

HOMOSEXUALITY: REFLECTIONS ON BASIC FACETS OF HUMAN RIGHTS, LEGISLATIONS, INDIVIDUALITY, AND INTEGRITY

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“God made ‘Adam and Eve’ not ‘Adam and Steve’? Hmmmm...then who made ‘Steve’?”

-Anon

PRELUDE

Homosexuality is no longer illegal but the stigma remains as evident by a very recent incident in hallowed portals of one of the premiere central Universities of India, Aligarh Muslim University (AMU). After seven long months of lull came the storm. In the eye of storm this time is Dr. Shrinivas Ramchandra Siras of AMU who has *allegedly* been filmed by his students engaging in homosexual act in his official residence.¹ He is reader and chairman of Modern Indian Languages at AMU. Subsequently, AMU placed him under suspension on the charge of his *alleged* “misconduct” on campus. The university authorities claimed to have received complaints of his homosexuality. This suspension has created furore in legal fraternity and LGBT (lesbian, gay, bisexual, transgender) community. Anjali Gopalan, founder of NGO Naz foundation which is instrumental in LGBT rights and HIV/AIDS awareness, condemned university, saying: “Will they catch a man who is having sex with a woman who is not his wife in his house and suspend him? Action needs to be taken against the university for doing an illegal thing.” This statement has been made in wake of landmark judgement *Naz Foundation v. Govt. of NCT of Delhi*² of 2nd July, 2009 which decriminalised private consensual sex between consenting adult. Coming to rescue of the professor, legal fraternity opined that pulling off a sting operation on a man depicting what he does behind closed doors in his private life is gross violation of his right to privacy. Criticising

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¹ Available at <<http://timesofindia.indiatimes.com/india/Aligarh-Muslim-University-professor-suspended-for-being-gay/articleshow/5585787.cms>>. See also “AMU suspends ‘gay’ teacher” at <<http://www.indianexpress.com/news/amu-suspends-gay-teacher/580269/>> Last accessed 19th Feb,2010

² 2010 CriLJ 94, 160 (2009) DLT 277

the varsity's action, Aditya Bondopadhyay, a lawyer and gay rights activist said that instead the people who filmed the act should be punished. "What happened was atrocious and a most horrible thing. Instead of suspending the professor, it is the people behind the incident who should be investigated," he said. "The university has no locus standi to suspend a person for what he does in his personal life. The action is illegal and can be challenged in court," he added.³ While the professor chose not to challenge the university, the senior Supreme Court advocate K T S Tulsi⁴ argued the university's action can very well be challenged by the professor in court as after decriminalisation of homosexuality, the varsity cannot describe his act as gross misconduct as it is no more a criminal activity citing "The action taken by the university is illegal and incorrect. Even the rules of conduct of universities do not have any provision to suspend a person on these grounds,"⁵ University spokesperson Rahat Abrar confirming the suspension also feigned ignorance of Delhi HC judgement to that effect "If there is any such order of the High Court, Dr. Siras can produce it during inquiry in his support." With this conundrum not heading for resolution as of now, we have to wait and watch whether SC delivers the final nail in coffin for homosexuality detractors or pulls up cudgels of morality and social milieu to overrule Delhi HC decision. The murky water of misguided sex and sexuality is heading for final showdown. The petition on legal position of sec 377 of Indian Penal Code, 1860 has been filed in apex court in the wake of this incident.

INTRODUCTION

Nothing stirs human imagination than sex and sexuality. Sex is a vital force that runs throughout our public and private lives, but typically it is treated solely as a private concern. The term *homosexual* was coined in 1869, appearing in a German pamphlet attributed to the Austrian novelist and sex reformer Karl-Maria Krafft-Ebing classified homosexuality as a "paraesthesia" or a "deviance" consisting of sexual desire for the wrong object. Because he believed that the purpose of sexual desire is human reproduction, he considered any sexual desire or behaviour that led away from that aim to be an aberration. After studying many homosexuals, Krafft-Ebing, like his successor the psychoanalyst Sigmund Freud, concluded that homosexuality is neither a mental disease nor a perversion but a normal variation of human behaviour. Study by Alfred Kinsey showed that most people have a fluid range of sexual desires that includes sexual feelings. Sexual relationships represent a fundamental element of individual

³ Available at "AMU action against Prof homophobic" <http://timesofindia.indiatimes.com/india/AMU-action-against-prof-homophobic/articleshow/5594682.cms> Last accessed on 19th Feb,2010

⁴ The lawyer can be reached at <<http://www.ktstulsi.com/>>

⁵ *Ibid*

identity and an intimate aspect of an individual's private life. Although there have always been - and will always be - people who engage in homosexual relationships and activities, being "gay" is a modern political concept that has emerged in response to the deprivation of rights on the basis of sexual orientation⁶

"Homosexuality, same gender sex needs no introduction. From pre-Christian times, it has troubled, terrified and inspired the western minds and culture. Sodom and Gomorrah, the Cities of the plain, were supposedly destroyed because of it; Paul warned a the early Christians against it; leading scholars of the Church wrote eloquently opposing it; English kings were assassinated on the suspicion of it ; and countless common people have victimised, blackmailed and persecuted because of it".⁷

Sexual preference is not, of course, only a matter of sexuality. Sexual orientation, if not heterosexual and if it is made overt, has implication that has extended far beyond the sexual relations because, in many cultures, until recently such an orientation could only lead only to stigmatization and social rejection but also to imprisonment and sometimes persecution.

No understanding of society or individuals is complete without a thorough analysis of sex and how it is constituted. Homosexuality as an identity and a set of practices has undergone repeated metamorphoses since classical antiquity. Responses to homosexuality have been filtered through religious, legal and cultural lenses and have varied widely from positive recognition to violent persecution and oppression. The historical debate over how to classify homosexual practises and attitudes has culminated in the late-twentieth and early twenty first century conversation about how to define homosexuality and bisexuality as "sexual attraction, sexual behaviour political self-identification or some combination of these factors"⁸.

HOMOSEXUALITY IN INDIA: THE NAZ FOUNDATION CASE

In India, the notions of sex and sexuality have been matter of taboo largely due to religious- social milieu. A matter pertaining to sex and its orientation seems like cardinal sin if talked about, debated in public citing our glorified Hindu scriptures. The concept of homosexuality is as ancient as the civilization itself. The religious texts and their interpretations, ancient monuments and sculptors suggest, though not expressly, it

⁶Stewart, Chuck. *Gay and lesbian issues: a reference handbook*. Santa Barbara, CA: ABC-CLIO, 2003. See Eric Heinze, *Sexual Orientation: A Human Right* 37 (Kluwer Academic Publishers 1995)

⁷ RUSE M., *Homosexuality: A Philosophical Enquiry*, (Oxford: Blackwell1988,), p ix

⁸ Raymond A. Smith, Donald P. Haider-Markel, 2002. *Gay and Lesbian Americans and Political Participation: A Reference Handbook*, Santa Barbara, CA: ABC-CLIO

existed in India from times immemorial. After British colonization of India, in 1860, as a “moral watchdog with sanction” British colonizers introduced a new criminal code to occupied India. Section 377, result of wisdom of Lord Macaulay, of the code prohibited “carnal intercourse against the order of nature.” After passage of 148 winters, the law became archaic both in its application as well as meaning. The emergent social culture is sum total of preferred habits, style, values and predilections. Liberalisations and globalisation has changed the social milieu, the young’s are caught between tradition and modernity, questioning the perverted notion of sex and sexuality. On 2nd July, 2009, Delhi High Court in *Naz Foundation vs. Government of NCT and Ors*⁹ decriminalised private consensual sex between adults of the same sex. The hush of the courtroom was broken by disbelieving gasps, a few hastily suppressed whoops of joy, and then the sound of weeping, as rows of gay activists clutching hands listened to a judgment that few had believed would come in their lifetime of the law being repealed which criminalized consensual gay sex between adults, in a judgment that invoked an Indian tradition of tolerance and inclusion.

The well researched classic judgment has radically change life for millions of gay, lesbian and transgender Indians, who have long been subject to harassment and abuse under the law, and also represents a huge gain for gay rights in the developing world. The advocate on behalf of the petitioner, Anand Grover had submitted before the court that sex within art 15 also includes sexual orientation which was accepted by the court courtesy various decisions of international tribunals, cases from US and UK and opinions of leading jurist on the subject.

In an unequivocal decision, Justice S. Muralidhar invoked the country’s first prime minister, Jawaharlal Nehru, and his belief in inclusiveness as laid out in the country’s constitution.

“This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society?” the judge noted “Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracized. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination.”

HOMOSEXUALITY AND HUMAN RIGHTS

In April 2003, at the 59th Session of the United Nations Commission for Human Rights (UNCHR) in Geneva, Brazil unexpectedly introduced a resolution for consideration that called upon both the United Nations and state governments to incorporate protection

⁹ 2010 CriLJ 94, 160 (2009) DLT 277

from persecution and discrimination on the basis of "sexual orientation" into their human rights practices and procedures¹⁰. While this was not the first time that the relationship between human rights and protection from persecution and discrimination on the basis of "sexual orientation" had been discussed at the UNCHR, it was indeed the first time that a resolution had been proposed with such wide ramifications for member states vis-a-vis the protection of (non-normative) sexual orientations¹¹. Earlier, while still controversial, the UNCHR had only considered, and passed, resolutions that worked to protect people from being extra-judicially, arbitrarily, and summarily executed based on their sexual orientation.¹² Are human rights merely a product of interests, or are they, as Ronald Dworkin would say of rights, "a claim that it would be wrong for the government to deny an individual even though it would be in the general interest to do so"?¹³ Given the metaphysical problems with attempts to justify human rights,¹³ one might be inclined to ask: are human rights the product of some intuition, a result of some social contract, or simply a necessary condition for happiness? These questions all address how we justify human rights. The claims of gays and lesbians to rights to privacy, non-discrimination, marriage, parenting, and so forth, are indeed particular instantiations of the human rights found in the U.N. Declaration of Human Rights. To do this, however, it will be necessary to identify three important human rights components of such claims, which are also related to the two components - freedom and well-being. The claims of lesbians and gays have the same foundation as the rights found in the U.N. Declaration. The three components are privacy, freedom of speech, and equal protection of the laws. Privacy and freedom of speech are components here because, as will be shown below, they directly relate to freedom and indirectly support well-being.¹⁴ Equal protection of the laws is important because it directly relates

¹⁰ The text of the U.N. Comm'n on Human Rights draft resolution, titled, Human Rights and Sexual Orientation, E/CN.4/2003/L.92, can be found at Int'l Gay and Lesbian Human Rights Comm'n, Sexual Rights and Sexual Orientation at the United Nations Commission on Human Rights: Campaign Dossier (Draft) 17 (2005), available at http://www.iglhrc.org/files/iglhrc/UNCHR%20Action_Kit_2005.doc. last accessed on 26 January, 2010

¹¹ See generally Douglas Sanders, Human Rights and Sexual Orientation in International Law (Nov. 23, 2004), <http://www.ai-lgbt.org/international.doc> (discussing the history of "sexual orientation" discussions, reports, and debates in the United Nations system). See also Holning Lau, Sexual Orientation: Testing the Universality of International Human Rights Law, 71 U. CHI. L. REV. 1689 (2004).

¹² See J. Roland Pennock, Rights, Natural Rights, and Human Rights - A General View, in Human Rights 2 (J. Roland Pennock & John W. Chapman eds., 1981) (suggesting that, even though there existed no word to express the concept of a legal right, the idea of a "right" was implicit in Ancient Greek society).

¹³ Two metaphysical problems arising from human rights grounded in religious doctrine include: proving the existence of God and the proper interpretation of her ordinances.

¹⁴ Tobias Barrington Wolff, Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy, 63 Brook. L. Rev. 1141, 1141-43 (1997).

to well-being and indirectly supports freedom.¹⁵ So, in making the transition from human rights, in general, to gay-rights, in particular, one continues to protect voluntary purposive agency, as an end of moral reasoning.¹⁶ The analysis would succeed by providing a way to see gay rights as mere particular instantiations of these other, already accepted, more general human rights.

(a) Right to Privacy

The Black's Law Dictionary¹⁷ refers to privacy as "*the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions*". The right to privacy, albeit it's differing connotations, remains a private right of an individual. It is exercise of personal autonomy. On a plain reading of Article 19, it appears that "*liberty*" as defined is broad enough to signify "*the right to be let alone*"¹⁸. Privacy is a facet of the dignity of an individual that the preamble to the Constitution assures every individual.¹⁹ Thus the right is not merely a negative mandate upon the state not to encroach upon the private space of the individual but is also a positive affirmation on the state to create adequate institutions that would enable one to effectively protect his private life.²⁰ The famous and celebrated article, "The Right to Privacy" by Charles Warren and Louis D. Brandeis²¹ expounded the theory of privacy beyond tangible possession "scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,— the right to be let alone"²² Human rights activists consider section 377 of Indian Penal Code, 1860 as anachronistic, discriminatory and violative of the rights of privacy and personal liberty guaranteed in The United Nations International Covenant on Civil and Political Rights²³ to which India is signatory and

¹⁵ See Cass Sunstein Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163-79 (1988). , Also see Diane Silver *The New Civil War* 35-36 (1997) (noting the rights to which heterosexual individuals are entitled but to which homosexuals are denied, and further noting that no state or municipality in the United States grants equal rights to homosexuals and heterosexuals).

¹⁶ See Alan Gewirth, *Reason and Morality*, University of Chicago Press, 1981 at 135, 256

¹⁷ Bryan A. Garner (ed), *Black's Law Dictionary* 9th ed. (West Group, 2009) 1315

¹⁸ See A.M. Bhattacharjee, *Equality. Liberty and Property Under the Constitution of India* (1997) 104-105.

¹⁹ Refer to the Preamble "We, the people..."

²⁰ See R. Unger, *Knowledge and Politics* (1975), as referred to in Lawrence H. Tribe, *American Constitutional Law* 1305 (1988).

²¹ 4 Harv. L. Rev. 193 (1890),pg 1

²² *Ibid.*

²³ Available at <<http://www2.ohchr.org/english/law/ccpr.htm>> last accessed 13th March,2010

ratified. In the Naz Foundation case²⁴, Mr. Anand Grover, Sr. Advocate, submitted that Section 377 IPC violates the constitutional protections embodied in Articles 14, 19 and 21. It suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community. It also unreasonably and unjustly infringes upon the right of privacy, both zonal and decisional. Reliance can be placed on International treaties and convention in this regard. Article 12 of the Universal Declaration of Human Rights²⁵ (1948) refers to privacy and it states:

Art 12. "No one shall be subjected to arbitrary interference with his *privacy*, family, home or correspondence nor to attacks upon his honour and reputation. *Everyone* has the *right to the protection of the law against such interference or attacks.*"

Article 17 of the International Covenant of Civil and Political Rights²⁶ (to which India is a party), refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation, does The European Convention on Human Rights".

All the seven learned Supreme Court Judges held that the "right to privacy" was part of the right to "life" in Article 21 in case of *Kharak Singh v. The State of U.P.*²⁷ in 1963 itself.

Human Rights are rights that belong to an individual as a consequence of being human. They refer to wide continuum of values that are universal in nature and in some sense equally claimed for all human beings. ²⁸ Everyone has a sexual orientation and a gender identity. When someone's sexual orientation or gender identity does not conform to the majority, they are often seen as a legitimate target for discrimination or abuse. A large part of the international community continues to deny many of the protections of human rights law to homosexuals, bisexuals, and other sexual minorities. Few states do so in the conviction that sexual minorities lack the same basic human needs as everyone else. All people should be able to enjoy all the human rights described in the

²⁴ Para 24(i),160(2009)DLT27, Available at Delhi High Court Website <<http://lobis.nic.in/dhc/>> , <http://www.ilga.org/news-upload/Delhi_high_court_decision.pdf> last accessed 23 January, 2010

²⁵ Available at < <http://www.un.org/en/documents/udhr/>> Accessed on 30th September,2009.

²⁶ Supra n. 23

²⁷ AIR 1963 SC 1295,1963 Cri LJ 329

²⁸ *The New Encyclopaedia Britannica*, volume 6 (15th ed.) 137, Also available at <<http://www.britannica.com/EBchecked/topic/275840/human-rights>> Last accessed 29th September, 2009

Universal Declaration of Human Rights. Yet millions of people across the globe face execution, imprisonment, torture, violence and discrimination because of their sexual orientation or gender identity. The range of abuses is limitless²⁹ which has been discussed contentiously in the paper.

There is growing jurisprudence and other law related practice that identifies a significant application of human rights law with regard to people of diverse sexual orientations and gender identities. This development can be seen at the international level, principally in the form of practice related to the United Nations - sponsored human rights treaties, as well as under the European Convention on Human Rights. The sexual orientation and gender identity - related human rights legal doctrine can be categorised as follows: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity. International human rights law and the lesbian and gay rights movement have grown up together in the post-war period.³⁰ Both are still developing. Both are evolving from their western origins to a world-wide presence.³¹

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

²⁹ Amnesty International <<http://www.amnesty.org/en/sexual-orientation-and-gender-identity> > Last Accessed on 29th September, 2009

³⁰ None of the lesbian and gay human rights organizations now in existence pre-date World War II. The same is true of the Non Governmental Organizations, like Amnesty International and Human Rights Watch, which have taken up lesbian and gay issues in the last fifteen years. The regional and international human rights treaties and intergovernmental bodies concerned with human rights arise in the same period (with the exception of the International Labour Organization).

³¹ See Peter Drucker, 'In the Tropics There is No Sin': Sexuality and Gay-Lesbian Movements in the Third World, (1996) 218 *New Left Review*, 75-101; Peter Drucker, *Different Rainbows*, Gay Men's Press - Millivres, 2000; Amy Lind, *Gay Rights in Latin America*, NACLA Report on the Americas, March/April, 1997; Barry Adam, Jan Duyvendak, Andre Krouwel, *The Global Emergence of Gay and Lesbian Politics*, Temple, 1999; *Out South: Sexual Minorities in the Majority World*, *New Internationalist*, No. 328, October, 2000. Legal reform has spread from northern Protestant countries to a number of countries with Roman Catholic majorities. Ireland repealed its sodomy law in 1993 and France enacted legislation recognizing same-sex relationships in 1999. There are now over a dozen lesbian and gay organizations in each of the Philippines and Hong Kong. The new South African constitution was the first in the world to expressly prohibit discrimination on the basis of sexual orientation. The South African Constitutional Court has struck down a sodomy law, and recognized same-sex partner rights in immigration law. See *National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, decision of October 9th, 1998, Constitutional Court of South Africa, Case CCT 11/98.

social region, property, birth or other status". In *Toonen v. Australia*³², the Human Rights Committee, while holding that certain provisions of the Tasmanian Criminal Code which criminalise various forms of sexual conduct between men violated the ICCPR, observed that the reference to 'sex' in Article 2, paragraphs 1 and 26 (of the ICCPR) is to be taken as including 'sexual orientation' and the same argument was advanced in Naz Foundation case which was accepted by Delhi High Court. While enforceability of the *Toonen* decision is subject to the limitations of the ICCPR, the ruling makes clear that momentum is growing in both international and domestic law for the recognition of the right of sexual minorities to equal protection and non-discrimination³³. In fact, many commentators suggest that international law now provides highly persuasive authority to vindicate the equal protection claims of sexual minorities worldwide.

HOMOSEXUALITY AND LEGISLATION

"An unjust law is no law at all", so said St Augustine, providing the foundation of civil disobedience movements across the globe. As Britain wobbled toward the last days of its colonial power, an official recommendation by a set of legal experts the famous Wolfenden Report of 1957—urged that "homosexual behaviour between consenting adults in private should no longer be a criminal offence." The report said:

"The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour."³⁴

WHAT ARE SO-CALLED "SODOMY" LAWS FOR?

Removing the sodomy laws would affirm human rights and dignity. It would also repair a historical wrong that demands to be remembered. The legacy of colonialism

³² See *Toonen v. Australia*, reprinted in U.N. GAOR, Hum. Rts. Comm., 15th Sess., Case No. 488/1992 (1994); see also DAVID HARRIS, INTERNATIONAL HUMAN RIGHTS REPORTS 105 (1994). (1994). UN Doc CCPR/C/50/D/488/1992 (4 April 1994). Available at <<http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>>

³³ See generally James D. Wilet, International Human Rights Law and Sexual Orientation, 18 HASTINGS INT'L & COMP. L. REV. 1, 4 (1994) [hereinafter Wilet, Sexual Orientation]. The term "sexual minorities" includes any group that has been marginalized by society because of sexual orientation, inclination, behavior, or gender identity.

³⁴The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (New York: Stein and Day, 1963) 23, Also available at <<http://www.williamapercy.com/wiki/images/Wolf.pdf>> Last accessed 24 January, 2010.

should no longer be confused with cultural authenticity or national freedom. The campaigns for law reform are not merely for a right to intimacy, but for the right to live a life without fear of discrimination, exposure, arrest, detention, or harassment. Reform would dismantle part of the legal system's power to divide and discriminate, to criminalize personhood and identity, to attack rights defenders, and to restrict civil society.

States must justify all such restrictions as consistent with human rights, and the practices of the great majority of states of the world respecting sexual minorities and unconventional sexuality cannot easily be reconciled with any self-consistent human rights jurisprudence or even ethical theory. Any explanation for the absence of a strict correlation between state commitments to international human rights generally and their recognition of equal human rights for sexual minorities³⁵ must account for the role of organized, fundamentalist religions in undermining the uniform application of human rights.

INDIVIDUALITY AND INTEGRITY

Given that the major human rights treaties proclaim as their fundamental purpose the preservation of human dignity and autonomy,³⁶ the subject at hand raises the question of whether the state is ever justified in interfering with or discriminating based upon private sexual behaviour between two consenting adults. The term "autonomy" denotes a basic condition of freedom from state interference and adverse discrimination, but the term "dignity" is value-laden. Legal protection of privacy and freedom of intimate association plays a central role in preserving both dignity and autonomy by limiting the state's power to interfere with any individual's chosen path toward self-actualization through interpersonal relationships.³⁷ Laurence Tribe has noted that "virtually every

³⁵ Jim Nickel refers to these as "Universal Rights Applied to Minorities" to distinguish them from special group rights proper. See James W. Nickel, *Making Sense of Human Rights* (2nd edn. 2006) 54.

³⁶ See, e.g., U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, pmb., para. 1, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1980), 1249 U.N.T.S. 13; U.N. Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263 (XXII), pmb., para. 1 (Nov. 7, 1967); ICCPR, supra note 1@, pmb., para. 1; UDHR, supranote 1@, pmb., paras. 1, 5 & art. 1.

³⁷ Cf. *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008) ("The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.").

intrusion upon association works a displacement of human personality."³⁸ The major human rights treaties allow such intrusions only upon a showing of sufficient state interest.³⁹ The question, then, is when state regulation of private, consensual conduct can be justified as consistent with international human rights law and the moral theory underlying it.

International human rights law imposes a burden of justification on the state seeking to discriminate against a disfavored class or individual conduct that falls within the scope of the defined freedoms of speech, association, or privacy. This burden is increased when the state seeks to regulate or discriminate based on intimate, private conduct between consenting adults. Because any interference must be proportional and "necessary in a democratic society" or reasonable and objectively necessary to accomplish a legitimate state purpose, the basis for regulation must first be grounded in a theory of legitimate state interests. In this regard, state authorities have been notably unsuccessful in justifying discrimination against unconventional sexuality as necessary or even helpful to preventing some societal harm or promoting some public benefit. The realm of intimate association between consenting adults is considered the most fundamental kind of privacy interest. The European Commission of Human Rights has long insisted that "a person's sexual life is an important aspect of his private life" protected by Article 8 of the ECHR.⁴⁰ Similarly, the European Parliament has publicized its "unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters."⁴¹

Integrity is one of the most important and oft-cited of virtue terms. It is also perhaps the most puzzling. For example, while it is sometimes used virtually synonymously with 'moral,'⁴² In *Lawrence v. Texas*,⁴³ "Privacy" in this sense means something more akin to a general freedom to act privately without unnecessary government interference. These rights have obvious, but as yet largely unrealized, implications for sexual minorities and others who practice unconventional sexuality.

³⁸ Laurence H. Tribe, *American Constitutional Law* (2d edn. 1988) 1616, see also H.L.A. Hart, *Law, Liberty and Morality* 22 (1963) ("Interference with individual liberty may be thought an evil requiring justification ... for it is itself the infliction of a special form of suffering... This is of particular importance in the case of laws enforcing a sexual morality."). This view may be traced back to liberal philosophers such as John Stuart Mill and Jeremy Bentham.

³⁹ UDHR, Arts. 29(2), 30.

⁴⁰ *X. v. Germany*, App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46, 54 (1976); *X. v. United Kingdom*, 3 Eur. H.R. Rep. 63, 126 (Eur. Comm'n on Hum. Rts. 1978).

⁴¹ Eur. Parl. Res. 812, 4 (1983).

⁴² Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/integrity/#4>> Accessed on 30th September, 2009.

⁴³ 539 U.S. 558 (2003).

In Naz Foundation case⁴⁴, Chief Justice of Delhi High Court Ajit Prakash Shah reiterated, "The right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy - dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. It is averred that no aspect of one's life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie easily at the core of the "private space", they are an inalienable component of the right of life. Based on this line of reasoning, a case has been made to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right of privacy and dignity within the ambit of right to life and liberty under Article 21." In order to eradicate the 'survival of several centuries of prejudice' against homosexual persons, the state must recognize that homosexual persons are indeed equal to heterosexual persons under the law. This equality is not possible when homosexuality is viewed as immoral, and a force against which people must be protected. Instead, the Convention must recognize sexual self-determination as a fundamental freedom. Each individual may live his or her sexuality free of state interference or coercion. Indeed, this is a basic premise of democracy.⁴⁵ The Court has acknowledged this idea in stating that democratic societies embody 'two hallmarks . . . tolerance and broadmindedness . . . ' ⁴⁶.

CONCLUSION

Acres of paper and rivers of ink have been employed in arguing for and against homosexuality. Various facets have been dealt like Delphic oracle. Homosexuals have been recognised as individuals who are as "normal" as their counterparts heterosexual. Psychoanalysis and scientific researched has proved that homosexuality is manifestation of normal human behaviour and subsequently in this recognition WHO removed it from its list of disease in 2001. Nobody should be denied of his very basic human rights and his right to enjoy life with dignity. His integrity and individuality should be respected. Homosexuals are not aliens; they are individuals having their distinct identity because of their sexuality. India joined the bandwagon of 126 countries to have decriminalise homosexuality. Hail Delhi High Court!

⁴⁴ Para 8, 160(2009)DLT27, Available at Delhi High Court Website <<http://lobis.nic.in/dhc/>> , <http://www.ilga.org/news-upload/Delhi_high_court_decision.pdf> Last accessed 23 January, 2010.

⁴⁵ Muller, *Fundamental Rights in Democracy*, 4 HUM. RTS. L.J. 131 (1983).

⁴⁶ *Dudgeon v. United Kingdom* 45 Eur. Ct. H.R. (ser. A) (1982) at 21.