of LGBT because of their sexual orientation is infringement of human right¹⁷¹.

In *Nicholas Toonen v. The State of Australia*¹⁷² case, the issue of homosexuality term as the most focusing topic of UNHR where the commission said that to criminalize homosexuality

¹⁶⁵ *Government v. Bapoji Bhatt* (1884) (7) Mysore LR 280. Retrieved on June 06, 2014 from www.indiankanoon.org

¹⁶⁶ *Khanu v. Emperor* 1925 Sind. 28. Retrieved June 07, 2014 from www.indiankanoon.org

¹⁶⁷ Sexual intercourse or anal intercourse performed by male inserting his penis into the anus of a male or female partner.

¹⁶⁸ Oral Sex

¹⁶⁹ *Grace Jeyaramani v. EP Peter* AIR 1982 Karnataka 46. Retrieved June 08, 2014 from www.indiankanoon.org

¹⁷⁰ Fernandez, B. (1999). *Humjinsi – A resource book on Lgbt in India*. Indian Centre for Human Right and Law. Retrieved on June 09, 2014

¹⁷¹ Amnesty International. (2005). *Stone Walled. Police abuse and misconduct of LGBT*. Amnesty International. Retrieved on June 07, 2014 from <http://www.streetwiseandsafe.org/wp-content/uploads/2011/01/StonewalledAI.pdf>

¹⁷² *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01, 2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

act is violation of Article 2 and Article 26 which provide right to privacy and right to equal protection of International Covenant on Civil and Political Right¹⁷³.

In India, human right raised the issue of homosexuality not only to criminalize section 377 but also to give importance to discuss it openly in a broader platform. In 1996 'Gender lust law organisation' group of LGBT's discussed this topic in a broad manner¹⁷⁴.

UDHR¹⁷⁵ state all human being are equal in dignity and rights. The UDHR declare that everyone is entitled to the right and freedom to live¹⁷⁶.

Non discrimination is the basic principle of human right treaties. The committee on Economic Social council said that the discrimination varied according to the condition evolve during time. Article 2 of ECOSOC stated that the ground of other statues also needed to categorize with different treatment which cannot be reasonable. These grounds can only be recognized on the social group that have been suffered¹⁷⁷.

UNHR and United Nation General Assembly said that many different ways have been taken to protect LGBT right but people failed to protect them. The current law of international human right is not only made by convention, treaties or by report of international human right but also from precedents and in many cases court talk about the right of homosexuality¹⁷⁸. UNHR and UNGA said that homosexuals also have full rights to express their sexual orientation without fear¹⁷⁹.

The right of homosexuals can only be achieved when:

- State decriminalizes same sexual activities¹⁸⁰.

¹⁷³ Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01, 2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

¹⁷⁴ Fernandez, B. (1999). Humjinsi – A resource book on Lgbt in India. Indian Centre for Human Right and Law. Retrieved on June 09, 2014

¹⁷⁵ United Declaration of Human Rights.

¹⁷⁶ United Declaration of Human Rights. Article 2. Retrieved on June 06, 2014 from www.un.org/en/documents/udhr/h

¹⁷⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20. Retrieved on June 05, 2014 from <http://www.unhcr.org/refworld/docid/4a60961f2.html> . para. 27

¹⁷⁸ Amnesty International. (2013). Making Love a Crime – Criminalization of Same Sex Conduct in Sub – Saharan Africa. Amnesty International UK. pp 72 – 78. Retrieved June 01, 2014 from www.amnesty.org

¹⁷⁹ Ibid.

¹⁸⁰ International Convention on Civil and Political Rights. Article. 2 and 26. Retrieved on June 13, 2014 from www.un.org/en/

- State stops decriminalizing the sexual orientation in gender identity¹⁸¹.
- State stops imposing punishment on LGBT people¹⁸².
- State start to promote right to privacy¹⁸³.
- Non discrimination of civil marriage¹⁸⁴.
- Encourage sexual orientation and gender identity and stop to arrest them¹⁸⁵.
- State has to start providing fair trial to LGBT¹⁸⁶.
- State stops the imposing of detention of LGBT person¹⁸⁷.
- State provides freedom to express their opinion and freedom of assembly or a association to them¹⁸⁸.

In Amnesty International report it was stated that these homosexual people suffer a lot in different form such as¹⁸⁹:

- Police abuse
- Corruption by targeting gay man. In a case man was caught while buying condos through that was legal.
- Blackmail
- Extortion
- LGBT activist blackmail by police.

¹⁸¹ UDHR, art. 2; ICERD, art. 5; ICCPR, art. 2(1); ICESCR, art. 2(2); CEDAW, art. 3; CAT, art. 1(1); CRC, art. 2; ICRMW, art. 1(1); African Charter on Human and Peoples' Rights [African Charter], adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, art. 2. Retrieved on June 06, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

¹⁸² UDHR, art. 5; ICCPR, art. 7; African Charter, art. 5; See also Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Declaration on Torture], General Assembly Resolution 3452 (XXX), annex, 30 UN GAOR Supp. (No. 34) at 91, UN Doc. A/10034 (1975). Retrieved June 15, 2014.

¹⁸³ UDHR, art. 12, ICCPR, art. 17 and HRC, Concluding observations of the Human Rights Committee: Chile, UN Doc. CCPR/C/79/Add.104, 30 March 1999, para. 20: "The continuation in force of legislation that criminalizes homosexual relations between consenting adults involves violation of the right to privacy protected under article 17 of the Covenant and may reinforce attitudes of discrimination between persons on the basis of sexual orientation." See also *Toonen v. Australia*, (CCPR/C/50/D/488/1992), UN Human Rights Committee. Retrieved 16, 2014 from <http://www.unhcr.org/refworld/docid/48298b8d2.html>.

¹⁸⁴ International Convention on Civil and Political Rights. Article. 2 and 23. Retrieved on June 13, 2014 from www.un.org/en/

¹⁸⁵ UDHR, art. 9; ICCPR, art. 9; African Charter, Art 6. Retrieved on June 13, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

¹⁸⁶ UDHR, art. 10; ICCPR, art. 14; African Charter, Art 7. Retrieved on June 13, 2014 from www.un.org/en/

¹⁸⁷ ICCPR, art. 10; African Charter, art 6. Retrieved on June 13, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

¹⁸⁸ UDHR, art. 20; ICCPR, arts. 21 and 22; African Charter, arts. 10 and 11. Retrieved on June 13, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

¹⁸⁹ Amnesty International. (2013). Making Love a Crime – Criminalization of same sex conduct in sub Saharan Africa. Amnesty International Ltd. Retrieved June 16, 2014 from www.amnesty.org

- After arrest they have been abused brutally by police.

The fundamental principle of the international human right treaties term that gender identity and criminalizing sexual orientation is a violation of human right also such things violate their right before law which provide right to equality before law¹⁹⁰. ICCPR include the provision which prohibit discrimination of sexual orientation¹⁹¹. In many countries law which criminalize sexual orientation punishes same sexual act with death penalty¹⁹². Human right policy says right to life is essential for human right. UDHR believed that sexual orientation does not come in category of crimes¹⁹³. People have right to live freely without fear of arrest and deprivation¹⁹⁴. In countries like India where same sex act has been criminalizing, the homosexuals of such countries live with fear of arrest and deprivation. International human right provides liberty to sexual orientation to live without fear¹⁹⁵.

International human rights provide fair trial without discrimination¹⁹⁶. If LGBT people appeal before court they have to be provided with fair trial. It is the duty of state and judiciary and police to provide fair trial without discrimination¹⁹⁷.

Article 19 of ICCPR provide right to freedom of express. The right to freedom of expression include that they have right to express their views except on the national security, reputation, public order, public health and moral. Many times people took LGBT issue under the moral

¹⁹⁰ United Declaration of Human Rights. Article 7 and International convention on civil and political rights. Article 26. Retrieved on June 06, 2014 from www.un.org/en/documents/udhr/h

¹⁹¹ CESCR, General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, UN Doc. E/C.12/2000/4, para. 18. Retrieved June 09, 2014 from [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En).

¹⁹² The right to life is affirmed in foundational and regional human rights documents. See, for example, UDHR, art. 3; ICCPR, art. 6, African Charter, art. 4

¹⁹³ UN Commission on Human Rights, Human Rights Resolution 2005/59: The Question of the Death Penalty, 20 April 2005, E/CN.4/RES/2005/59, para. 7 (f): "...ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as...sexual relations between consenting adults...". Retrieved June 16, 2014.

¹⁹⁴ See UDHR, art. 9; ICCPR, art. 9; African Charter on Human and Peoples' Rights, Art 6. Retrieved June 16, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

¹⁹⁵ Ibid.

¹⁹⁶ UDHR, art. 10; ICCPR, art. 14; African Charter, art. 7; see also Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders (Milan, Italy, 1985, endorsed by UN General Assembly resolutions 40/32 of 29/11/85 and 40/146 of 13/12/85, especially Principles 2, 5 and 6; and Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 1990, especially Guidelines 12-14). Retrieved June 15, 2014

¹⁹⁷ Human Rights Committee, Concluding observations of the Human Rights Committee: Chile, UN Doc. CCPR/C/CHL/CO/5, 18 May 2007, para. 16; Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. A/HRC/4/25, 18 January 2007, para. 21. Retrieved June 17, 2014.

issue but ICCPR in comment 34 under Article 19 says that ‘the concept of moral include social, philosophical and religious matter it does not include sexual orientation in it¹⁹⁸.

Article 16 of UDHR and Article 23 of ICCPR provide right to marry and found a family. Article 2 of ICCPR stated that there should be no discrimination regarding right of marriage and found a family and international human right state that prohibiting same sex couples to adopt a child is a violation of human right¹⁹⁹.

UN general assembly of 2008 which form joint settlement of 85 countries who took part in human right council in 2001 provided ‘Ending act of violence and related to human right violation based on sexual orientation and gender identity’. In 2011 the human right commission in its 17th session pas resolution no. 17/19 which was based on sexual orientation and gender identity. This topic was very 1st time presented in human right commission where 23 votes given in favour and 19 in against all over the world. Also in such resolution it was order that all countries should decriminalize such act²⁰⁰. This plea was presented to human right commission jointly by South Africa and Brazil²⁰¹.

The report on sexual orientation discrimination was published by high commissioner for human right (OHCHR) in 2011. This report says that people face violence and discrimination because of their sexual orientation and gender identity. Many cases of LGBT get them to risk. These violation include rape, killing, physical attack, torture, arbitrary detention, expression, discrimination of health, employment and education. Also it is believed that government neglect the violation against LGBT. Human right commission require filling this gap and promoting universal respect by providing freedom, fundamental right with fair and equal manner²⁰².

¹⁹⁸ ICCPR.General Comment no. 34 on Article 19: Freedom of opinion and expression. Retrieved June 15, 2014 from www.ohchr.org

¹⁹⁹ See UDHR, art. 16; ICCPR, art. 23.Retrieved June 16, 2014 from www.un.org/en/ and www.achpr.org/instruments/achpr/

²⁰⁰ UN Human Rights Council. Joint Statement on Ending Acts of Violence Related Human Rights Violations Based on Sexual Orientation and Gender Identity. Retrieved June 16, 2014 from <http://www.unhcr.org/refworld/docid/4eb8f32e.html>.

²⁰¹ Ibid.

²⁰² Human Rights Council, 19th Session, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’, Report of the UN Commissioner for Human Rights. Retrieved June 16, 2014 from http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf.

7.4 HIV/AIDS in homosexuals –

The issue of repealing of Section 377 of IPC in India has been started in 1991 by AIDS Bhedbhav Virodhi Andolan (hereinafter ABVA). ABVA filed a petition before parliament to repeal section 377 but it does not bring positive result. ABVA tried to distribute condoms in Tihar Jail, Delhi to prevent the prisoners from HIV but they refuse the permission of distribution by stating that the authorities cannot support criminal activities in jail²⁰³. In 2003 Naz Foundation²⁰⁴ filed a petition from the same object. Naz Foundation is an organisation which works for sexual orientation also it rehabilitates AIDS victims. Approximately 33.3 million people suffering from HIV world wide and 1.8 million deaths have been occurred and 2.6 million patients have been found of HIV. Unprotected sexual relation term to the result of all the above²⁰⁵.

HIV in men who have sex with man has been increasing a lot especially in Asia. The Government of India's National AIDS Control Organisation found that 6.41 percent of MSM having HIV²⁰⁶.

The major issue that have been raised in Suresh Kumar Kaushal v. Naz Foundation²⁰⁷ case was that the percentage of HIV has been increased to 8 % due to homosexuality²⁰⁸.

HIV use to be transmitted by many ways but in sexuality it occurs especially doing anal intercourse without protection i.e. without using condoms²⁰⁹.

7.5 Yogyakarta Principles²¹⁰ –

The Yogyakarta principles are a set of principles relating to sexual orientation and gender identity in International Human Rights Law which sets standards to protect LGBT's. These principles were framed in International commission of jurist meeting where the human rights

²⁰³ Naz Foundation. (2012). Section 377: 150 years on and still counting. 'Pukar' The Journal of Naz Foundation International Publication. Issue 77. Retrieved June 11, 2014 from www.nazindia.org

²⁰⁴ Naz foundation v. Govenment of NCT of Delhi 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

²⁰⁵ Ibid.

²⁰⁶ Annual Report 2009-10. New Delhi: Department of AIDS Control; National AIDS Control Organization; 2010. Retrieved June 16, 2014

²⁰⁷ Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors. MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

²⁰⁸ Ibid.

²⁰⁹ Naz Foundation. (2012). Section 377: 150 years on and still counting. 'Pukar' The Journal of Naz Foundation International Publication. Issue 77. Retrieved June 11, 2014 from www.nazindia.org

²¹⁰ The Yogyakarta Principles. (2007). Principles on the application of international human rights law in relation to sexual orientation and gender identity. United Nation Human Rights. Retrieved on June 18, 2014 from www.yogyakartaprinciples.org/principles_en.pdf

experts have been called among the world for the international service of human rights. It consists of 29 principles. These principles says that all human beings are born free and they have equal rights and they are free to enjoy their right without any discrimination on the basis of race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Further it stated that in history LGBT's suffered due to human right violation because of their sexual orientation. These principles provide rights to LGBT's such as right to live, right to equality, right to privacy, right to recognition before law, non discrimination, right to security of person, fair trial, treatment with humanity while detained, freedom from torture or inhuman treatment, protection from sale, trafficking etc, right to work, social security, protection from medical abuses, education, freedom of opinion and expression, right to found a family, right to participate in public life, public culture, right to effective remedies etc. These principles were launched in 2007 at UNHR in Geneva.

7.6 Biological Basis of Sexual Orientation:

Today every country guarantees many rights to their citizens. The controversy on the issue of LGBT crossed limits. The discussion on the sexual orientation issue is on heights. On one hand were many countries decriminalized the same sex activities but in a country like India such minority people and their rights have been neglected. The question arise really these acts are against nature or such acts are the born from nature.

Gay activist believe that one become gay from his birth which is unchangeable. Many scientific researches have been held to solve the query about the gay gene. Many scientists believe that homosexuality is caused due to surrounding environment²¹¹. Numerous research showed that no studies yet supporting biological cause of sexual orientation²¹².

It was proved in research that nobody born gay as no DNA shows that any person has been born as gay or lesbian²¹³. In the research which occurred 11 years ago it was found that the behaviour characteristic only to know their findings when they are not produced²¹⁴. Researcher said that they have been researching for 20 years and they yet did not found the

²¹¹ Price, H. (2010). Are people really born gay. Pure intimacy. Retrieved June 18, 2014 from <http://www.pureintimacy.org/a/are-people-really-born-gay/>

²¹² Deem, R.(2013). Genetics and Homosexuality: Are People Born Gay?The Biological Basis for Sexual Orientation. Retrieved June 05, 2014 from http://www.godandscience.org/evolution/genetics_of_homosexuality.html

²¹³ Price, H. (2010). Are people really born gay. Pure intimacy. Retrieved June 18, 2014 from <http://www.pureintimacy.org/a/are-people-really-born-gay/>

²¹⁴ Kehrman,N.(2005). Homosexuality:Some Neglected Considerations. Journal ofAmerican Physicians and Surgeons. Volume 10.Number 3. Retrieved June 14, 2014

gene of gay²¹⁵. A senior author in a press said that genes are the most important thing which helps to determine whether a man is gay or not²¹⁶.

In a research it was found that homosexuality is based on partly gene rest it depends on the surrounding environment. It was found that gay man genetic shares their make-up which result that 40% in them were found to be turn into gay. Dr. Michael Bailey, from northern west university conducts a research on 400 sets of twins and they found that gay man share genetic signature on 'X' chromosome. After his research he said that sexual orientation is not by choice somewhere genes plays an important role²¹⁷.

Dr. Alan Sander who is an associate professor of psychiatry is working on gay gene research says that it will be a false impression to say that gay's are born by birth or they have gay gene but homosexuality occurs due to environment²¹⁸.

Dr. Dean Hmer from US national cancer institute believes that 'X' chromosome is related to sexual orientation²¹⁹. Dr. Bailey said the biggest impact on homosexuality causes through environment further he state that environment term to be as not which is by birth but it is not by social impact also²²⁰.

Two biggest studies have been conducted in 1940 and 1970 on gays by Kinsey on 1700 homosexuals in his 1st research and 979 homosexuals in 2nd research. These studies were conducted before the gay moment which was started to find out about the birth of homosexuals. In the research they asked from these homosexuals about their origins and desire and it was found that the feelings and behaviour of these homosexuals is due to environment influences²²¹.

²¹⁵ NARTH. (2004).The fading gay gene. NARTH Bulletin. Retrieved June 12, 2014 from <http://www.narth.com>

²¹⁶ Kehrman,N.(2005). Homosexuality:Some Neglected Considerations. Journal ofAmerican Physicians and Surgeons. Volume 10.Number 3. Retrieved June 14, 2014

²¹⁷ Knapton,S. (2014). Being homosexual is only partly due to gay gene, research finds. The Telegraph. Retrieved on June 15, 2014 from <http://www.telegraph.co.uk/science/science-news/10637532/Being-homosexual-is-only-partly-due-to-gay-gene-research-finds.html>

²¹⁸ Slanders, A. (2013). Exploring the origin of sexual orientation and gender identity. LGBT Science. Retrieved on June 16, 2014 from <http://www.lgbtscience.org/alan-sanders/>

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Cameron, P.(1997). What cause homosexual desire. family research institute of Colorado. Retrieved June 16, 2014

In another research which was conducted on 147 homosexuals in 1983 by Family Research Institute found that the results are not conclusive as some says that their behave is hereditary some says it is biologically²²².

Homosexuality is due to any sexual experience in childhood, it also includes family abnormality, unusual sexual experience, and cultural influence²²³.

²²² Ibid.

²²³ Ibid.

CHAPTER – 8

VERIFICATION OF HYPOTHESIS

Hypothesis Number 01:- The overruling of Honourable Supreme Court over the decision of Delhi High Court in Naz Foundation v. Government of NCT of Delhi seems to be re-examined and the decision is not fair -

India, which comes in the largest democratic countries of the world, guarantees human rights to its citizens in their fundamental rights. Though, in India casteism has been divided in different classes but then also each type of persons whether of upper class or backward class has rights to enjoy their fundamental rights. Indian constitution provides privilege to backward class, women's and children's of the society to bring them in equal to the other citizens but the rights of homosexuals has been violated in this country.

India was among the 51 founder members of UNO and also a great follower. India support UNO in each and every aspect. In 2011 UNHR council passed a resolution regarding sexual orientation and gender identity which guarantees right to the homosexuals. In 2010 UN secretary council called all the member countries and suggest them to decriminalize same sex activities²²⁴.

Most of the Indian citizens keep faith in their mythology, customs and traditions. India is known for its old customs and traditions. Homosexuality in India has been founded from the ancient especially in Indian mythologies. God Shiva and Goddess Parvati had taken the incarnate of Ardhanarishvara which depicts right half part of male i.e. God Shiva and left half of female i.e. Goddess Parvati²²⁵. In Mahabharata Arjun son Iravana who use to be worshipped among transgender community was homosexual. On his death bed he married to Lord Krishna who had taken the incarnate of a female named Mohini and gave him the marriage pleasure²²⁶. There are many more examples of homosexuality in Hindu mythology such as Ayyapan who was born from two males²²⁷, Bahucharya Devi who become impotent,

²²⁴ United Nation. (2011). The Universal Declaration of Human Rights. Retrieved on June 01,2014 from www.un.org

²²⁵ Mathur, S and Chaturvedi, B.K. (2012). Hindu Gods and Goddess. Diamond Books. ISBN: 81-288-0802-8. pp 27 - 31

²²⁶ Pattanaik, D. (2010). Jaya : An illustrated retelling of the Mahabharata. Penguin Group. ISBN : 9780143104254. pp 245 – 250. Retrieved June 07, 2014 from books.google.co.in

²²⁷ Vanita, R. (2005). Love's rite – same sex marriage in India and the west. Penguin Group Publication. pp 99 – 105. ISBN13: 9780144000593, ISBN10: 0144000598. Retrieved June 08, 2014 from books.google.co.in

Mavender Singh Gohil who was the 1st known Gay who adopted child²²⁸, in Mahabharata girl Shikandi made marry to female etc. Various religious arts in Khajuraho depicts about homosexuality²²⁹.

In 172nd report of law commission where the committee recommended for the deletion of Section 377 of IPC and stated that it will harm the public health. In numerous researches it was found that there is a need of homosexuality²³⁰. In 2006 research named Section 377 and the dignity of homosexuals' it was found that Section 377 is a biggest offence towards humanity also the researcher opines that Section 377 does not decriminalize the sodomy act but it criminalize the lives of people who are part of same sex activities²³¹.

In various landmark judges of foreign countries and of UDHR it was found that criminalizing homosexual relation is violation of the rights of equality of homosexuals before law. US Supreme Court in his decision held that homosexuals have full rights to obtain license for their marriage²³². International court in their decision on homosexuals in *Dudgeon v. The UK* held that interrogation regarding same sex activities is a violation of Article 8 of ECHR which provides right to privacy. This was the first case in European courts favouring homosexuals²³³.

In the landmark judgement of *Toonen v. Australia* case UNHR held that criminalising same sex activities is a violation of the homosexual's privacy²³⁴. Many research have been conducted on gay gene which says that numerous research didn't yet proved that gays are born by gene or such behave is a adoption almost researcher term that the gay is because of their environment influence which does not include social influence which says that nature is somewhere responsible for their behave and it's impossible to control their sexual needs so such relation cannot be term as an unnatural offence.

²²⁸ Supra note 55

²²⁹ Howard, S. (2013). *The Kamasutra Diaries – Intimate Journeys through Modern India*. Nicholas Brealey Publisher. ISBN: 9879383260942. Retrieved on June 03, 2014 from books.google.co.in

²³⁰ Law Commission of India. (2000). *Review of Rape Laws*. 172nd Report. Ministry of Law. Retrieved on June 02, 2014. www.lawcommissionofindia.nic.in

²³¹ Gupta, A. (2006). *Section 377 and The Dignity of Homosexuals*. *Economic and Political Weekly*. Retrieved June 01, 2014

²³² Supra note 104 and 105

²³³ *Dudgeon v United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights. Retrieved June 06, 2014 from www.refworld.org

²³⁴ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human Rights Library. University of Minnesota. Retrieved on June 01, 2014 from www.umn.edu/humanrts/undocs/html/vws488.htm

In *Suresh Kumar Kaushal v. Naz Foundation*²³⁵ case it was said that decriminalization of same sex activities increases HIV/ AIDS from 1% to 8%. However there are many NGO's in India who works to rehabilitate the HIV/AIDS victims who believes that HIV can be prevented by taking proper protection while doing anal sex through condoms²³⁶. It believes that HIV use to be transmitted by doing anal intercourse without using condom. On a point that decriminalization homosexuality increases the HIV to 8% our judiciary cannot take away or misuse the human rights of homosexuals.

Though our judiciary is correct on a point that Section 377 of IPC is unconstitutional but due to that it cannot neglect the rights of homosexuals. Homosexuals are not by choice; their nature is due to the environment not because of person preference²³⁷. The changes in a person towards being homosexuals is due to the nature, human are not responsible for their sexual orientation.

In 2009 from *Naz Foundation v. Government of NCT Delhi*²³⁸ Honourable High Court decriminalize the same sex relationship but in the recent landmark judgement of *Suresh Kumar Kaushal v. Naz Foundation*²³⁹ Honourable Supreme Court criminalize the same sex relationship by stating that Section 377 does not violate Article 14, 15 and 21 of Indian Constitution. The decision of SC by according to researcher is not fair in many aspects such as human rights, international scenario and especially in the customs. Various decisions that have been analyzed in Chapter 7 clearly prove that Honourable Supreme Court decision is not fair.

Thus, it can be concluded that above hypothesis has been accepted.

Hypothesis Number 2:- There is a need of separate law for LGBT's in India

In India a part of minority's rights has been discriminated by declaring Section 377 of IPC as unconstitutional. In 2008 a research has been conducted by Suicide Prevention Resource Centre where it was found that the suicidal behaviour of homosexuals is due to discrimination

²³⁵ *Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors.* MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

²³⁶ Naz Foundation. (2012). Section 377: 150 years on and still counting. 'Pukar' The Journal of Naz Foundation International Publication. Issue 77. Retrieved June 11, 2014 from www.nazindia.org

²³⁷ Slanders, A. (2013). Exploring the origin of sexual orientation and gender identity. LGBT Science. Retrieved on June 16, 2014 from <http://www.lgbtscience.org/alan-sanders/>

²³⁸ *Naz foundation v. Govenment of NCT of Delhi* 2010 Cr.LJ 94 (Del.). Retrieved May 28, 2014 from www.indiankanoon.org

²³⁹ *Suresh Kumar Kaushal & Anr. Vs. Naz Foundation and ors.* MANU/SC/1278/2013. Retrieved June 01, 2014 from www.manupatrafast.com

towards them by the society. It was also found that such can be removed by empowering them through law²⁴⁰. In 2009 research on homosexuals found that due to criminalizing of same sex activities acts many places such as school, library, public places etc homosexuals are being discriminated and being misbehaved by the heterosexuals of the society which pressurise LGBT's to commit suicide or they suffer from mental illness. 15% of homosexuals were scared about the treatment by their families when they will come to know about that they are homosexuals²⁴¹. In 2003, Public Union for Civil Service in their study said that there is an urgent need of laws for the protection of homosexuals as they are being discriminated by the society. In 2006 research it was found that 20% to 40% of youth are homeless because of the discriminatory behaving by the society towards them. There is a need to take a fair stand on homosexual issue by the government of India²⁴². There is a highly need of research and laws for the homosexuals so that they may get opportunity to stand in the society.

Thus, it can be concluded that the above hypothesis has been accepted as there is an urgent need of homosexuals separate law so that they may live with dignity in the society.

Hypothesis Number 3:- Section 377 of IPC is a violation of Human Rights

The principles of International Human Rights said that criminalising sexual orientation is a violation of human rights also it violates their right of equality and non discrimination. Not only UNHR but ICCPR in their statute stated that everyone has right to life freely and equally. In 2011 human right commission passed a resolution in favour of sexual orientation. All the human rights of LGBT's has been discussed above in chapter 7 which proves that same sex rights have been violated in our country.

In *Nicholes Toonen v. The State of Australia*²⁴³ where UNHR stated that criminalizing of homosexuality is a violation of Article 2 and Article 26 of ICCPR which provides right to privacy and equal protection before law.

²⁴⁰ Suicide Prevention Resource Centre. (2008). Suicide risk and prevention for lesbian, gay, bisexual, and transgender youth. Newton, MA: Education Development Centre, Inc. Retrieved June 10, 2014 from http://www.sprc.org/library/SPRC_LGBT_Youth.pdf

²⁴¹ Valentine, G, & Wood, N. (2009). The experiences of lesbian, gay and bisexual staff and students in higher education. Equality and Human Rights Commission commissioned by Equality Challenge Unit. This research was based on the survey on 4205 LGBT staff and students in England, Wales, Northern Ireland. Retrieved June 09, 2014 from <http://www.ecu.ac.uk/publications/lgbt-staff-and-students-in-he>

²⁴² Ray, N. (2006). Lesbian, gay, bisexual and transgender youth: An epidemic of homelessness. New York: National Gay and Lesbian Task Force Policy Institute and the National Coalition for the Homeless. Retrieved June 09, 2014 from <http://www.nationalhomeless.org/>

²⁴³ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). Human

Amnesty International in its report stated that violence on LGBT's through decriminalizing homosexuality is infringement of human rights²⁴⁴. UNHR and UNGA stated that homosexuals have rights to express their sexual orientation without fear and that can be achieved when state will decriminalize same sex activities which was provided in ICCPR in their Article 2 and 26, UNHR in Article 2 which provides to decriminalize sexual orientation and gender identity, Article 5 on which prohibit to punish LGBT's, Non decriminalization of civil marriage which was guaranteed by Article 2 and 23 of ICCPR etc.

In amnesty report it was stated that homosexual peoples due to their sexual orientation suffers a lot such as police abuse, extortion, blackmail etc²⁴⁵. Article 16 of UDHR provides right to marry and found a family and Article 2 stated that no discrimination should be made on right of marriage also international human right states that prohibiting same sex relationship is violation of human rights²⁴⁶.

In 2011 UNHR commission passed a resolution no. 17/19 in its 17th session for decriminalising homosexuality in all over the world. In 2007 UNHR propound principles for homosexuals to protect them which consist of 29 principles as LGBT's have equal rights and they are free to enjoy their right without any discrimination on the basis of race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Further it stated that in history LGBT's suffered due to human right violation because of their sexual orientation. These principles provide rights to LGBT's such as right to live, right to equality, right to privacy, right to recognition before law, non discrimination, right to security of person, fair trial, treatment with humanity while detained, freedom from torture or inhuman treatment, protection from sale, trafficking etc²⁴⁷.

Homosexual's human rights have been violated in each and every aspect. It is the duty of our country to protect the rights of every citizens even the minorities of the country.

Rights Library. University of Minnesota. Retrieved on June 01,2014 from www1.umn.edu/humanrts/undocs/html/vws488.htm

²⁴⁴ Amnesty International. (2005). Stone Walled. Police abuse and misconduct of LGBT. Amnesty International.

Retrieved on June 07, 2014 from <http://www.streetwiseandsafe.org/wpcontent/uploads/2011/01/StonewalledAI.pdf>

²⁴⁵ Amnesty International. (2013). Making Love a Crime – Criminalization of same sex conduct in sub Saharan Africa. Amnesty International Ltd. Retrieved June 16, 2014 from www.amnesty.org

²⁴⁶ Supra note 187

²⁴⁷ The Yogyakarta Principles. (2007). Principles on the application of international human rights law in relation to sexual orientation and gender identity. United Nation Human Rights. Retrieved on June 18, 2014 from www.yogyakartaprinciples.org/principles_en.pdf

Thus, it can be concluded that the above hypothesis has been accepted.

Hypothesis Number 4:- AIDS in LGBT's can be controlled

The major focus of Supreme Court decision in Suresh Kumar Kaushal case have been given on AIDS which said that the percent of AIDS increases to 8% because of legalizing homosexual activities but in various research it was found that HIV/AIDS can be controlled by taking proper protection in anal sex such as by using condoms²⁴⁸ above it was proved that doing sex with protection will save a person from HIV. Though the percentage of HIV has been increased in homosexuals but criminalising same sex activities will result such activities to be done in privacy with fear which will make them not to use protection. To prevent from HIV there is a need for proper protection which can be done only by support of judiciary and government so that one may decriminalize such act and other may bring awareness about such virus and their protection.

Thus, it can be concluded that the above hypothesis has been accepted.

²⁴⁸ Supra note 207

CHAPTER - 9

CONCLUSION AND RECOMMENDATIONS

India, which term to be as the world largest democratic country is a developing country which consist of a minority of homosexuals. Indian constitution provides fundamental rights to its citizens which include right to life, equality, non discrimination etc. But the rights of LGBT's especially human rights have been violated in India due to criminalizing same sex relationship. As being a member of Universal Declaration of Human Rights which suggests to decriminalize same sex activities but India does not did such. As per the topic 'Decision of Honourable Supreme Court on Section 377 of Indian Penal Code – Is it Just and Fair?' the answer to the question is no. Criminalizing of same sex activities is not fair towards human rights of India on the basis as –

Homosexuality in many countries has been legalized in many countries not only this but many countries change their constitution such as South Africa for the protection of LGBT's human rights. In India such relationship has been criminalized as our country term it as unnatural. In India the issue of homosexuals is a controversial topic which is been hotly debated and has attracted the attention of general public as well as our judiciary. Though India is an active member of UNHR and has signed most of the resolution but homosexual topic is yet in the books. According to our judiciary these are unnatural offences and now the discretion to repeal this section is on parliament.

India is a nation of different culture, and here different peoples have different types of thinking and living. Legalizing the activities of homosexuals is a modern trend over the world. In the ancient homosexuality has been adopted by different Gods and kings not only in India but over the world. UNHR says every citizen ha right to live equally and all are equal before law but their rights has been violated.

Many researches have been conducted over the world on homosexuals and it found that sexual orientation is due to environment no one has adopted such kind of behaviour and it's a natural cause. In 172nd report of law commission it was term that criminalizing of such activities may term to the growth of crime and HIV in privacy and these crimes will include rape and killing as well. This report further recommended decriminalizing section 377 of IPC.

In the landmark judgement of Lawrence v. Texas²⁴⁹ court held that sodomy should be considered as crime when such act is done without consent. In Nicholas v. The state of Australia²⁵⁰ court held that criminalizing same sex relation is violation of Article 2 and Article 26 of ICCPR which provides right to privacy and equality to its citizens.

In the research researcher analyzed many foreign and Indian cases where court in a numerous case talks about the rights of LGBT's. In many cases court held that criminalizing same sex activities is discrimination with such minorities.

From the overall study, hence it was proved that Decision of Honourable Supreme Court on Section 377 of Indian Penal Code is not just and fair as it violates the homosexual human rights and it is necessary to repeal Section 377 for the protection of LGBT's minorities.

Recommendations –

After the research the researcher noticed that though our country guarantee human rights to its citizen but a minority of Indian population which term to be as LGBT's has been some where neglected. After concluding the judicial decision in researchers own views here are some humble submissions:

- Repeal of Section 377 of IPC - The researcher humbly recommends to the guardian of the constitution to repeal section 377. A country where law term to be as the father of nation, there it is mandatory to follow the law hence citizens get punished. After decriminalizing Section 377 of IPC the friendly behaviour will come before judiciary for the LGBT's which result that such behave will impact society at large and with the fear of punishment society will provide equal treatment to homosexuals and by interaction society will understand their feeling which may increase respect for these people.
- HIV/AIDS - AIDS have been found in MSM, this reason has been focused by our judiciary while criminalizing the same sex conducts. The researcher submits that every citizen has right to live with their own choice just because the percent of HIV has been increased due to MSM one cannot criminalize it. HIV use to find in heterosexual's people also but in India many programmes used to be operated by

²⁴⁹ Supra note 106

²⁵⁰ Supra note 132

government which spread HIV awareness. Daily in news paper, in television, magazines, radio channel we found government awareness programmes or advertisement for the awareness of HIV. Not only in cities but in village also various camps use to be conducted by government of India who use to teach how one can get protected from HIV. Even in school and colleges students learn to protect them. Doctors and scientist said that the only way this virus spread by the means of sexuality is doing sex without protection. When government can spread awareness for normal individuals how to get protected from HIV then why not for LGBT's. HIV in LGBT can be controlled by making them aware, by distributing condoms to them by giving special privilege so they may stand equal to the society.

- Distribution of Condoms - Condoms should be distributed to LGBTs freely by government in villages, prisons etc also awareness programme should be specially conducted for the homosexuals in schools, colleges, television and on radio.
- Privilege to LGBT's - In education, employment and other activities a special privilege should be provided to LGBT's, so they may stand equal to the society. As today criminalising of same sex activities created hatred towards the homosexuals by the society which leads discrimination in public places, employment, schools etc due to which homosexuals create suicide. It is the duty of government to provide privilege to them so that they may bring equal to the society.
- Prohibition for their personal rights should be stopped - Homosexuals are not by their choice it's because of the environment or their gene. So prohibiting them for their personal sexual rights should be stopped as if you will going to interfere in their personal lust they will going to fulfil their needs in privacy which may convert that into criminal activities such as rape, killing, sexual abuse etc.
- Safer Sexual Practice - Promotion of sexual health, reproduction of LGBT's should be encouraged for safer sexual practice.

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