CHAPTER-4
INTERNATIONAL HUMAN RIGHTS FRAMEWORK
FOR SEXUAL MINORITIES

“I have often asked myself why human beings have any rights at all. I always come to the conclusion that human rights, human freedoms, and human dignity have their deepest roots somewhere outside the perceptible world. These values are as powerful as they are because, under certain circumstances, people accept them without compulsion and willing to die for them.”  

- Vaclav Havel.

4.1. Introduction

With an understanding about the human sexuality in general and sexual minorities in particular in chapter two followed by introduction of various NGOs and organizations working for sexual minorities provided the necessity to go with human rights perspective which was already included in the title of Ph.D. thesis, hence this chapter with a co-relational approach includes a human rights framework. The categorical definitions of human rights are available within Indian Constitution under Part III i.e. Fundamental Rights, such fundamental rights are treated as human rights. Application of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. ‘All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to the rights to life, security of person and privacy, to freedom from torture and ill-treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights’¹. So far as the homosexuality and its human rights relation is concerned it is to understand in a better way with the help of following human rights-

A. Natural Right of man (on the base of requirement)

B. Right to Trumps

C. Right to marriage (Family), thought, expression, association

D. Right to choice

E. Freedom of liberty

F. Life with dignity

G. Self determination

H. Democracy’\textsuperscript{2}. ‘Since 1993, the United Nations High Commissioner for Refugees has decided that homosexual persons are members of a ‘particular social group’ whose treatment is regulated by international standards of human rights’\textsuperscript{3}.

These international instruments for human rights are considered as international human rights instruments and includes Universal Declaration of Human Rights (hereinafter UDHR), 1948, International Covenant on Civil and Political Rights (hereinafter ICCPR), 1966 in addition with two optional protocols, and International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), 1966 in addition with three adopted optional protocols, United Nations’ Charter, American, African, Arab Charters etc. and various other Conventions, Declaration at different regions such as American, Geneva, European Convention, Vienna, Yogyakarta Principles, etc. Out of these, UDHR, ICCPR, ICESCR and two optional protocols related to human rights are known as International Bills of Human Rights. The provisions mentioned in these international instruments are general in nature and universal in application. For the purpose of understanding about the human rights framework for sexual minorities persons, we would have to be based on general understanding of human rights related provisions mentioned in various international human rights instruments.

Generally, the international human rights framework talks about providing all human rights to each and every individual without discrimination of any kind. Since,


sexual minority persons are the member of human race by birth, hence, the question of considering them a group or class of different characteristics becomes secondary and their primary status as person remains protected by the nature itself. This clearly indicates towards the applicability of all available human rights to sexual minority persons without any further controversy. Hence, sexual minority persons are entitled for human rights equally available similar to other persons in society as far as the question of human status is concerned. ‘The term ‘peoples’ includes individuals who have jus standi in international law in accordance with the functions under applicable norms of international law such as human rights law’4. ‘In the past decade, a “double movement of globalization” has taken place in the realm of gay rights. On the one hand, a globalization of human rights has occurred, whereby human rights have become a key criterion by which the “progress” of nation is evaluated. On the other hand, there has been a globalization of same-sex sexualities as identities’5.

Hence, their claim is not for creating new law, legislation or rights but the claim stands for existing rights i.e. human rights which are universal in application. There are various international instruments regarding providing and protecting human rights to all and that are referred here as international human rights framework and international human rights law framework too that not only includes the human rights provisions in legal documents but also norms, principles, resolutions, declarations said and agreed upon by the international community. Except this, the talks and discussions of authorities and assemblies are also included in this framework. Although, some initial rights based international documents like Magna Carta, Revolutions of various regional countries (French, America, Germany, etc.) are also referred but it is just to initiate from natural law and a relationship with sexual minorities.

‘Non-discrimination in international law: Article 2 of UDHR; Article 2(1) of the ICCPR; Article 2(2) of the International Covenant on Economic, Social and


Cultural Rights (ICESCR); Article 2 of the African Charter on Human and Peoples’ Rights (African Charter); Article 1 of the American Convention; Article 14 of the European Convention”.

‘In December 2008, 66 States signed a statement presented to the United Nations General Assembly that affirmed the principle that international human rights law protects against violations based on sexual orientation and gender identity’.

‘Much of this debate arises in the context of laws that criminalize sexual activity between same-sex partners. In many countries around the world, sexual conduct between consenting adults of the same-sex is a criminal offence. The punishments range from a few months in prison to the death penalty. Although in some cases these laws are a colonial legacy, in others criminal offences or stiffer penalties have been only recently introduced. The laws are often defended on the grounds of public morality. Do such laws violate rights guaranteed under international human rights instruments? In other words, is someone’s sexual orientation or private sexual activity a matter covered by international law? Does international law really speak to what people do in their own bedroom or whom they choose to do it with? The short answer is yes’.

‘A Review of international human rights standards and their authoritative interpretation by treaty bodies and human rights courts makes clear that the criminalization of same-sex sexual conduct is a violation of rights guaranteed under international law. Moreover, domestic courts, interpreting the same language or parallel provisions in domestic constitutions, have also found decriminalization of same-sex sexual conduct to be required under international law. International law protects individuals from discrimination based on fundamental personal decisions to form intimate personal relationship, which includes the right to engage in sexual activity. This sexual orientation is very much a part of human rights law’.

‘There is a growing jurisprudence and other law related practice that identifies a significant application of human rights law with regard to people of diverse sexual

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7 Id. at 2.
8 Ibid.
9 Ibid.
orientations and gender identities. This phenomenon can be observed 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 development of this sexual orientation and gender identity related human rights legal doctrine can be categorized as follows: (a) non-discrimination, (b) protection of privacy rights and, (c) the ensuring of other general human rights protection to all, regardless of sexual orientation or gender identity. In addition, it is useful to examine (d) some general trends in human rights by people of diverse sexual orientations and gender identities.\(^{10}\) The framework of human rights starts in detail with next section. The natural law is the prime and supreme law which remains in basis and the study is required to start with the same. The natural law belongs to all including sexual minorities.

### 4.2. Natural Law and Sexual Minorities

Before starting of any specific discussion about the law, the first discussion starts with the understanding of natural law as necessary. The jurisprudence itself includes various jurists and natural law philosophers that undertake the principles of natural law, natural rights and natural justice as the basis of all legislations. ‘A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or is important only by its opposition to or unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right mindedness, of good and proper order among men and individual conduct. Unless some such claim is justified, analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general manifestations of the various concepts peculiar to

particular peoples and/or to the particular theorists who concern themselves with those people’\textsuperscript{11}.

‘The principles of natural law, thus understood, are traced out not only in moral philosophy or ethics and ‘individual’ conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen. For those principles justify the exercise of authority in community. They require, too, that authority be exercised, in most circumstances, according to the manner conveniently labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component. More particularly, the principles of natural law explain the obligatory force (in the fullest sense of ‘obligation’) of positive laws, even when those laws cannot be deduced from those principles’\textsuperscript{12}.

‘Aquinas formulates one of the fundamental theoretical principles of his account of the content of natural law: ‘all those things to which man has a natural inclination, one’s reason naturally understands as good (and thus as “to be pursued”) and their contraries as bad (and as “to be avoided“)’\textsuperscript{13}. In this series, some names like Aquinas, Stammler, Radbruch, Finnis, etc. are important. The philosophy of natural rights is related to the human rights that makes the importance of human rights as universal phenomenon. The next section discusses about human rights relation with sexual minorities.

4.3. Human Rights and Sexual Minorities

The universality of human rights proclaims that every human being is entitled to his or her basic human rights assigned with the birth. The starting of first generation human rights is now entering into the fourth generation human rights. The human rights history is attached with the Magna Carta (1215) but the term human rights is first included in United Nations Charter, 1945 followed by Universal Declaration of Human Rights, 1948. ‘Human Rights are expressions of basic freedoms, which require access to and availability of basic necessities for all people to

\textsuperscript{11} John Finnis, Natural Law and Natural Rights 18 (Clarendon Law Series, Oxford University Press, New York, 2000).
\textsuperscript{12} Id. at 23-24.
\textsuperscript{13} Id. at 403.
be reached through processes that are built on the notion of equality, non-discrimination, participation and empowerment\textsuperscript{14}.

In 1948, future US vice-president Hubert Humphrey famously said, on the topic of segregation, that it was time for America “to get out of the shadow of States’ rights and to walk forthrightly into the bright sunshine of human rights”\textsuperscript{15}. “The human rights codified in the UDHR, 1948 include dignity of every individual; right to life, liberty and security of person; equality before the law and equal protection of the laws; right not to be discriminated against on the ground of race, colour, sex, language, religion, political opinion, social origin, property, birth or other status; equal rights of men and women as to marriage, during marriage and its dissolution; right to privacy; freedom of movement and residence in any part of the state; right to travel abroad; right to own property and hold it; right to freedom of thought, conscience and religion; right to freedom of speech and expression; right to take part in the government of the country directly or through freely chosen representatives; right to social security and realization of economic, social and cultural rights indispensable for dignity and free development of one’s personality; right to work, to just and humane conditions or work; right to rest and leisure; right to form associations or unions; right to reasonable standard of living and public assistance in case of undeserved want; right to education etc. In India most of these rights have been incorporated either in Part III of the Constitution as ‘Fundamental Rights’ which are enforceable by the Supreme Court and the High Court or in Part IV as ‘Directive Principles of State Policy’ which are not enforceable by any court but nevertheless fundamental in the governance of the country’\textsuperscript{16}.

The Article 2(d) of The Protection of Human Rights Act, 1993 states that: “Human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

\textsuperscript{15} Jessica Thompson, ‘Equal Rights for Some’, \textit{The Times of India}, New Delhi, Thursday, November 20, 2008.
‘The perceived conflict between minority and majority rights is often used to obscure the ways in which social justice is unevenly distributed globally. While there are many points of disagreement between western and majority world concept of human rights and dignity, the polarisation of individual and majority rights clouds the real issues. The rights of women and children the majority of world population do not infringe on the rights of indigenous people, gay, lesbian, bisexual, and transgender people, disabled people, refugees and immigrants-all considered minorities. When any of these people’s rights are violated or abused, the resolution to such injustice must be guided by the basic principle that all human beings are equal in their diversity’\textsuperscript{17}.

‘On Human Rights Day (10 December, 2014), homosexual activists converged on UN headquarters to make the case that “LGBT Rights are human rights”\textsuperscript{18}, But only a few countries within the United Nations agree. Under-Secretary General Jan Eliasson called the promotion of LGBT an “Unfinished human rights revolution”. He lamented the lack of international progress, but said gains had nevertheless been “spectacular”. Panellists called for redefining family in light of the persistence of UN member states not to recognise equivalence between same-sex couples and the union of a man and a woman. The event held was titled “Love is a Family Value”-a word plays mocking those who preserve the definition of the family as the result of the union of a man and a woman from the UDHR. “Families are not just biological families”, added Theresa Sparks, a trailblazing transsexual activist from San Francisco. He argued that ‘work families’, ‘activity families’, ‘chosen families’, and ‘substitute families’, is all kind of family. Several panellists spoke of the need for ‘supportive families’ when individuals identity as sexual minority, and how lack of acceptance leads to homelessness and suicide\textsuperscript{18}.

‘Human Rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedom have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and


an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by all in political, social, economic and cultural life are concomitant for national development, social and family stability and growth-cultural, social and economic. All forms of discrimination on grounds of gender violate fundamental freedom and human rights Convention for Elimination of all Forms of Discrimination Against Women (for short, ‘CEDAW’) was ratified by the UNO on 18th December, 1979 and the Government of India had ratified as an active participant on 19th June, 1993 acceded to CEDAW and reiterated that discrimination against anyone violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country, it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of every skilled in the service of the respective countries and of humanity”\(^\text{19}\).

‘It has indeed been pointed out by Justice A. S. Anand that the Courts must act with due circumspection while reading into municipal law the provisions of international instruments\(^\text{20}\). ‘Human rights cannot be reduced to a numbers game in which majority interests override all others’ rights. For example, even if heterosexual people make up the majority of the world population, this fact should not have a negative impact on defending sexual diversity rights; equality does not mean sameness and must be defended in relation to diversity first and foremost\(^\text{21}\).

Although, the term ‘human rights’ is available for all but specific concern for sexual minorities has to be understood them as person. The next section is very much related


to the sexual minorities as the act of homosexuality was examined with a relation to criminal law as well as morality.

4.4. Wolfenden Committee Report and Sexual Minorities

At the end of 1954, in England and Wales, there were 1069 men in prison for homosexual acts, with a mean age of 37. Hence for investigating the sodomy act (homosexuality), a committee of 15 members (3 women and 12 men) was created under the chairmanship of John Wolfenden. ‘The 1950’s saw the first improvement to sexual minority rights in the UK that had a positive effect worldwide. The Wolfenden Report published on 4 September 1957 looked into homosexual offences and discussed whether or not these provisions should still be enforced. This was the first step forward since the repeal of the death penalty for “sodomy”. The report concluded that homosexual acts should no longer be a criminal offence and stated that this matter belonged in “the realm of private morality and immorality which is, in brief and crude terms, not the law’s business”\textsuperscript{22}. At the same time, there was significant social pressure to retain the criminal prohibition of homosexual acts. It was only after ten years of heated debate and many amendments that in 1967 homosexual acts were legalised in England and Wales\textsuperscript{23}. Scotland took 13 years to follow England and Wales and did not change its anti-gay laws until 1980, when the Criminal Justice (Scotland) Act 1980 was passed.

‘We clearly recognise that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good; nor does our commission extend to assessing the teaching of theology, sociology or psychology on these matters, though on many points we found their conclusions very relevant to our thinking’\textsuperscript{24}. What are the


\textsuperscript{24} Wolfenden Committee Report, Report of the Committee on Homosexual Offences and Prostitution, Presented to Parliament by the Secretary of State for the Home department and Secretary of State for Scotland by command of Her Majesty 9 (London, September 1957).
essential elements of a criminal offence?, were also observed by the Committee as: ‘In this field (homosexuality), its function, as we see it 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, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence”.25 ‘It is not in our view, the function of the law to intervene in the private lives of citizen or to seek to enforce any particular pattern of behaviour”26.

‘It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour”27. ‘It is important to make a clear distinction between “homosexual offences” and “homosexuality””.28. The question ‘what is felt or what is done by the persons?’ ‘This is the further problem how widely the description “homosexual” should be applied. According to the psycho-analytic school, a homosexual component (sometimes conscious, often not) exists in everybody; and if this correct homosexuality in this sense is universal.29. ‘According to the psycho-analytic school, all individuals pass through a homosexual phase. Be these is as it may, we would agree that a transient homosexual phase in development is very common and should usually cause neither surprise nor concern”30. ‘It is interesting that the late Dr. Kinsey, in his study entitled “The Sexual Behaviour of the Human Male”, formulated this homosexual-heterosexual continuum on a 7-point scale, with a rating of 6 for sexual arousal and activity with other males only, 3 for arousals and acts equally with either sex, 0 for exclusive heterosexuality, and intermediate ratings accordingly”.31. ‘Late Dr. Kinsey concluded that in the United States, 4% of adult white males are exclusively homosexual throughout their lives after the onset of adolescence. He also found evidence to suggest that 10% of the white male population are more or less exclusively homosexual for at least three years.

26 Id. at 10.
27 Ibid.
28 Ibid.
29 Wolfenden Committee Report, Report of the Committee on Homosexual Offences and Prostitution, Presented to Parliament by the Secretary of State for the Home department and Secretary of State for Scotland by command of Her Majesty 11 (London, September 1957).
30 Id. at 12.
31 Ibid.
between the age of 16 and 65, and that 37% of the total male population have at least some overt homosexual experience, to the point of orgasm, between adolescence and old age.\(^{32}\) On the basis of this, it is concluded that there is never a single cause for normal behaviour, abnormal behaviour or mental illness. The causes are always multiple. Out of many recommendations by Wolfenden Committee, some are as follows:

(1) ‘That homosexual behaviour between consenting adults in private be no longer a criminal offence; that questions relating to “consent” and “in private” be decided by the same criteria as apply in the case of heterosexual acts between adults; that no proceedings be taken in respect of any homosexual act (other than an indecent assault) committed in private by a person under twenty-one, except by the Director of Public Prosecutions or with the sanction of the Attorney-General; that except for some grave reason, proceedings be not instituted in respect of homosexual offences incidentally revealed in the course of investigating allegations of blackmail; that except for indecent assaults, the prosecution of any homosexual offence more than twelve months old be barred by statute; that a court by which a person under twenty-one is found guilty of a homosexual offence be required to obtain and consider a psychiatric report before passing sentence; that prisoners desirous of having oestrogen treatment be permitted to do so if the prison medical officer considers that this would be beneficial; that research be instituted into the aetiology of homosexuality and effects of various forms of treatment\(^{33}\).

Report distinguished between the condition of homosexuality which relates to the direction of sexual preference and the acts or behaviour resulting from this preference. It means distinction, behaviour which is overtly sexual and behaviour not overtly sexual. As a result, the Wolfenden Committee Report explores the new form of homosexuality i.e. “Latent Homosexuality” or “Repressed Homosexuality” and treated “homosexuality as arrested development”. After this report a new direction of debate and discussion was emerged. The next section has a focus on the jurisprudential aspect of interplay between law (particularly criminal law) and

\(^{32}\) Wolfenden Committee Report, Report of the Committee on Homosexual Offences and Prostitution, Presented to Parliament by the Secretary of State for the Home department and Secretary of State for Scotland by command of Her Majesty 17 (London, September 1957).

\(^{33}\) Id. at 115-116.
morality which was a result of John Wolfenden committee report. After the Wolfenden Committee Report, a debate between the interplay of law (particularly criminal law) and morality was started and many jurists and law professors took part in this debate. For understanding this, a jurisprudential aspect is included in the next section, under which very broad theories and concepts are given.

4.5. Jurisprudential Aspect and Sexual Minorities

The outcome of Wolfenden Committee started a debate on the issue of homosexuality in general and the interplay of law and morality in particular. This also includes the public and privacy rights. Due to this, various debates and encounters are evident in jurisprudence and need to refer here. For understanding the views of various jurists and other academicians, these debates and views relating to law, morality, and public v private rights are referred. Various natural and legal positivism jurists and philosophers took part in this. Although, the jurisprudential aspect includes the views and understanding of the then jurists but keeping in view the sexual minorities’ rights and debate on homosexuality in India make this aspect much more relevant at present too. Here are some discussions out of the study of jurisprudential theories.

4.5.1. Law, Morality and Harm Principles

‘Some philosophers have located the essence of ‘morality’ in the reduction of harm, others in the increase of well-being, some in social harmony, some in universalizability of practical judgment, some in the all-round flourishing of individual, others in the preservation of freedom and personal authenticity’34. ‘Kelson correctly points out that according to natural law theories there is no specific notion of legal validity. The only concept of validity is validity according to natural law, i.e. moral validity. Natural lawyers can only judge a law as morally valid that is just or morally invalid, i.e. wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid is the only sense of validity

they recognize. Natural law, or morality, can be understood, assented to and applied without knowledge of metaphysics or anthropology is very clear: no one can be morally upright without (a) an understanding of the first principles of practical reasoning and (b) the practical reasonableness (prudential) which brings those principles to bear, reasonably, on particular commitments, projects, actions, but one can indeed be morally upright without speculative (i.e. theoretical, ‘is’-knowledge) wisdom, without the practical knowledge of a craftsman (art), and without speculative knowledge (Scientia).

‘The ‘moral majority’ is a dangerous concept; it is misleading to assume that large masses of people are in agreement on every aspect of an issue, even if a consensus is perceived and represented by the media or by politicians. Furthermore, large masses of people can be misinformed and manipulated by various institutions and mass media. Liberal democracies conceive of freedom based on the individual, yet when it is convenient to exclude, marginalize, or scapegoat a certain group of people, the idea of consensus is invoked.

4.5.2. John Stuart Mills and Sexual Minorities

“If it were felt that the free development of individuality is one of the leading essentials of well-being; That it is not only a coordinate element with all that is designated by the terms civilization, instruction, education, culture, but itself a necessary part and condition of all these things; there would be no danger that liberty should be undervalued.”

‘On harm v. offence principle it is to be submitted here that the harm principle or the principle of liberty was propounded by John Stuart Mill. He observed that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose

38 Bibha Tripathi, ‘Examining the Much Hue and Cry over the Verdict on Homosexuality’, (2009) 10 SCC 93.
for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. John Stuart Mill in his On Liberty, delving into the nature and limits of the State power that can be legitimately exercised in a civilized society over an individual against his will, observed: ‘The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for demonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns him, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

‘The Wolfenden Committee Report on Homosexuality and Prostitution in September 1957 was pioneering as it set out to rectify the English criminal law by implementing rationalising views of John Stuart Mill who argued passionately for a private space, free from State interference, even if it involves activities that members of a society don’t like, as long as they don’t harm anyone-popularly known as the

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39 Bibha Tripathi, ‘Examining the Much Hue and Cry over the Verdict on Homosexuality’, (2009) 10 SCC 94.
‘Harm Test’. Wolfenden Committee report had famously argued that there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business. Indian courts have never had the opportunity to decide the question of State enforcement of private morality, where regulations allowing police surveillance and domiciliary visits were challenged, the judges crafted the right to privacy based on US Supreme Court precedents on personal liberty and autonomy but stopped short at the point that: if the enforcement of morality were held to be a compelling as well as permissible State interest, the characterisation of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

‘John Stuart Mill argued that the only part of an individual’s behaviour over which the society should have control is that which concerns others, but the individual must be sovereign over his own body and mind (Banerjee and Gandhi 2002). ‘In his essay on Liberty, Mill had written: The object of this essay is to assert one simple principle, as entitled to govern absolutely the dealings of society with the individual by way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that-the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own well either physical or moral, is not a sufficient warrant’.

4.5.3. Immanuel Kant and Sexual Minorities

‘We must not expect a good Constitution because those who make it are moral men. Rather it is because of a good Constitution that we may expect a society

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43 Section 61 of the Wolfenden Committee Report on Homosexuality and Prostitution, available in Alok Gupta, ‘Section 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
44 In Govind vs State of Madhya Pradesh (1975)2 SCC 148.
45 Alok Gupta, ‘Section 377 and the Dignity of Indian Homosexuals’, EPW 4818 (November 18, 2006).
composed of moral men-Immanuel Kant. Kant’s viewed that we should treat our fellow man as an end, and not merely as a means, is usually regarded as one of the noblest expressions of his philosophy.

4.5.4. Jeremy Bentham and Sexual Minorities

‘Bentham’s principle of legislation:

(1) Legislation is science.

(2) The right aim of legislation is the carrying out of the principle of utility; in other words, the proper end of every law is the promotion of the greatest happiness of the greatest numbers.

(3) Every person is in the main and as a general rule the best judge of his own happiness. Hence, legislation should aim at the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours. Jeremy Bentham proposed the Utilitarian penal theory according to which if the apparatus of punishment does more harm than good, then the matter should be left to private ethics (Postena 2002).

4.5.5. A. V. Dicey and Sexual Minorities

Professor A. V. Dicey, in his ‘Introduction to the Study of the Law of the Constitution’ attributed three meanings to the rule of law. In the first place, it meant absence of arbitrary power on the part of the Government. Next it meant absence that no man was above the law and every man, whatever be his rank or condition, was subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals, i.e. equality before the law or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts. The third meaning given by Dicey was that the Law of the Constitution was not the source but the consequence of rights of individuals, as defined and enforced by the courts. This

49 Id. at 25.
last meaning does not apply to written Constitutions incorporating the rights of individuals which are enforceable by Courts.\textsuperscript{52}

4.5.6. Rosco Pound and Sexual Minorities

‘In Rosco Pound’s famous phrase, “the limits of effective legal action”, one is not sure whether the subject will be the attempted legal suppression of homosexuality or the failure of the government to convert the power of the tides into electricity at Passamaquoddy.\textsuperscript{53} Pound’s theory of Law treats the function of law in society as social engineering. ‘As ideas of what law is for are so largely implicit in ideas of what law is, a brief survey of ideas of the nature of law—will be useful—Roscoe Pound’\textsuperscript{54}.

4.5.7. Devlin-Hart Debate

‘However, the Wolfenden Committee’s recommendation for decriminalization of consensual adult homosexuality in private and the principle and rationale (loaded with the idea that in a free society a person’s morals should be his own affairs and thereby intermixing of criminal law with moral law and of crime with sin) of the recommendation reignited debate between Lord Devlin, a believer in legal moralism, and Professor HLA Hart, a liberal theorist and defender of the Millian ‘harm to others’ principle. These distinguish jurists delved into, and debated on, the interplay of law and morality vis-à-vis homosexuality. Criminal law’s functional paradigm outlined by the Wolfenden Committee also furnished a logical premise for gays and their rights activists to plead for decriminalization of homosexuality on the ground that sexual autonomy and choice of homosexuals needs to be respected by law and society. Such a legislative move, they argue and believe, will ensure the exercise of their ‘sexual freedom’ without any fear of prosecution and the consequential indignation and stigma—legal as well as social’\textsuperscript{55}.


\textsuperscript{53} Lon L. Fuller, \textit{The Morality of Law} 170 (Universal Publishing Co. Pvt. Ltd., Delhi, 2009).

\textsuperscript{54} Id. at 95.

‘The Wolfenden Committee’s functional paradigm of criminal law as well as the rationale [premised on (im)morality of homosexual behaviour and on (im)morality of criminal law in interfering with sexual autonomy of players in homosexual acts in private] for its recommendation for decriminalization of consensual homosexual act in private triggered debate between Lord Patrick Devlin, a distinguished jurist, and Professor HLA Hart, a legal philosopher of repute, among others, on the operational orbits of criminal law and of moral law and their interplay in the sphere of sexual morality.

‘Lord Patrick Devlin, in the Second Maacabaean Lecture in Jurisprudence delivered to the British Academy on March 18, 1959 after the Wolfenden Committee Report came out in September 1957, assailed the Mill’s thesis and the Wolfenden Committee’s formulation of criminal law vis-à-vis private (im)morality. He observed—

What has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behaviour or moral principles which society requires to be observed and the breach of them is an offence not merely against the person who is injured but against society as a whole. If the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens (including the protection of youth from corruption), it would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, duelling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of moral principle. It must be remembered also that although

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there is none that is condoned by the law. I think it is clear that the criminal law as we know it is based upon moral principle.  

‘With convincing reasons and apt concrete examples, he argued that society, not an individual, has the right to pass judgments in the matters of morals and it has the right to use criminal law to enforce those moral judgment. Asserting that ‘society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist’, he argued that some kind of shared morality, i.e., some common agreement about what is right and what is wrong which operates as one of the ‘invisible’ bonds that keep the society intact, is necessary for the social existence. If social mores, i.e., ideas about the way its members should behave and govern their lives, are not enforced, the society, he argued, will ‘disintegrate’ from within. The loosening of moral bonds is often the first stage of disintegration. He, therefore, argued that criminal law has legitimate claim not only to speak about morality and immorality but is also concerned with immorality. The society has a right to preserve, through the weapon of criminal law and its sanctions, its moral code for the social existence. He argued that ‘the suppression of vice (like homosexuality) is as much the law’s business as the suppression of subversive activities’. If society hates homosexuality, it is justified in outlawing it. Society has a right to punish homosexuality if its members strongly disapprove it, even though it has no effects that can deemed ‘injurious’ to others. He asserted that in a number of crimes criminal law’s ‘function is simply to enforce a moral principle and nothing else’. He also failed to see any ‘theoretical limits’ on the State’s power ‘to legislate against immorality’.

‘Professor HLA Hart, however, in a series of lectures delivered at Standford University in 1962, addressed the question of the enforcement of morals through

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60 Ibid.
61 Id. at 13-14.
62 Id. at 14.
63 Ibid.
criminal law. In the course of his lectures, he disapproved the Lord Devlin’s thesis that ‘enforcement of morals’ through criminal law is necessary for the ‘preservation of society’ and the society has ‘right’ to do so. He argued that it is indeed absurd to believe that everything that society views profoundly immoral and disgusting threatens the social existence. It depends upon the ‘nature’ and characteristic of the ‘society’ and of the ‘moral principles’ it wants to ‘preserve’.

Supporting the Wolfenden Committee’s stand, he argued that the Lord Devlin’s assertion that immorality jeopardizes or weakens society, in the absence of empirical evidence, is a mere a priori assumption. Lord Devlin, Prof HLA Hart argued, has failed to demonstrate, with empiricism, that deviation from accepted sexual morals, even by adults in private, is something that threatens the existence of society. ‘It is of course clear (and one of the oldest insights of political theory)’, he observed, ‘that society could not exist without a morality which mirrored and supplemented the law’s proscription of conduct injurious to other. But there is again no evidence to support and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society’. It is indeed absurd, he emphasized, to enforce any deviation from society’s shared morality merely on the apprehension that such a deviation threatens the social existence. Prof. HLA Hart, with assertion equal that of Lord Devlin, claimed that criminal law has nothing to do with morals and it, in fact, has to hands-off when it comes to the enforcement of (im)moral principles. He asserted that ‘no one should think even when popular morality is supported by an overwhelming majority or marked by widespread intolerance, indignation, and disgust

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65 The questions he formulated and addressed to were: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally punishable to enforce morality as such?. And ought immorality as such to be a crime?, available in K I Vibhute, ‘Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality’, 51 JILI 14 (January-March 2009).

66 In this context he argued: ‘if a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the ‘disintegration’ of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it’. See, ‘Lecture I: The Legal Enforcement of Morality’. Available in K I Vibhute, ‘Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality’, 51 JILI 14 (January-March 2009).

that loyalty to democratic principles require him to admit that its imprison on minority is justified.\(^{68}\)

‘The Devlin-Hart debate over the legal enforcement of morality, which emerged into familiar arguments-the legal moralism and the harm-to-others’ principle\(^{69}\), is not merely of academic interest. It indeed leads to two conflicting paradigms and justifications for criminalization of homosexuality, including homosexual act between consenting adults in private. The first theoretical paradigm allows and justifies legislative interference against homosexuality the moment it is perceived as ‘immoral’. No other justification, except immorality per se, for legislative interference in the so-called ‘sexual autonomy’ is necessary. While, the latter approach does not allow legislature to legislate against homosexuality merely on the ground that is ‘immoral’ or society condemns it. It can legislate against homosexuality, if it, in a convincing way, causes ‘harm to others’, is ‘injurious or offensive to others’, or leads to ‘exploitation or corruption of others’.\(^{70}\) However, it is difficult to say, with precision, as to whether the law against homosexuality articulated in section 377 of the Penal Code is premised on the legal moralism, advocated by Stephen J (and Lord Devlin), or the harm to others’ principle, propounded by John Stuart Mill (and Prof. HLA Hart).\(^{71}\)

‘A careful reading in a breath of Lord Devlin’s Enforcement of Morals and Professor HLA Hart’s Law, Liberty, and Morality, reveals two conflicting bases and

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69 The Devlin-Hart debate, in fact, replicated, in many ways, the earlier debate between John Stuart Mill (in On Liberty) and Lord James Fitzjames Stephen (in Liberty, Equality, Fraternity). There is great ‘similarity in the general tone and sometimes in the detail of the arguments’ advanced by Lord Devlin with that of Lord James Fitzjames Stephen. [See, HLA Hart, Law, Liberty, and Morality, Lord Devlin conceded that there was ‘great similarity’ between Lord James Fitzjames Stephen’s view and his on the principles that should affect the use of the criminal law for the enforcement of morals. Nevertheless, he pleaded that at the time of he delivered the Maccabaean lecture he ‘did not then know that the same ground had already been covered’ by Lord James Fitzjames Stephen. Lord Devlin, returning Hart’s observation almost in same coins, also noted the similarity between HLA Hart, John Stuart Mill and the Wolfenden Committee. Referring to the Wolfenden Committee Report, Lord Devlin observed that ‘the use of the [harm] principle observed by HLA Hart (in his Law, Liberty, and Morality) is “strikingly similar” to Mill’s doctrine (in On Liberty), available in K I Vibhute, ‘Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality’, 51 JILI 15 (January-March 2009).


71 Ibid.
rationale for legislative intervention and the enforcement through criminal law of immoral acts or sins. Lord Devlin asserts that merely public condemnation and disapproval of an act is enough for criminal law to legislate against it. While, Professor HLA Hart pleads that legislative intervention based on mere social disapproval of an act is unjustified, unless it is shown that the socially disapproved act is ‘injurious to others’. To put it in the present context, if a society hates and disapproves homosexuality, it is unjustified in outlawing it and forcing homosexuals to choose between the miseries of frustration and prosecution by the State. Such a legislative intervention is justified in the name of preservation of society. Society, and not the homosexuals, has the right to decide what is ‘right’ and ‘wrong’ for them even though the society is not injured by the vice. Professor Hart, however, feels that such a legislative measure amounts to an unjustified interference with the homosexuals’ private lives, as the law has ‘no business’ to enter into the ‘realm of private morality’. This assertion, in ultimate analysis, leads to a proposition that adults have an unbridled autonomy to opt for, and to get indulged into, sexual activity-natural or unnatural-of their choice and society has to respect their ‘choice’ and ‘autonomy’.

4.5.8. Hart-Fullar Debate

‘A discussion, which began in the late 1950s between Hart and Fuller, highlights some of the fundamental differences between the legal positivists and advocates of natural law. Essays by Hart and Fuller, which appeared in the Harvard Law Review 1958, set out their reactions to certain events in Germany following the end of the Second World War, which appeared to revive the question of the links between law and morality. Fuller took the general view that law and morality must not be separated and that a law which is totally divorced from morality ceases to be ‘law’. Hart insisted that the law is the law even though it may not satisfy the demands of morality. This law versus morality debate is best evidenced from the argument that ensued between two great jurists or our time: HLA Hart and Patrick Devlin (Samuelson 1998). Devlin (better known in legal circles as Lord Devlin), one of the foremost judges and jurists of England, attacked the Wolfendon Committee report

published in England in 1957 which stated that homosexuality should be
decriminalised. Devlin believed that a society is kept together by the bonds of a
common morality and held homosexuality to be immoral. On the basis of this
assumption, he argued that a society has the right to pass judgment on all matters of
morality as also the right to use the law to enforce those judgments. He believed that
society disintegrated when no common morality was observed and therefore
maintained that society is justified in taking the same steps to preserve its moral code
as it does to preserve its government and other essential institutions. Immorality for
the purposes of the law was what every “right headed person” presumed to consider
immoral. Devlin thus concluded that society may suppress vice just as it suppress
subversive activities: crime and sin cannot be separated.

In response to these arguments HLA Hart, Professor of jurisprudence at
Oxford University (Perhaps the most influential legal philosopher of our times),
asserted that it was at best a crude and uncritical expedient on Devlin’s part to turn
popular morality into criminal law. He argued the use of the criminal law to enforce
popular morality in particular sexual morality, was inappropriate. Hart attacked a
society whose morality is based on retrograde principles and he rejected Devlin’s
hypothesis that a universally shared morality is a prerequisite for a society’s
existence. Such an assumption would warrant the extravagant claim that all of a
society’s morality was “a single seamless web, so that those who deviate from any
part are likely or perhaps bound to deviate from the whole.” This would then warrant
the absurd conclusion that legal enforcement is a compulsory requirement for moral
preservation. Hart thus concluded that when the values of liberty, safety, and
protection are secured, they permitted a society to accommodate individual
divergences from a dominant morality and in fact enabled it to profit from such
divergences by making suitable adjustment for change.74

‘Hart has argued that the “right to undisturbed performance of private
consenting acts is more important than the immorality of the act”75. By taking the two
moralties i.e. morality of aspiration and morality of duty, Lon. L. Fuller argued that

75 HLA Hart, Law, Liberty and Morality (Oxford University Press, 1963) available in Alok Gupta,
‘Section 377 and the Dignity of Indian Homosexuals’, EPW 4819 (November 18, 2006).
‘we cannot know the bad without knowing the perfectly good, or, in other words, that moral duties cannot be rationally discerned without first embracing a comprehensive morality of aspiration’\(^{76}\). He further argued that ‘the moral injunction “thou shalt not kill” implies no picture of the perfect life. It rests on the prosaic truth that if men kill one another off no conceivable morality of aspiration can be realised’\(^{77}\). ‘It has been suggested that the morality relates to man’s life in society, while the morality of aspiration is a matter between a man and himself or between him and his God’\(^{78}\).

‘Our common sense tells us that we can apply more objective standards to departures from satisfactory performance than we can to performances reaching toward perfection. And it is on this common sense view that we build our institutions and practices’\(^{79}\). Hart proposes to call this (law) “the rule of recognition”\(^{80}\). According to HLA Hart, the concept of law is ‘imposing a duty or conferring a power’.

Lon L. Fuller demonstrated that ‘an acceptance of this morality is a necessary, though not a sufficient condition for the realisation of justice, that this morality is itself violated when an attempt is made to express blind hatreds through legal rules, and that, finally, the specific morality or law articulates and holds before us a view of man’s nature that is indispensable to law and morality alike’\(^{81}\). ‘Hart is attempting to convey is that I (Lon L. Fuller) make too much of purpose and that I would do well to play it down in my thinking. In Fuller’s view Hart makes too little of purpose; he suffers from the positivist delusion that some gain-unstated and unanalysed- will be realised if only we treat, insofar as we can, purposive arrangements as though they served no purpose’\(^{82}\). ‘But instead we coupled “value” with the term “judgment”, an expression which suggests not a striving toward perfection, but a conclusion about obligations. Thus a subjectivism appropriate to the higher reaches of human aspiration


\(^{77}\) Ibid.

\(^{78}\) The valuable analysis of W.D. Lamont seems to me to be marred by his assumption that the morality of duty has to do with social relations, while the morality of value is concerned with individual preference ratings. See the value Judgment (1955) available in Lon L. Fuller, *The Morality of Law* 12 (Universal Law Publishing Co. Pvt. Ltd., Delhi, Revised Edition., 2009).


\(^{80}\) Id. at 137.

\(^{81}\) Id. at 168.

\(^{82}\) Id. at 190.
spreads itself through the whole language of moral discourse and we are easily led to the absurd conclusion that obligations obviously essential for social living rest on some essentially ineffable preference.\footnote{Lon L. Fuller, \textit{The Morality of Law} 13 (Universal Law Publishing Co. Pvt. Ltd., Delhi, Revised Edition., 2009).}

In \textit{The Morality of Law}, Socrates identified virtue with knowledge. He assumed that if men truly understood the good they would desire it and seek to attain it. This view has often been considered as being either puzzling or absurd depending on the modesty of the critic.\footnote{Ibid.} ‘His argument would not have been clarified, but confused, if he had said, “first, I shall demonstrate what the good life is like so that you may understand it and discern what kind of man you would become if you led it. Then I shall advance reasons why you ought to lead such a life”\footnote{Id. at 14-15.}.

‘It becomes essential to consider certain distinctive qualities of the inner morality of law. In what may be called the basis morality of social life, duties that run toward other persons generally (as contrasted with those running toward specific individuals) normally require only forbearances, or as we say, are negative in nature: Do not kill, do not injure, do not deceive, do not defame, and the like.\footnote{Id. at 42.} Lon L. Fuller has ‘called the internal morality of the law to the ages-old tradition of natural law’\footnote{Id. at 96.}. In spite of Hart’s nod in the direction of ‘the core of good sense’ in the natural law, the parties to the debate remain widely separated. For Hart it is the confusion of ‘law’ with ‘morality’ which blurs the fundamental issue: law remains law until repealed or otherwise replaced. Fuller sees this as an inevitable, and regrettable, result of positivist doctrine; for him man-made law which lacks an inner morality has no claim to be recognised as ‘true law’. It has been suggested that the inconclusive nature of the debate followed inevitably from a failure to define terms such as ‘law’, ‘morality’, ‘lawlessness’ however the ‘theory of dynamic positivism’ has tried to end this debate.
4.5.9. View of Ronald Dworkin

‘In taking rights seriously, Ronald Dworkin makes a principles argument in favour of decriminalisation of homosexuality. He puts forth a distinction between personal and external preferences-personal preferences being for a person’s own enjoyment of some goods or opportunities, while external preferences being for the assignment of goods or opportunities to other.\(^88\) Dworkin suggested that we should abandon the Hart-Fullar debate and concentrate of liberties. If behaviour is a basic liberty (like sex), this should never be taken away, even if someone has a different way of ‘doing’ sex e.g. R vs Brown\(^89\) (The Spanner Case) general liberties could be restricted if they cause harm. But, it is not clear how you tell the difference between a basic and a general liberty?

4.5.10. John Rawls and Sexual Minorities

‘John Rawls, in A Theory of Justice, while elaborating on the liberal notions of justice, equality and fair opportunity has proposed two principles of justice. His first principle endows upon all persons certain inalienable ‘basic liberties’ that are to be compatible with the similar liberties of others. Through his second principle, he recognises the existence of inequalities and allows them as long as they operate to everyone’s advantage.\(^90\) ‘Rawls, through his first principle, propounds is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for another”.\(^91\) ‘According to his second principle “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to

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\(^88\) Dworkin says, “I wish now to propose the following general theory of right. The concept of an individual political right-is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedent, likely to have been reached by virtue of the external components of the preferences democracy reveals”. See generally John Hart Ely, Professor Dworkin’s External Personal Preference Distinction, (1983) Duke L. J. 959, available in Rohit Sharma, ‘The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment’, NUJSLR 452 (July-September 2009).

\(^89\) R v Brown (1994) 1 AC 212.


everyone’s advantage and (b) attached to positions and offices open to all”.92 ‘Rawls (1993, 1999) makes this distinction clear and cogent by demonstrating that the rational (efficient means to reach a desired result) may not always be reasonable (justifying both the means and the result); that what is desired does not make it rational nor may it be construed as reasonable. A classification that renders certain number of people right less may count as “rational” but for that reason alone can never be called reasonable or even constitutional.’93 In his paper he further discussed about ‘recognises as “true that the theory the sexual intercourse is only meant for the purpose of conception is an out-dated theory”’.94

4.5.11. Amartya Sen and Sexual Minorities

‘Amartya Sen also asked for an abolition of the “colonial era monstrosity” that ran contrary to “the enhancement of human freedom” and India’s commitment to “democracy and human rights”. Like all laws, Section 377 was used both inside and outside the courtroom’95. Amartya Sen observed ‘that the harm done by such an “unjust law” can, therefore, “be far larger than would be indicated by cases of actual prosecution”.’96 Amartya Sen wrote: “It is surprising that Independent India has not yet been able to rescind the colonial era monstrosity in shape of Section 377, dating from 1861…Today, 145 years (presently 155 years) later, we surely have urgent reason to abolish in India, with our commitment to democracy and human rights, the un-freedom of arbitrary and unjust criminalisation.”97

4.5.12. Prof. Upendra Baxi and Sexual Minorities

In an article entitled “Just governance” Prof. Upendra Baxi, emeritus Professor of Law at the university of Warwick and Delhi University, viewed that ‘in the Supreme Court’s curative petition against section 377 of the IPC, the two-judge bench’s decision to leave the question of sexual minority rights to Parliament should

93 Upendra Baxi, ‘Naz 2: A critique’, XLIX EPW 13 (February 8, 2014).
94 Ibid.
95 Sanjay Kumar Singh, ‘Decriminalization of Section 377 of the IPC: A Silver Lining to the Homosexuality in India’, CriLJ (Journal Section) 240 (2010).
96 Ibid.
be reversed. Apart from strong independent arguments supporting this change, a reversal is now further mandated by the three judge bench decision recognising the Constitutional rights of the third gender. Prof. Baxi emphasised that 'Judicial independence should be regarded as an aspect of good governance'.

“In sum, Naz 2 (Case of Suresh Kumar Khosal v. Naz foundation) is a poorly reasoned decision; it is self-contradictory; and it has many a fault line, the most perverse being its conception of sexuality. No matter how read, its conception of Constitutionality and adjudicatory leadership is grossly inconsistent with the very ones entertained by the court itself, and it is incoherent in its operative result. One hopes that the apex court will reverse itself on the curative petition and if it needs further exploration, convene a larger bench, possibly of the size of Kesavananda, if not a full court. At stake for the court is nothing less than its institutional integrity; at stake for millions that constitute sexual minorities is nothing less than their fundamental human rights to live with dignity”.

He further suggested ‘the very same “liberal and expansive” view is called for in adjudging the claims of sexual minorities. Judicial disgust or disagreement at particular acts or conduct is not the way in which Constitutional judgments should ever be made (as taken in SP Mittal Case at para 2).”

4.5.13. Nussbam and Sexual Minorities

In deciding the Naz Foundation case, Delhi High Court referred the relevance of jurisprudential aspect in respect of homosexuality debate. This was specifically looked by some jurists. ‘The judgment has certainly raised some important points of jurisprudence viz. Constitutional morality v. public or popular morality, harm v. offence principle, rights of sexual minority persons and sexual abuse of children’. The next section discusses about the international human rights instruments available to all persons and produces a relationship with sexual minorities.

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99 Ibid.
100 Upendra Baxi, ‘Naz 2: A critique’, XLIX EPW 14 (February 8, 2014).
101 Ibid.
102 Bibha Tripathi, ‘Examining the Much Hue and Cry over the Verdict on Homosexuality’, (2009) 10 SCC 94.
4.6. International Human Rights Instruments and Sexual Minorities

The international human rights instruments are covered under international law and gaining day to day recognition in terms of fulfilling the rights of individuals, groups, communities and other sections of societies. States have the obligations to provide protection and promotion of such rights by making appropriate laws under the shadow of international law. The international human rights instruments pave the way to fulfil such obligations. ‘Human development and democratic governance are closely linked to human rights contained in international legal standards. Taking a human rights-based approach means not only that planning and policy-making should be informed by human rights at the ‘front end’ of the governance process (for example, budget making, program development and decentralisation initiatives), but also that rights should be enforceable if violated. Human rights, whatever their source, should be linked to remedies, and in many jurisdictions, such rights are enforceable. Across all these initiatives, Millennium Development Goals (MDGs) and other indicators linked to human, well-being form a road map for promoting ESC rights’103.

Article 3 of the African Charter, Article 24 of the American Convention, etc. have equal protection in International law. ‘Although, such instruments listed above do not include “Sexual Orientation” among the enumerated categories, these categories are clearly intended to be illustrative and not exhaustive. The use of the phrase “or other status” means that the list of categories is open-ended”104. Similarly, ‘Just as individuals are protected from discrimination on grounds of sexual orientation, sexual activity between consenting adults is protected from interference by the right to privacy under Article 12 of the UDHR, Article 17(1) of the ICCPR, Article 8 of European Convention, Article 21 of the Arab Charter, Article 11(2) of the American Convention on Human Rights, etc.’105.

‘The argument that sexual orientation and private sexual activity are not protected by international human rights law is based on a series of false assumptions.

103 UN Development Programme office of the High Commissioner for Human Rights (OHCHR) Toolkit, for collaboration with National Human Rights Institutions (NHRI), United Nations Human Rights, 98 (December 2010).
105 Id. at 9.
The argument that sexual orientation is not part of “universally recognized” human rights ignores the first principle of human rights law-which is that human rights are universal. Human Rights apply to everyone simply because they are born human. This means that all human beings regardless of whether they are lesbian, gay, bisexual or transgender or intersex, are entitled to the full enjoyment of all human rights. As the Vienna Declaration and Programme of Action, adopted unanimously by all States at the World Conference on Human Rights in 1993, states, “Human rights and fundamental freedoms are birth right of all human beings; their protection and promotion is the first responsibility of Governments.” This principle of the universality of all human rights is enshrined in the Universal Declaration of Human Rights and reflected in all other universal and regional human rights instruments. Some illustrations are such as ‘Article 1 of the Universal Declaration of Human Rights (UDHR); Preamble of the International Covenant on Civil and Political Rights (ICCPR); Article 1 of the European Convention for the protection of Human Rights and Fundamental Freedoms; Article 1(4) of the African Charter on Human and Peoples’ Rights’, etc.

‘However before 1994, international law did not expressly protect any sexual minority.’ The foundational principle of human rights is that all human beings are equal in rights, dignity, and worth. Former equality has historically been a central goal of human rights struggles. From anti-slavery to civil rights, from women’s suffrage to undocumented migrants’ movements, these struggles have reconfigured our socially constituted understanding of who is fully human and therefore possesses

109 Ibid.
all of the dignity and legal rights accorded to those already recognized as full human beings\textsuperscript{112}. The categorical understanding of these instruments is provided.

4.6.1. **Universal Declaration of Human Rights (UDHR) Provisions and Sexual Minorities**

‘The UDHR, 1948 (adopted by U.N. General Assembly Resolution 217-A (III) of 10\textsuperscript{th} December, 1948) was the first serious attempt to spell out individual human rights and all subsequent instruments were drafted in the spirit of this declaration and provisions regarding enforcement of individual and collective human rights were incorporated in such instruments. The two other Covenants, namely, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (1966) are the other two most important human rights instruments. These instruments also contain provisions regarding enforcement of human rights enshrined therein’\textsuperscript{113}.

In understanding the importance of human rights, the role of provisions discussed in UDHR, 1948\textsuperscript{114} are very much significant. Every article of UDHR gives


\textsuperscript{114} Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3: Everyone has the right to life, liberty and security of person.

Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5: No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
Article 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence;
No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 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 13: Everyone has the right to freedom of movement and residence within the borders of each State;
Everyone has the right to leave any country, including his own, and to return to his country.

Article 14: Everyone has the right to seek and to enjoy in other countries asylum from persecution.
This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15: Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution;
Marriage shall be entered into only with free and full consent of the intending spouses;
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17: Everyone has the right to own property alone as well as in association with others.
No one shall be arbitrarily deprived of his property.

Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20: Everyone has the right to freedom of peaceful assembly and association;
No one may be compelled to belong to an association.

Article 21: Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
Everyone has the right to equal access to public service in his country;
The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23: Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment;
Everyone, without any discrimination, has the right to equal pay for equal work;
Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25: Everyone has the right to a 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, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control;

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light on human rights of individual as well as group. While talking about the human rights mentioned in UDHR provisions, the case of sexual minority persons' human rights also moves parallel to other persons. The language of such provisions makes it clear that there is no restriction or denial of rights to all sexual minority persons on any of the ground. The scope of application of human rights provisions in UDHR is universal. Hence, it is clear to understand that the demand of sexual minority persons for their rights is already recognised by UDHR provisions.

‘The strenuous debates over same-sex marriage, largely in developed countries, point to yet another minority rights issue in which the principles of equality in diversity are being fought over. Belgium, The Netherlands, South Africa, and parts of Canada have all extended marriage to include same-sex couples, either through legislation or the courts. Under the UDHR, all men and women have the right to marry and found a family. While the UDHR has tended to be interpreted in a heterosexist fashion, there is nothing on the face of it that precludes the support of same-sex marriage.\footnote{Daniel Fischlin and Martha Nandorfy, \textit{The Concise Guide to Global Human Rights} 103 (Oxford University Press, New York, 2007).}

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Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Article 26**: Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit;

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

Parents have a prior right to choose the kind of education that shall be given to their children.

**Article 27**: Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits;

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

**Article 28**: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

**Article 29**: Everyone has duties to the community in which alone the free and full development of his personality is possible;

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society;

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
4.6.2. International Covenant on Civil and Political Rights (ICCPR) and Sexual Minorities

The preamble of ICCPR says that: ‘The States Parties to the present Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Recognising that these rights derive from the inherent dignity of the human person, recognising that, in accordance with the UDHR, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved of conditions are created whereby everyone may enjoy this civil and political rights, as well as his economic, social and cultural rights. Considering the obligation of States under the Charter of United Nations to promote universal respect for and observance of, human rights and freedoms. Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant’\textsuperscript{116}. Article 1, 2, 3, 6, 7, 9, 10, 12, 14, 16, 17, 19, 21, 22, 23(2)(3), 25 (a)(b)(c), 26 of ICCPR are generally important.

‘Human Rights Committee (Sixty-Sixth Session), In para no. 16, it was discussed “The Committee is concerned about restrictions on the right to privacy, in particular in regard to homosexual relations between consenting adults, which are penalized by article 200, paragraph 1, of the penal code (Art. 17)”’. The State party should take timely action to ensure that this provision is amended so as to confirm with the Covenant\textsuperscript{117}. ‘The Committee notes with concern that a sexual relationship between consenting adult partners of the same-sex is punishable under law. The Committee recommends that the State Party amend the law in this subject’\textsuperscript{118}. ‘Non-


\textsuperscript{117} CCPR/C/79/Add. 11, 1, 28 July 1999, Human Rights Committee-Sixty-Sixth Session-

discrimination is an explicit right under the International Covenant on Civil and Political Rights (ICCPR), however, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), non-discrimination is not a right but is a cross-cutting principle. Therefore, in most United Nations (UN) discourse, it is accepted as a “cross-cutting norm” which includes both dimensions.\(^{119}\)

### 4.6.3. International Covenant on Economic, Social and Cultural Rights (ICESCR) and Sexual Minorities

The preamble of ICESCR says that: ‘The States Parties to the present Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Recognising that these rights derive from the inherent dignity of the human person, recognising that, in accordance with the UDHR, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved of conditions are created whereby everyone may enjoy this civil and political rights, as well as his economic, social and cultural rights. Considering the obligation of States under the Charter of United Nations to promote universal respect for and observance of, human rights and freedoms. Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant’.\(^{120}\) Article 1, 2, 3, 4, 6, 9, 10, 11, 12, 13, 15, 18, 23 of ICESCR are generally important. ‘The ICCPR and ICESCR were adopted by the General Assembly of the United Nations in Resolution, 2200 (xxi) of the December 16, 1966’.\(^{121}\)

Collectively, the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights, 1966 and its three protocols, International Covenant on Economic, Social and Cultural Rights, 1966 and its two protocols are

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121 Id. at 1026.
known as International Bill of Rights and now converting as International Bill of Human Rights.

4.7. United Nations and Sexual Minorities

Charter of the United Nations, 1945, preamble says-‘We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. To practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples. Have resolved to combine our efforts to accomplish these aims-accordingly, our respective governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present charter of the United Nations and do hereby establish an international organisation to be known as the United Nations’.

‘In examining developments made in considering homosexuality as human rights the Human Rights Conference at the 59th Session of the United Nations Commission for Human Rights (UNCHR) in April 2003 is a good starting point. At this Conference, Brazil introduced a resolution for consideration that called upon both the United Nations and State governments to incorporate protection from persecution

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and discrimination on the basis of sexual orientation into their human rights practices and procedures.123

‘Earlier, the relationship between human rights and protection from persecution and discrimination on the basis of sexual orientation had been discussed at the United Nations Higher Commissioner for Refugees. The Commission has considered discrimination on the basis of sexual orientation as human right violation and extra-judiciary, arbitrary, and summary execution based on sexual orientation as persecution.124 According to Satish L. Patel, ‘United Nations has directed the notions world-wide to adopt rights-based approaches for development and governance’125. ‘The United Nations has an impressive record of drafting and adopting various human rights instruments. All these instruments which are directly or indirectly connected with human rights and touch almost every aspect of human activity contain provisions for enforcement of rights contained in these instruments’.126

‘Discussions of sexual minority rights at the United Nations have mainly centred on resolutions in General Assembly and the United Nations Human Rights Council regarding the topic. In the General Assembly, a proposed resolution supporting sexual minority rights originally submitted in its first form in 2008 by French/Dutch representatives, backed by the European Union, remains open for signature, with ninety-four countries having signed thus far. In the United Nations Human Rights Council another resolution supporting sexual minority rights, proposed by South Africa, was passed in 2011. Since its founding in 1945, the United Nations had not discussed sexual minority rights (regarding equality regardless of sexual orientation or gender identity) until December 2008, when a Dutch/French initiated; European Union-backed statement was presented to the United Nations General Assembly. The statement, originally intended to be adopted as resolution, prompted

declaration included a condemnation of violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity that undermine personal integrity and dignity.\textsuperscript{127}

“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”\textsuperscript{128}

‘In 1960s, the United Nations drew up two major Covenants which have mechanisms of enforcement internationally. The most relevant Covenant for sexual orientation is the International Covenant on Civil and Political Rights (ICCPR), which came into force in 1976 and is enforced by the Human Rights Committee (HRC). The HRC’s main role is to monitor human rights around the world, and to make sure that the rights enshrined in the Covenant are respected, protected and fulfilled by the State parties. In 1994, ICCPR was held by HRC to encompass sexuality.’\textsuperscript{129} The other major Covenant, ICESCR.\textsuperscript{130}

‘Protecting sexual minority people from violence and discrimination do not require the creation of a new set of sexual minority-specific rights, nor does it require the establishment of new international human rights standards. For all the heat and

\textsuperscript{127} Available at: https://en.wikipedia.org/wiki/LGBT_rights_at_the_United_Nations.
complexity of the political debate about sexual minority equality at the United Nations, from a legal perspective the issue is straightforward. The obligations that States have to protect sexual minority persons from violations of their human rights are already well established and are binding on all United Nations Member States.\(^{131}\)

‘In 2011, the United Nations Human Rights Council for the first time officially addressed the issue of homosexuality and asked the UN Human Rights Commissioner to prepare a report on human rights violations suffered by persons of different sexual orientation or gender identity. The report, published in November 2011, stated that homosexual conduct should be decriminalised in every country, and called on all States to promote equality and work to eradicate homophobia.\(^{132}\)

‘On 15 December 2011- The first ever United Nations report on the human rights of sexual minority people details how around the world people are killed or endure hate-motivated violence, torture, detention, criminalisation and discrimination in jobs, health care and education because of their real or perceived sexual orientation or gender identity.\(^{133}\) Further, ‘The report, released by the UN office for the High Commissioner for Human Rights (OHCHR) in Geneva, outlines “a pattern of human rights violations that demands a response”, and says governments have too often overlooked violence and discrimination based on sexual orientation and gender identity.\(^{134}\) ‘Homophobic and transphobic violence has been recorded in every region of the world, the report finds, and ranges from murder, kidnappings, assaults and rapes to psychological threats and arbitrary deprivations of liberty.\(^{135}\) ‘Violent incidents or acts of discrimination frequently go unreported because victims do not trust police, are afraid of reprisals or are unwilling to identify themselves as sexual minority.\(^{136}\)


\(^{133}\) Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41-english.pdf.

\(^{134}\) Ibid.

\(^{135}\) Ibid.

\(^{136}\) Ibid.
‘In the report, the then UN High Commissioner for Human Rights, calls on countries to repeal laws that criminalise homosexuality, abolish the death penalty for offences involving consensual sexual relations, harmonise the age of consent for heterosexual and homosexual conduct, and enact comprehensive anti-discrimination laws. In 76 countries (presently 79 countries), it remains illegal to engage in same-sex conduct and in at least five countries-Iran, Mauritania, Saudi Arabia, Sudan and Yemen-the death penalty prevails’\textsuperscript{137}.

The chief of Office of High Commissioner for Human Rights’ global issues section, told UN radio that “one of the things we found is. If the law essentially reflects homophobic sentiment, then it legitimizes homophobia in society at large. If the State treats people as second class or second rate or worse, as criminals, then it’s inviting people to do the same thing”. It was stressed that all UN Member States have an obligation under international human rights law to decriminalise homosexuality, adding it was important to persuade rather than lecture States to change their laws\textsuperscript{138}.

‘The United Nations announced on 3 July, 2014 that it will now recognize all legal marriages by where they were performed, and not by the laws of the country where the married couple are citizens’\textsuperscript{139}. ‘A decision by the Indian Supreme Court to reinstate a ban on gay sex represents a “significant step backwards for India” and violates international law, United Nations human rights the then chief said, suggesting the case be reheard\textsuperscript{140}.

“Criminalising private, consensual same-sex sexual conduct violates the rights to privacy and to non-discrimination enshrined in the ICCPR, which India has ratified”, Pillay said in a statement issued in Geneva. Pillay, who previously served on the High Court of her native South Africa, said; “The Supreme Court of India has long and proud history of defending and expanding protection of human rights. This decision is a regrettable departure from the tradition”. She voiced hope that the Court

\textsuperscript{137} Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41-english.pdf.
\textsuperscript{138} Ibid.
\textsuperscript{140} Stephanie Nebehay and Mark Trevelyan, ‘India’s ruling congress party slams Supreme Court for banning gay sex’, UN High Commissioner for Human Rights Navi Pillay attends a news conference at the United Nations European headquarters in Geneva (December 2, 2013).
might exercise its review procedure, in effect agreeing to rehear the case before a larger panel of judges.\textsuperscript{141}

4.7.1. United Nation Human Rights Commission/Council and Sexual Minorities

`At the 61\textsuperscript{st} session of the UN Commission on Human Rights,\textsuperscript{142} for the first time, “sexual orientation” was included in the draft resolution on violence against Women. Echoing the debates that prevented the acceptance of the words “sexual rights” at Beijing exactly ten years earlier, however, the Commission removed “sexual orientation” from the final declaration on violence against women “in the face of concerns about whether inclusion might jeopardise consensus on the resolution”.\textsuperscript{143}

`In June 2011, just a few months before the Commonwealth Heads of Government Meeting, the UN Human Rights Council passed a resolution, proposed by South Africa, which instructed the UN Commissioner for Human Rights to prepare a report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity in all regions of the world.\textsuperscript{144}

`Over the past decade, many of the individual human rights experts appointed by the Commission on Human Rights to study particular themes or country situations have foregrounded sexuality as important human rights.\textsuperscript{145} Their analysis has served not

\textsuperscript{141} Stephanie Nebehay and Mark Trevelyan, ‘India’s ruling congress party slams Supreme Court for banning gay sex’, UN High Commissioner for Human Rights Navi Pillay attends a news conference at the United Nations European headquarters in Geneva (December 2, 2013).

\textsuperscript{142} On 15\textsuperscript{th} March 2006, the UN General Assembly adopted resolution A/RES/60/251 to establish the Human Rights Council in place of the Commission on Human Rights. The Commission on Human Rights concluded its 62\textsuperscript{nd} and final session on 27 March 2006. Available at: http://www.ohchr.org/eng/chr_index.htm.

\textsuperscript{143} ARC International 2005, ‘Out at the UN: Advancing Human Rights Based on Sexual Orientation and Gender Identity at the 61\textsuperscript{st} Session of the UN Commission on Human Rights’, Available at: http://www.arc-international.net/chreport.pdf.


\textsuperscript{145} In contrast to the treaty bodies, the CHR’s special procedures can scrutinize the human rights performance of countries regardless of the treaties they have ratified. There is far greater scope for analysis of patterns, causes and consequences of violations in their work, which often draws on academic scholarship or input from NGOs, and more leeway to determine areas of research or inquiry. Some have proactively sought contact with LGBT rights organizations, in Human Rights Committee, 

only to identify the specific forms, causes, and consequences of abuses based on sexual orientation and gender identity, but also to prompt new approaches to human rights as they apply to human sexuality.\(^{146}\)

‘Affirming that “Sexuality is a characteristic of all human beings and a fundamental aspect of an individual’s identity”, Paul Hunt, the Special Rapporteur on the Right to Health, has significantly advanced the thinking on the links between sexuality, health and rights. The Rapporteur posits a rights-based approach to sexual health that transcends the medicalizing and moralizing approaches of much social policy in areas of sexuality. Affirming that “Sexuality is a characteristic of all human beings and a fundamental aspect of an individual’s identity”, Paul Hunt concludes that “the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interferences”\(^{147}\). ‘The Human Rights Council adopted a resolution expressing “grave concern” at violence and discrimination against individuals based on their sexual orientation and gender identity\(^ {148}\). ‘In June 2011, the Human Rights Council adopted resolution 17/19-the first United Nations resolution on human rights, sexual orientation and gender identity\(^ {149}\).

4.7.2. United Nations Human Rights Committee and Sexual Minorities

There are at least six core human rights treaties, which have set up committees to perform the task of monitoring States Parties in compliance with their obligation, which are:


\(^{149}\) Ibid.
1. Human Rights Committee (HRC) by the International Covenant on Civil and Political Rights (ICCPR).


4. Committee Against Torture (CAT) by the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.


6. The Committee on the Racial Discrimination (CRD) by the Convention on the Elimination of all forms of Racial Discrimination.

Resolution 1503 (XLVIII) adopted by the Economic and Social Council in 1970 allows individuals and non-governmental agencies to make petitions to the Human Rights Commission and its sub Commission on Prevention of Discrimination and Protection of Minorities and on situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights” and fundamental freedoms.

‘In its recently issued General Comment 20, the UN Committee on Economic, Social and Cultural Rights (CESCR) defined discrimination as “any distinction, exclusion, restriction or preference or other different treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of CESCR rights”150.

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In March 1994, a ground-breaking decision by the Human Rights Committee (HRC) in the case of Toonen v. Australia found that Tasmanian laws criminalizing all sexual relations between men were in breach of the International Covenant on Civil and Political Rights (ICCPR), whose non-discrimination provisions were interpreted as including “sexual orientation”. In Toonen, the Human Rights Committee found a violation of the ICCPR’s privacy provisions (Article 17) in conjunction with the prohibition of discrimination (Article 2), innovatively interpreting the principle of non-discrimination on grounds of “sex” as including “sexual orientation”. States are required to protect “all persons, regardless of sexual orientation (or) transgender identity from torture and cruel, inhuman or degrading treatment or punishment.”-United Nations Committee against Torture.

The Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW) have repeatedly and consistently called for the repeal of laws criminalizing homosexuality in countries around the world. The prohibition against discrimination under article 26 of the International Covenant on Civil and Political Rights comprises also discrimination based on sexual orientation”-United Nations Human Rights Committee, x v. Columbia (2007). The criminalization of consensual, adult same-sex relationships breaches a State’s obligations under international law, including obligations to protect privacy and guarantee non-discrimination.

152 Id. at 51.

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4.7.3. United Nations Treaty’s Bodies and Sexual Minorities

‘The various international treaties and other instruments that offer an evolving patchwork of protection against violations of human rights do not explicitly refer to violations based on sexual orientation and gender identity, although the inclusiveness of the language on non-discrimination, in the UDHR, and in other treaties, such as ICCPR and ICESCR, provides a good basis for extending protection in this direction. This is important: we should be looking for ways to ensure that everyone enjoys the full protection of international human rights law, not for grounds to justify excluding certain individuals’155. ‘The treaty bodies have clearly interpreted the language of these treaties in this spirit. In particular, the Human Rights Committee in a decision dating back to 1994 found that the reference to ‘sex’ in articles 2 and 26 of the ICCPR should be taken as including sexual orientation. In various General Comments, the Committee on Economic, Social and Cultural Rights and Committee on the Rights of the Child have also recognized the applicability of existing human rights law in this context, noting that treaty language prohibiting discrimination on various specific grounds or “any other status” should be interpreted to cover discrimination on grounds of sexual orientation. The Committee on the Elimination of Discrimination against Women, while it has not addressed the issue in a General Comment, has urged the special procedures “to ensure that the rights of lesbians, bisexual and transgendered women are fully protected”156.

‘Equally influential are a series of U.N. expert bodies responsible for investigating economic, social and cultural rights, as well as civil and political rights. These expert groups include treaty bodies such as the Human Rights Committee, the Committee on the Elimination of Race Discrimination, and the Committee against Torture, all of which monitor violations of particular international instruments157, in we acknowledge the many cultural and political limitations inherent in the use of

155 Statement by the High Commissioner: Ending Violence and Criminal Sanctions based on sexual orientation and gender identity, (September 17, 2010).
156 Ibid.
terms such as “gay”, “bisexual”, “queer”, or “sexual minority”. As noted by many critics, they are “predominantly wester and may not adequately or accurately define individuals who are oriented affectionately toward others of their own sex, particularly in non-western cultures. The native American berdache and Ghanaian obaa banyan are examples of other culturally relevant terms”.

Amnesty International USA, Breaking the silence: Human Rights violations based on sexual orientation 44 (1994) (hereinafter breaking the silence)\textsuperscript{158} and expert bodies created under the auspices of the CHR, such as the Sub-Commission on the prevention of Discrimination and Protection of Minorities (the Sub-Commission)\textsuperscript{159}. Among the most important procedures for lesbians and gay men to focus on are the mechanisms for human rights monitoring established within the CHR, composed of 53 government representatives elected in regional groupings by ECOSOC, the CHR has created a number of important procedures to promote a wide range of civil, political, economic, social, and cultural rights. These include confidential investigations of consistent patterns of gross human rights violations under the so-called “1503 procedure”\textsuperscript{160}.

‘Although no international human rights treaties expressly mention homosexuality or sexual orientation. Human rights monitoring institutions, both judicial and political, have recently begun to interpret these treatises to protect certain aspects of lesbian and gay identity and conduct. Similarly, legal schools and human rights activists have argued with increased frequency that governments may not

\textsuperscript{158} Laurence R. Helfer, Alice M. Miller, ‘Sexual orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 9 HHRJ 96 (1996).
\textsuperscript{160} Under Resolution 1503 (XLVIII) adopted by ECOSOC in 1970, nongovernmental organizations can alert the CHR to gross violations of human rights in a particular country or countries. The Commission then considers the information in a series of private meetings in which it communicates with the State concerned. Public access to the results of the CHR’s investigations is limited, although its efforts have resulted in an improvement in the human rights situation in several countries. For a more detailed discussion of the “1503 procedure”, see, Nigel S. Rodley, United Nations Non-Treaty procedures for dealing with Human Rights Violations available in We acknowledge the many cultural and political limitations inherent in the use of terms such as “gay”, “bisexual”, “queer”, or “sexual minority”. As noted by many critics, they are “predominantly western—[and] may not adequately or accurately define individuals who are oriented affectionately to ward others of their own sex, particularly in non-western cultures. The native American berdache and Ghanaian obaa banyan are examples of other culturally relevant terms”’. Amnesty International USA, Breaking the silence: Human Rights violations based on sexual orientation 44 (1994) [hereinafter breaking the silence], in Laurence R. Helfer, Alice M. Miller, ‘Sexual orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 96 HHRJ (1996).
discriminate on the basis of sexual orientation when upholding individuals’ rights and freedoms.\textsuperscript{161}

‘The reports received concerning ill-treatment inflicted on men because of their real or alleged homosexuality, apparently encouraged by the lack of adequate clarity in the penal legislation.\textsuperscript{162} ‘Remove all ambiguity in legislation which might underpin the persecution of individuals because of their sexual orientation. Steps should be taken to prevent all degrading treatment during of body searches.\textsuperscript{163} ‘Concluding the article certain suggestions in include sexual rights at UN, followed by undertaking specific studies on human rights and sexuality; considering the desirability of a dedicated thematic mandate; using all available mechanisms to held governments to their obligations under the range of human rights treaties; factoring sexuality into the ongoing process of gender integration and sharing best practices among different bodies; and strengthening contacts with human rights defenders working on sexuality issues while eliminating barriers to their effective participation in the UN system.’\textsuperscript{164}


\textsuperscript{163} Id. at Para-k.

4.7.4. United Nations General Comment and General Assembly

Resolutions and Sexual Minorities

It was through the 2000, and particularly in 2010, that the development desired related to universality of ‘human’ into the ‘form of global statements and declarations, some of them at the UN level such as the 2010 Resolution on Extrajudicial, summary or Arbitrary Executions, adopted at the UN General Assembly which addressed killings of persons based on their sexual orientation165, and the 2011 Resolution of the U.N. Human Rights Council on Human Rights, Sexual orientation and Gender Identity which expressed grave concern at acts of violence committed against individual because of their sexual orientation and gender identity166. The later Resolution has led to a report by the U.N. High Commissioner on Human Rights titled ‘Discriminatory Law and Practices and Acts of Violence against Individuals based on their sexual orientation and gender identity, published in December 2011167.

UN General Assembly statement affirms rights for all in world, 19/12/2008, first ever statement on sexual orientation and gender identity at the UN General Assembly. The statement read by Argentina and the counter statement read by the Syrian Arab Republic that immediately followed can be seen respectively at 2:25:00 and at 2:32:00 in the video archived on the UN website and marked as “18 December 08 General Assembly: 70th and 71st plenary meeting-Morning session”.

We have the honour to make this statement on human rights, sexual orientation and gender identity on behalf of Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay,

166 Ibid.
167 Ibid.
Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela.

1. We reaffirm the principle of universality of human rights, as enshrined in the Universal Declaration of Human Rights whose 60th anniversary is celebrated this year, Article 1 of which proclaims that “all human beings are born free and equal in dignity and rights”;

2. We reaffirm that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as set out in Article 2 of the Universal Declaration of Human Rights and Article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights;

3. We reaffirm the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity;

4. We are deeply concerned by violations of human rights and fundamental freedoms based on sexual orientation or gender identity;

5. We are also disturbed that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses;

6. We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health;

7. We recall the statement in 2006 before the Human Rights Council by fifty four countries requesting the President of the Council to provide an opportunity, at an appropriate future session of the Council, for discussing these violations;
8. We commend the attention paid to these issues by special procedures of the Human Rights Council and treaty bodies and encourage them to continue to integrate consideration of human rights violations based on sexual orientation or gender identity within their relevant mandates;

9. We welcome the adoption of Resolution AG/RES. 2435 (XXXVIII-O/08) on “Human Rights, Sexual Orientation, and Gender Identity” by the General Assembly of the Organization of American States during its 38th session in 3 June 2008;

10. We call upon all States and relevant international human rights mechanisms to commit to promote and protect human rights of all persons, regardless of sexual orientation and gender identity;

11. We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.

12. We urge States to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice;

13. We urge States to ensure adequate protection of human rights defenders, and remove obstacles which prevent them from carrying out their work on issues of human rights and sexual orientation and gender identity.

“States parties to the ICESCR should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights-in addition, gender identity is recognised as among the prohibited grounds of discrimination”-United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 20; (2009)\(^\text{168}\).

“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as-sexual orientation and gender identity”-United Nations Committee on the Elimination of Discrimination against women,

General Recommendation No. 28 (2010). “State parties to the Convention against Torture must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of sexual orientation (or) transgender identity”-United Nations Committee against Torture, General Comment No.2 (2009).

Article 1 of the Universal Declaration of Human Rights (UDHR) states that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. This article is the fundamental basis of human rights law. Prosecuting homosexuality is a clear violation of this article. ‘In 2008, Article 1 of UDHR was reaffirmed to include sexual orientation by many members of the United Nations’.

‘But it is not only this article which outlaws the outlawing of homosexuality. Article 2 of UDHR and certain articles of International Covenants and of the European Convention on Human Rights (ECHR) also make the prosecution of homosexuality a violation of human rights, through interpreting protection from discrimination on the basis of “other status” to include sexual orientation.’

‘Thus, the question in achieving substantive equality is not how to treat people in the same way but what is required for people in fundamentally different circumstances to actually have equal enjoyment of their rights’.

‘Human Rights Law does not magically resolve debates within the public health and development fields as to which health inequalities are necessarily inequalities. However, a human rights framework does establish that all people, by

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170 Ibid.
virtue of being human, have a claim for redress when they are treated unfairly and have a right to participate in determining what equity and equality require in a given context. As Thomas Pogge has suggested, the poor and disadvantaged can thus no longer be seen merely as “shrunken wretches begging for our help” but must be addressed as “person with dignity who are claiming what is theirs by rights”.174 ‘The State Parties should decriminalize sexual acts between adults of the same-sex and take all necessary actions to protect homosexuals from harassment, discrimination and violence’175.

‘The General Assembly, in its resolution 60/251 establishing the Human Rights Council, entrusts the Council to promote “universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”.176 ‘All human beings are born free and equal in dignity and rights’177.


4.7.5. United Nation Special Rapporteur and Sexual Minorities

Under the United Nations strategy for exploring the factual situation about any going on issue at any level like local, national, regional and international, an expert in concerning subject is appointed as Special Rapporteur from time to time to explore and find out the facts regarding the issue under investigation. Number of Special Rapporteur have been engaged earlier on various critical issue but the issue of homosexuality is not taken up much more. Only in 2010, Anand Grover as Special Rapporteur for right of everyone to the enjoyment of the highest attainable standard of physical and mental health had discussed about homosexuality in general. In the recommendation no. 76, ‘the Special Rapporteur calls upon States: (a) to take immediate steps to decriminalize consensual same-sex conduct and to repeal discriminatory laws relating to sexual orientation and gender identity, as well as to implement appropriate awareness-raising interventions on the rights of affected individuals’179.

4.7.6. UN Rights Experts advise Russian Duma to Scrap Bill on

‘Homosexuality Propaganda’

GENEVA (1 February 2013) – A group of United Nations independent human rights experts today called on the lower house of the Russian parliament to discard a draft bill to establish administrative penalties for “propaganda of homosexuality

among minors,” which has already been approved by the State Duma. The experts on freedom of expression, human rights defenders, cultural rights and the right to health warned the bill may undermine the enjoyment and promotion of human rights in Russia, unjustifiably singling out lesbian, gay, bisexual, transgender and intersex people, who have increasingly become the target of sanctions and violence in the country. “Any restriction on freedom of opinion and expression should be based on reasonable and objective criteria, which is not fulfilled by the draft bill approved during the first reading by the Duma,” said the Special Rapporteur on freedom of opinion and expression, Frank La Rue. “The law could potentially be interpreted very broadly and thereby violate not only the right to freedom of expression but also the prohibition of discrimination.” The Special Rapporteur on the situation of human rights defenders, Margaret Sekagya, warned that this legislation could be used to unduly restrict the activities of those advocating for the rights of sexual minorities individuals. “The draft legislation could further contribute to the already difficult environment in which these defenders operate, stigmatizing their work and making them the target of acts of intimidation and violence, as has recently happened in Moscow,” she stressed.

“We fear that such laws, in practice, will exacerbate an already difficult situation for sexual minority individuals wishing to express their identity, and will hamper the organization of cultural events or dissemination of artistic creations addressing sexual minority issues,” highlighted the Special Rapporteur in the field of cultural rights, Farida Shaheed. She further underlined that sexual minority youth would be particularly affected. Stressing the bill’s ambiguous wording, the Special Rapporteur on the right to health, Anand Grover, warned that “banning ‘propaganda of homosexuality’ may not only penalize those who promote sexual and reproductive health among sexual minority people, but will also undermine the right of children to access health-related information in order to safeguard their physical and mental health.” Far from protecting children, the proposed law would potentially harm them by re-enforcing stigma and contributing to a discriminatory environment, which would put them at increased risk.
4.7.7. United Nations Authorities and Sexual Minorities

“There is no peace without development, no development without peace, and there is no lasting peace or sustainable development without respect of human rights and the rule of law”—United Nations Secretary-General Ban Ki-Moon. ‘Sexual minority communities around the world will soon have a powerful advocate in the State Department whose sole job is to watch out for their interests. Later the State Department will name a special envoy to focus on the rights of sexual minority people globally, a department official said that Secretary of State John Kerry and his staff are in the final stages of selecting and openly gay Foreign Service Officer as the United States’ first-ever diplomat to focus on sexual minority issues.’

“In 1999, President Bill Clinton appointed the first openly gay US ambassador, James Hormel.

“To those who are sexual minority, let me say: you are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the UN and I have sworn to defend and uphold. Today, I stand with you and I call upon all countries and people to stand with you, too” —UN Secretary General Ban Ki-Moon, March 2012.

“When I raise the issue of violence and discrimination against individuals based on their sexual orientation or gender identity, some complain that I’m pushing for “new rights” or “special rights”. But there is nothing new or special about the right to life and security of person, the right to freedom from discrimination. These and other rights are universal: enshrined in international law but denied to many of our fellow human beings simply because of their sexual orientation or gender identity” —UN High Commissioner for Human Rights, Navi Pillay, May 2012.

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182 Ibid.
‘Following are UN Secretary-General Ban Ki-Moon’s remarks at the event on “Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity” in New York today, 10 December, 2010. As men and women of conscience, we reject discrimination in general and in particular discrimination based on sexual orientation and gender identity. When individuals are attacked, abused or imprisoned because of their sexual orientation, we must speak out. We cannot stand by. We cannot be silent. During my recent trip to Africa, “I urged leaders to do away with laws criminalizing homosexuality”.

“Everybody’s born free and born equal”, Ms. Chaka Chaka said at a press conference ahead of an afternoon event, “The role of leadership in the fight against homophobia”, in which she and fellow music star Ricky Martin were scheduled to participate. “We all have to stand up and say, ‘No, this is not correct’, She emphasised. “To all the lesbian, gay, bisexual and transgender people, we love you the way you are”, she continued. “Be what you want to be”, she said. “As a mother, as an advocate, as musician, I have decided to fight this war”. While pleased that the United Nations was taking up the issue, and that South Africa had taken the lead by legalising same-sex marriage, she said more must be done in the war against homophobia. ‘Accompanying Ms. Chaka Chaka was Charles Radcliffe, Chief of the Global Issues Section in the office of the United Nations High Commissioner for Human Rights (OHCHR), who spoke on behalf of Ivan Simonovic, Assistant Secretary-General for Human Rights. He said much had happened in the two years since the Secretary-General’s launch of an International appeal to end violence and discrimination against sexual minority people. “It’s been a period of change, a period when we’ve seen this issue-United Nations radar screen-move to the centre on to the formal agenda”.

‘Mr. Radcliffe said that the Secretariat’s position matched two decades of international human rights law that carried legal obligations for States; he said the division of opinions was shifting. In the last six years, the number of signatories to the
joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity had risen from 21 to 85, he noted\(^{189}\).

‘Martin Nesirky, Spokesperson for the Secretary-General, also emphasized the views of Secretary-General, as was his support for what must happen to support the rights of the sexual minority community’\(^{190}\).

‘We often think about homophobic bullying as a problem specific to school settings and adolescence. But the roots go deeper; they lie in prevailing harmful attitudes in society at large, sometimes encouraged by divisive public figures and discriminatory laws and practices sanctioned by state authorities. Taking this problem is a shared challenge; we all have a role, whether as parents, family members, teachers, neighbours, community leaders, journalists, religious figures or public officials. But it is also, for States, a matter of legal obligation. Under international human rights law, all States must take the necessary measures to protect people-all people-from violence and discrimination, including on grounds of sexual orientation and gender identity’\(^{191}\).

‘I recognize the particular vulnerability of individuals who face criminal sanctions, including imprisonment and in some cases the death penalty, on the basis of their sexual orientation or gender identity. Laws criminalizing people on grounds of sexual orientation and gender identity violate the principle of non-discrimination. Responsibilities of the United Nations and the obligations of States are clear. No one, regardless of their sexual orientation or gender identity, should be subjected to torture or to cruel, inhuman or degrading treatment. No-one should be prosecuted for their ideas or beliefs. No-one should be punished for exercising their right to freedom of expression’\(^{192}\).

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\(^{190}\) Ibid.

\(^{191}\) UN, the Secretary General message to event on ending violence and discrimination based on sexual orientation and gender identity, delivered by Ivan Simonovic, Assistant Secretary General for Human Rights, New York, 8 December, 2011.

\(^{192}\) UN, the Secretary General message to event on ending violence and criminal sanctions based on sexual orientation and gender identity, delivered by Ms. Navanethem Pillay, High Commissioner for Human Rights, Geneva, 17 September 2010.
‘In the U.S., a federal bill to protect workers from discrimination based on sexual orientation and gender identity-called the Employment Non-Discrimination Act-has stalled and failed several times over the past two decades. Still, individual States and cities have begun passing their own non-discrimination ordinances. In New York, for example, Governor David Paterson passed the first legislation to include transgender protections in September 2010’193.

US Under Secretary calls for Indian Government to change discriminatory laws on sexual minorities. It was said that ‘at the State Department, he mentioned that he is responsible for human rights, democracy, law enforcement, counter-terrorism, stabilizing conflict situations, addressing the challenges of refugees and migrants, and combating sex trafficking and forced labour. There is a common thread running through them. They all rely on just, transparent, and accountable rule of law, without which all of these goals are undermined. Again, he said, let him be clear strengthening the rule of law does not mean giving people in power additional tools to enforce their will. The rule of law must be built on laws and institutions to protect rights for all and, where protection fails, giving citizens the ability to access and pursue justice to help make the situation right again. It is the remedy to discriminatory traditions and customs, which undermine overall progress toward peace, stability and growth. Some citizens face challenges that require special attention, and he would like to speak for a few moments about some of those challenges.

The rule of law also needs to extend to the protection of the rights of lesbian, gay, bisexual and transgender individuals. As the United States has repeatedly raised our voice about this concern around the world, we sometimes hear the response that sexual minority issues must be subordinated to cultural and historical preferences. But we are not talking about cultural issues and talking about people. People should not be subjected to violence, abuse, or discrimination simply because of the peaceful expression of who they are. That was as true, say, for African Americans in the United States during the Civil Rights movement as it is for sexual minority persons in the U.S. and around the world now. My country’s most searing human rights struggles have involved ending baseless discrimination around dearly-held issues of identity. That is why combating discrimination and violence against vulnerable

minorities, including ethnic and religious minorities, has become a core tenet of our diplomacy. As you might expect, then, we along with many others in the international community and your own civil society are closely following the developments around the criminal status of homosexuality in India and urging that laws must not discriminate against members of the sexual minority community or perpetuate a climate that risks fuelling violence toward them\textsuperscript{194}.

“Like all of you, I care very much about non-discrimination, equal rights, and marriage equality and parenting rights. But I also care passionately about sexual minority people who are parts of the communities being vilified in today’s toxic mainstream politics. I care about women and gender non-conforming people being free from violence, about insuring that my womb and sexual freedom is not regulated by the likes of Rick Santorum; about insuring that gender and race based income inequality ends”\textsuperscript{195}.

‘In Ireland, ‘Leo Varadkar, Health Minister has come out as gay’. According to Leo Varadkar, “I think a lot of people wonder about my sexuality. It’s not something that defines me. I’m not a half-Indian politician, or a doctor politician, or a gay politician for that matter. It’s just part of who I am. It is part of my character”. “Minister Varadkar’s interview sends a very strong signal that sexual minority people can assure to and achieve the highest political office in Ireland”\textsuperscript{196}. “The promotion and protection of human rights is a bedrock requirement for the realization of the Charter’s vision of a just and peaceful world”. - Kofi A. Annan, Former UN Secretary General (2002)\textsuperscript{197}.

“We deplore the violent criminal act that took the life of this young man (Daniel Zamudio, a 24 year old gay man) and urge the children congress to pass a law against discrimination, including on grounds of sexual orientation and gender identity,

\textsuperscript{194} Excerpts from a speech by visiting United States Under Secretary Sarah Sewall, delivered at American Centre, New Delhi, on Thursday, November 13, 2014.
\textsuperscript{195} Urvashi Vaid, ‘Fenway Women’s Dinner Party-Susan Love Award’, May 5, 2012.
\textsuperscript{196} Health Minister Leo Varadkar: I am a gay man. It’s not a secret-Irish Mirror online.
\textsuperscript{197} UN Development Programme office of the High Commissioner for Human Rights (OHCHR) Toolkit, for collaboration with National Human Rights Institutions (NHRI), United Nations Human Rights, vi (December 2010).
in full compliance with the relevant international human rights standards”\(^\text{198}\). “Some say that sexual orientation and gender identity are sensitive issues. I understand. Like many of my generation, I did not grow up talking about these issues. But I learned to speak out because lives are at stake, and because it is our duty under the UN Charter and UDHR to protect the rights of everyone, everywhere”-UN Secretary-General Ban Ki-Moon to the Human Rights Council, 7 March 2012\(^\text{199}\).

‘This is an important issue that, I know, often speaks lively debate among States. It’s also an issue that knows no boundaries. In spite of very significant progress made in a number of States, there is still no region in the world today where people who are sexual minority can live entirely free from discrimination or from the threat of harassment and physical attack’\(^\text{200}\). ‘Our first task, I believe, is to frame this squarely as a human rights issue and demand that it be tackled as such. As High Commissioner for Human Rights, I have a responsibility to encourage States to promote and protect the human rights of all people without discrimination. Indeed, to believe in human rights is to believe in equality; equal rights for all people, regardless of who they are or where they are from’\(^\text{201}\). “On July 21, 2014, President Obama signed an Executive Order to prohibit discrimination on the basis of “sexual orientation” and “gender identity” by federal contractors, and to prohibit discrimination against federal employees based on “gender identity” (“sexual orientation” had already been included as a protected category in federal employment by President Clinton)”\(^\text{202}\).

The UN High Commissioner for Human Rights on the occasion of the International Day against Homophobia and Transphobia stated three areas of particular concern that require immediate attention. ‘The first relates to violent,
homophobic and transphobic hate crimes, which take place with alarming regularity in all regions of the world. These range from aggressive, sustained psychological bullying through the physical assault, torture, kidnapping and even murder. ‘A second area of concern relates to the criminalisation of homosexuality. It is nearly 20 years since the UN Human Rights Committee first established that criminalising consensual, same-sex relationship violates people’s right to privacy and non-discrimination.’ The third area of concern is the prevalence of discriminatory practices against sexual minority individuals, and a corresponding lack of legal protection by national laws.

In his paper titled ‘Equality, Non-discrimination and Development of International Human Rights Law’ Prof. Anthony Cullin stated about the importance of equality and non-discrimination in ensuring the justice to all. Except the UN authorities, various heads of countries (particularly Barak Obama from United States of America) have been continuously stating for recognizing the violence and violation of rights of sexual minorities on the basis of sexual orientation and gender identity and consequently coming forward to protect and enjoyment of the rights of sexual minorities as equal to other persons.

4.7.8. United Nations Special Envoy and Sexual Minorities

‘The Boston Globe reports that the U.S. State Department is creating a new senior level special envoy with the express mission of fighting for the rights of gay, lesbian, bisexual and transgender people across the globe. The new position will be created and filled by the end of February, 2015 and will have high-level authority to respond to anti-sexual minority crackdowns across the globe.’

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204 Ibid.
205 Ibid.
4.7.9. United Nations Development Program (UNDP) and Sexual Minorities

United Nations Development Program (UNDP) is the biggest supporter of sexual minority rights worldwide. In India, various programs related to sexual minority rights have already been completed and many are still going on. South Asian Country report for sexual minorities, reports of well recognized organizations have already been completed in joint efforts with UNDP.

4.8. Regional Human Rights Instruments and Efforts and Sexual Minorities

‘The European Convention for the protection of Human Rights and Fundamental Freedoms was signed in Rome on November 4, 1950. It has been ratified by 40 European States and is commonly known as the European Convention of Human Rights (ECHR)\textsuperscript{208}.

‘Article 3 reads as follows: No one shall be subjected to torture or to inhuman or degrading treatment or punishment\textsuperscript{209}.

‘Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and


\textsuperscript{209}Id. at 141.
freedoms of others\textsuperscript{210}. ‘Article 12, which reads: Men and Women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of the rights’\textsuperscript{211}.

‘The unanimous Declaration of the thirteen United States of America includes in Article 1-Men are born and remain free and equal in rights. Social distinctions can be based only upon benefit for the community\textsuperscript{212}. Similarly, ‘Article 2 states that- the aim of every political association is the preservation of the natural rights of man, which rights must not be prevented. These rights are freedom, property, security and resistance to oppression. Further, Article 4 states that- liberty consists in being able to do anything that does not harm other people. Thus, the exercise of the natural rights of each man has only these limits that ensure to the other members of society the enjoyment of these same rights. These limits may be determined only by the law.

‘The French Declaration of the Rights of Man and of Citizens (August 27, 1789) includes various articles which also state that- Article 1, Men are born and remain free and equal in their rights; social distinctions can only be based on the common interest; Article 2 says-The aim of any political association is to preserve the natural and inalienable rights of man, the right to liberty, property, security and resistance to oppression. Article 4 says- Liberty consists of being able to do everything which does not harm others. The exercise of the natural rights of each individual has no limits other than those which guarantee the exercise of these same rights to the other members of society; these limits can only be determined by the law. Article 16 says that any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no Constitution\textsuperscript{213}.

‘New York (Thomson Reuters Foundation)- U.S. lawmakers in both houses of Congress introduced a bill to protect and promote the rights of the international lesbian, gay, bisexual and transgender community. The international Human Rights

\textsuperscript{211} Ibid.
\textsuperscript{213} Id. at 25-26.
Defence Act, spearheaded by Sen. Edward Markey of Massachusetts and Rep. Alan Lowenthal of California, both Democrats, would appoint a special envoy within the U.S. Department of State to co-ordinate efforts to prevent discrimination and advance the rights of sexual minority people worldwide214.

‘Tammy Baldwin became the first openly Gay Senator in the U.S. history when she defeated former Wisconsin Governor Tommy Thompson’215. ‘On 6 December 2011, US Secretary of State Hillary Clinton stated at the United Nations Human Rights Council in Geneva that gay rights and human rights are ‘one and the same’216. Enze Han & Joseph O’ Mahoney discussed in their paper that ‘from 1860 onwards, the British Empire spread a specific set of legal codes throughout its colonies based on the colonial legal codes of India and Queensland, both of which specifically criminalized male-to-male sexual relations, though by long-term imprisonment rather than death’217.

Enze Han & Joseph O’ Mahoney formulated research questions and hypotheses as- Are former British Colonies more likely to have laws that criminalize homosexual conduct?, the second research question concerns the legacy of colonialism post-independence. Do British colonies have a harder time decriminalizing homosexual conduct laws once they are free of the imperialist yoke?218. Simultaneously, with the research questions, paper also formulates research hypotheses as-States with a British legal origin are more likely to have a law criminalizing homosexual conduct; States with a British legal origin have a longer time period between gaining their independence and decriminalizing homosexual conduct; and States with a British legal origin take longer to decriminalize since 1945. This paper concludes that ‘the decriminalization of homosexual conduct is an uneven

218 Ibid.
process around the world’. The findings of this paper ‘support the argument that British colonial experience left a damaging legacy on its former colonies’.

‘However their findings also indicate that the speed of decriminalization of homosexual conduct is not systematically slower for former British colonies than other former European colonies. This finding suggests that if a country has such a law the longevity of the law is not dependent upon a particular type of colonialism. Although they did not find that being a colony of any type prolongs the decriminalization process compared with non-colonies, they did not find evidence supporting the argument that British colonialism has special effect on the timing of decriminalization of homosexual conduct’.

‘In 2006, with the effect of its founder, Louis George Tin, International Day against Homophobia (IDAHO) launched a worldwide campaign to end the criminalization of same-sex-relationships. The campaign was supported by dozens of international public figures including Nobel laureates, academicians, clergy and celebrities’. In 2008, the 34 member countries of the organization of American States unanimously approved a declaration affirming that human rights protections extend to sexual orientation and gender identity’. ‘Following meetings between Tin and French Minister of Human Rights and Foreign Affairs Rama Yade in early 2008, Yade announced that she would appeal at the UN for the universal decriminalization of homosexuality, the appeal was quickly taken up as an international concern. The declaration was read out by Ambassador Jorge Arguello of Argentina on 18 December 2008, and was the first declaration concerning gay rights read in the General Assembly’.

‘In South Asia LGBT (SALGBT) network is the coming together of 12 partners and 1 observer (from Pakistan) from SIDARFSU supported network project “Sexual Minorities in South Asia” which comes to an end on 31st December 2012. The last partner meeting of the network, which is being held in Bangkok on the 30th

220 Id. at 285.
221 Available at : www.stop-homophobia.com, accessed on May 13th, 2013.
222 Available at : https://en.wikipedia.org/wiki/Brazilian Resolution.
and 31st of October 2012 agrees to the following points related to sexual minority network in South Asia for support and assistance each other. The French government planned to ban the use of words ‘mother’ and ‘father’ from all official documents under controversial plans to legalise gay marriage, says a report. This means only ‘parents’ will be used in identical marriage ceremonies for all heterosexual and same-sex couples. According to Daily Mail, the draft law states ‘marriage is a union of two people of different or the same gender’. The European Union (EU) wants on 60th anniversary of the UDHR to also mark the expansion of document to condemn the criminalisation of same-sex relations. A delegation from the EU hopes to convince the UN General Assembly to formally condemn treating homosexuals as criminals.

‘A group of 11 countries called on U.N. member states to repeal laws that discriminate against sexual minority people, in the world organisation’s highest-level meeting on the issue ever. “Those who are sexual minority must enjoy the same human rights as everyone else”, said the declaration of the sexual minority Core Group, which includes the United States, Japan, Israel and European and Latin American nations”. “Advancing equality for sexual minority persons isn’t just the right thing to do”, Secretary of State John Kerry said in his statement at the meeting. “It’s also fundamental to advancing democracy and human rights”.

Discussing about the homosexuality, Tim Cook, Chief Executive Officer (CEO), Apple company, publically admitted that he is a homosexual and feels proud of it.


224 Bangkok Declaration of the SALGBT Network, dated 31st October 2012.
226 Milan, Italy, ‘EU same-sex showdown moves to UN’, The Times of India, New Delhi, December 12, 2008.
229 See Articles: 1, 2, 3, 4, 5, 7, 9, 11, 17(3), and 24.
230 See, Articles: 1, 2, 3, 4, 5, 6, 7, 12, 16, 19, 20, 22, 23, 24, 25, 27, 28, and 29.
231 See Article 1, 2, 3, 5, 7, 8, 10, 12, 13, 14, 34, 45, and 53.

4.9. Some Landmark Cases of International and Regional Human Rights Courts and Sexual Minorities

“The Prohibition against discrimination under article 26 (of the International Covenant on Civil and Political Rights) comprises also discrimination based on sexual orientation”-United Nations Human Rights Committee, X v. Colombia (2007)\textsuperscript{236}.

‘Griswold v. Connecticut’\textsuperscript{237} is regarded the first significant pronouncement where the U.S. Supreme Court recognized a Constitutional right to privacy\textsuperscript{238}. ‘Thomas S. Eisenstadt v. William R. Baird’\textsuperscript{239}, ‘Carey v. Population Services International’\textsuperscript{240}, ‘Roe v. Wade’\textsuperscript{241}, ‘Planned Parenthood of Southeastern Pennsylvania v. Casey’\textsuperscript{242}. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to

\textsuperscript{232} See Article 1, 2, 3, 4, 5, 8, 9, 13, 15, 17, 18, 20, 30, 33, 35, 36, and 39.
\textsuperscript{233} See Article 1, 2, 3, 4, 5, 6, and 7.
\textsuperscript{234} See Article 1, 2, 4, 10, 12, 13, and 14.
\textsuperscript{235} See Article 1 to 18.
\textsuperscript{237} Ajendra Srivastava, ‘Gay Sex and the Constitution: Naz Foundation and Lawrence Compared’, 51 JILI 513 (October-December 2009).
\textsuperscript{239} Ajendra Srivastava, ‘Gay Sex and the Constitution: Naz Foundation and Lawrence Compared’, 51 JILI 514 (October-December 2009).
\textsuperscript{240} Ibid.
\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid.
define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.\textsuperscript{243}

In South Africa, ‘In its judgment on same-sex marriage, the Constitutional Court made it clear that the status quo in terms of which lesbian and gay people are excluded from having the same status, rights and responsibilities as heterosexuals do in marriage is simply unacceptable. Parliament was given a year to remedy this Constitutional defect and ensure that the law in both its tangible and intangible respects accords lesbian and gay people the same status, rights and responsibilities as heterosexuals.’\textsuperscript{244} ‘In September 2006, Parliament released the Civil Union Bill which purports to offer lesbian and gay people the opportunity to form a “Civil Partnership”.’\textsuperscript{245}

‘It was only through pressure from the courts that the law for one part of the United Kingdom, Northern Ireland, was changed. The case of Dudgeon v. the United Kingdom\textsuperscript{246} was one of four cases decided within a 30-year time frame in international jurisdictions that had significant influence on the repeal of homophobic legislation. It is interesting to examine the reasons why each of these cases was decided in a positive light towards homosexuality. These cases can be compared with more recent cases that failed to advance the gay rights movement.

‘The European Court of Human Rights decided the case of Dudgeon in 1981, at a time when Northern Ireland still had “sodomy” laws that had not been altered since the 19\textsuperscript{th} century; nor had Northern Ireland legalised to accept the recommendations from the Wolfenden Report, possibly due to the greater influence of the Catholic and protestant churches in that country compared to the rest of the UK. Dudgeon argued that Article 8 of the ECHR, which protects the right to a private and family life, and Article 14, which prohibits status discrimination, should apply to

\textsuperscript{243} Ajendra Srivastava, ‘Gay Sex and the Constitution: Naz Foundation and Lawrence Compared’, 51 JILI 515 (October-December 2009).
\textsuperscript{244} Parliamentary Submission: Civil Union Bill September 29, 2006, submitted by members of the joint working group, drafted by OUT LGBT well-being, p.3.
\textsuperscript{245} Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at (149), available in Parliamentary Submission: Civil Union Bill September 29, 2006, submitted by members of the joint working group, drafted by OUT LGBT well-being, p.3.
same-sex conduct. The court held in favour of Dudgeon and stated that there had been a breach of his rights under Article 8. The right to private family life included private sexual relations and therefore not extending this right to homosexuals resulted in a breach of this Article. As this was definitive, the court saw no purpose in examining Article 14. It can therefore be said that Article 8 was interpreted to imply full equality in terms of sexual orientation.

‘The next case that is to be argued to have had an even wider impact is Toonen v Australia. This case was heard by the United Nations Human Rights Committee, as there had allegedly been certain breaches of Articles of the ICCPR. The complaint communicated to the committee that section 122(a) and (c) and 123 of Tasmanian Criminal Code did not comply with Articles 2(1) and 26 of the ICCPR which deals with the right to privacy. The Tasmanian Criminal Code outlawed various forms of sexual contact between men, including between consenting males. The complainant therefore argued that certain sections breached his right to privacy as well as being discriminatory. The committee noted that apart from Tasmania, every other State in Australia had already repealed laws concerning “sodomy”. The committee decided the case solely on the basis of the right to privacy and, like the European Court of Human Rights, did not feel the need to decide the case on grounds of an infringement of the right to equality. Article 17 of the ICCPR was now affirmed to extend to sexuality as an aspect of private life.

‘The decision of the U.N. Human Rights Committee in Toonen v. Australia is an important step in advancing the global struggle for lesbian and gay rights. The Committee’s unanimous conclusion that sodomy statutes are an arbitrary interference with privacy and a violation of the principle of non-discrimination provides

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compelling evidence that issues of concern to lesbian and gay men are also matters of fundamental human rights.\(^{250}\)

‘The decision given below was handed down in a case filed by Mr. Sunil Babu Panta of the Blue Diamond Society and others on behalf of lesbian, gay, bisexual, transsexual and intersex (LGBTI) people where the petitioners prayed for the issuance of an order of mandamus in order to provide the gender identity on the basis of their gender feelings and to recognize their co-habitation as accordance with their own sexual orientation.\(^{251}\)

‘By a 5–4 majority, the U.S. Supreme Court on Wednesday i.e. 26-06-2013 issued a much-anticipated ruling that determined as unconstitutional the 1996 Defence of Marriage Act (DOMA), which denies federal government benefits to legally married same-sex couples, on the grounds that it violates the Fifth Amendment; Linked to the framework of the DOMA decision, the court also declined to issue a ruling on proposition 8, the State of California ban on same-sex marriages, and this is likely to open up channel for such unions there going forward.\(^{252}\)

‘Justice Anthony M. Kennedy who wrote the opinion along with the four “liberal-leaning justices”, Elena Kagan, Sonia Sotomayer, Stephen Breyer and Ruth Badar Ginsburg, added, “By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment”.\(^{253}\)


\(^{252}\) Narayan Lakshman, ‘U.S. Supreme Court ruling brings cheer to gay couples’, The Hindu, June 27, 2013.
\(^{253}\) Ibid.

Recently, in a case decided by a Turkish court ordered the Turkish Football Federation (TFF) to pay 23,000 Turkish Lira ($7,900) in material and moral compensation over its treatment of Halil Ibrahim Dinçdag, the Dogan had become a symbol of discrimination against gays and lesbians in largely conservative and overwhelmingly Muslim Turkish society. “This lawsuit was a case in favour of all people who suffered injustice and discrimination,” Dinçdag told the Diken online news website. “Winning this case was really something very important. The court has now confirmed that my fight was a right. I hope that this decision sets a precedent for similar cases. This is victory”. Except these, many cases are evident to recognize the equal rights to sexual minorities and protect them from any violence based on sexual orientation and gender identity. The next section is very specific in this regard since it recognizes the sexual orientation and gender identity as a ground not to be used against sexual minorities.

4.10. Yogyakarta Principles (YP) and Sexual Minorities

To address the deficiencies based on sexual orientation and gender identity ‘a consistent understanding of the comprehensive regime of international human rights law and its application to issue of sexual orientation and gender identity was necessary. It was critical to collate and clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.”

‘The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, have undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation

256 Ibid.
257 Available at www.yogyakartapriniciples.org.
and gender identity to bring greater clarity and coherence to States’ human rights organisations.\(^{258}\)

‘A distinguished group of human rights experts has drafted, developed, discussed and refined these principles. Following an experts’ meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguish experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles on the application of International Human Rights law in relation to sexual orientation and gender identity.\(^{259}\) By adopting these principles in March 2007, ‘although outside of the UN framework was an important stage in the process described here in these principles. Drafted by an international panel of experts in International Human Rights Law, sexual orientation and gender identity, this comprehensive document deals with twenty-nine human rights examined in the context of sexual orientation and gender identity. Many of these rights are actually general human rights that have been adapted in the context of sexual orientation and gender identity merely through a proviso that people should not be discriminated with regard to the given right on the basis of sexual orientation and gender identity.\(^{260}\) However, some of the principles and rights outlined in the Yogyakarta Principles engage with more specific and unique issues relating to gender identity and sexual orientation, such as recognition before the law and the right to family life.

‘The rapporteur of the meeting, Professor Inchael O’Flaherty, made immense contributions to the drafting and revision of the principles. His commitment and tireless efforts have been critical to the successful outcome of the process. The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. The principles affirm the primary obligation of States to implement human rights. Each principle is accompanied by detailed recommendations to States. The experts also emphasize, though, that all actors have responsibilities to promote and protect human rights.

\(^{258}\) Available at www.yogyakartaprinciples.org.

\(^{259}\) Ibid.

Additional recommendations are addressed to other actors, including the UN human rights system, national human rights institutions, the media, non-governmental organisations, and funders. The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognize that States may incur additional obligations as human rights law continues to evolve. The Yogyakarta Principles affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birth right\textsuperscript{261}.

4.11. Legal Status of Sexual Minorities’ Right: International Perspective

India is currently one of 79 countries in the world that makes homosexuality a crime, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association, which tracks how many countries institute such laws. Harriet Shone travelled to Belgrade with Ed Fordham, a leading Lib Dem sexual minority campaigner, to meet with their sister-party, the Liberal Democrat Party (LDP). With their support, the LDP has set up a Human Rights Council modelled on the Lib Dem sexual minority plus Group, as a champion of the sexual minority community in Serbia. Ed and Harriet ‘held a workshop with representatives of the Human Rights Council to hear about their work, building on their role in Belgrade’s first ever gay pride march to proceed without harassment. Together with the Human Rights Council and LDP trainers, they developed a sexual minority curriculum which will be used to equip party members across Serbia with the necessary knowledge and skills to become advocates for sexual minority rights’\textsuperscript{262}. Britain Civil Partnership Act, 2004 gives gay couples the same rights and responsibilities that heterosexual couples enjoy in a civil marriage.

‘On April 1, 2001, the Netherlands became the first country in the world to legalize same-sex marriage. Homosexual couples in Belgium have almost the same

\textsuperscript{261} Available at www.yogyakartaprinciples.org.
rights as heterosexuals. They won the right to marry in 2003 and in 2006 Parliament voted into law a bill allowing homosexuals couples to adopt children. In 2005, Spain became the third member of the European Union to pass a law allowing same-sex marriages. Gay couples can adopt children, whether they are married or not. Canada adopted a national law allowing gays to marry and adopt in July 2005, though most provinces had already allowed same-sex unions before that date. The country South Africa legalized same-sex unions and adoptions by gay couples in November 2006, becoming the first African nation to do so. Norway, a 2009 law allowed homosexuals to marry and adopt children. Civil partnerships have existed in the country for 20 years. Sweden’s homosexuals have been allowed to wed in religious or civil ceremonies since May 2009. Under a 2010 law Portugal legalized gay marriage, while excluding the right to adoption.

Iceland Prime Minister Johanna Sigurdardottir married her long-time partner in June 2010 as a new law legalising homosexual marriages came into force. Same-sex couples who have lived together for at least five years have had right to adopt children since 2006. Gays in Argentina became the first on the South American Continent to be able to wed and adopt after legislation passed on July 14, 2010. Denmark, the first country in world to allow gay couples to enter into civil unions in the name of ‘registered partnership’ in 1989, voted overwhelmingly in favour of allowing homosexuals to marry in the State Evangelical Lutheran Church in June 2012. France legalized same-sex marriage in 2014. Uruguay voted in April 2, 2013 to allow same-sex marriages nationwide, making it only the second Latin American country to do so. New Zealand on April 17, 2013 became the first Asia Pacific country to legalize same-sex marriage after a decades-long campaign. Gay couples can marry in the nine US States, as well as in the capital Washington, while parts of Maxico also allow same-sex marriage. Brazil in the month of May, 2013 gave a de facto green light to same-sex marriages after its National Council of Justice ruled that government offices could issue marriage licenses to gay couples without having to wait for Congress to pass a law allowing gay unions. Same-sex couples in Britain have had the right to live in civil partnerships since 2005 but cannot marry. Ireland legalized same-sex marriage in the year 2015. A number of other countries have adopted laws that recognize civil partnerships and give couples more or less the same
rights as heterosexuals. Countries to have recognized civil unions without yet accepting gay marriage include Germany(2001), Finland(2002), the Czech Republic(2006), Switzerland(2007) and Columbia and Ireland(2011).263

“When the Queen Elizabeth II signed the Royal Assent for the equal marriages act, allowing gay couple to marry for the first time, she put it down and said ‘Well, who’d have thought 62 years ago when I came to the throne, I’d be signing something like this? Is n’t it wonderful, indeed! Wonderful, indeed! (Gay Star News)”264. ‘In a historic ceremony broadcast live on French television, the first gay couple to marry in France said, “Oui”, then sealed the deal with a lengthy and very public kiss’265.

‘In the United States, where homosexuality is not illegal, the gay rights controversy centres on marriage. The federal government does not recognise same-sex marriages, leaving the decision up to individual states. The front line of the battle is California, where the State Supreme Court legalised gay marriage, citing a fundamental “right to marry” of all citizens. It was a watershed moment for gay couples, 18,000 of whom have married in California since266. ‘Gays and Lesbians across the US erupted in celebration after the Supreme Court passed two landmark rulings on same-sex marriage in their favour267.

‘On a day that a French lesbian love story won the top award at Cannes, two young lesbians from Pakistan became the first Muslim women in Britain to marry in a civil ceremony in what the gay community hailed as a “landmark” event. Rehana Kausar (34) and Sobia Kamar (29) said they decided to go ahead despite receiving death threats because they believed it was “no one’s business what we do with our personal lives”.268

‘Israeli gay couple Yonatan and Omer Gher became parents when their child was conceived with the help of a Mumbai-based surrogate mother in a fertility clinic

in Bandra. Yonatan, who heads Israel’s largest gay rights organisation, feels it’s time for India to change section 377, all the more because India is so “diverse and pluralistic” and shouldn’t outcast 10% of its population. Yonatan (30) and Omer (31) have been together for the past seven years and recently decided to start a family. “Israel doesn’t allow same-sex couples to adopt or have a surrogate. So we started scouting around and found that only India and US offer surrogacy to same-sex couples”, said Yonatan*

‘The current Cameroonian penal code criminalises “sexual relations with a person of the same sex” and provides for a penalty of up to five years imprisonment and a fine. The law as it stands is in breach of Cameroon’s international human rights commitments and violates rights to privacy and to freedom from discrimination, both of which are guaranteed by the ICCPR”.

‘A Buddhist temple in Japan is offering sexual minority couples a place to have symbolic wedding ceremonies even though gay marriage is still illegal in the country. Japan allows same-sex marriage ceremonies within its borders, according to the Council on Foreign Relations, but these couples won’t be given the legal rights and privileges that heterosexual couples have. Despite these restrictions, deputy head priest Rev. Takafumi Kawakami claims five couples have come the Shunkoin Temple in Kyoto since 2010 to symbolically tie the knot. “I am not specialising the gay wedding here”, the priest told Huffpost via e-mail. “I am just accepting every couple who would like to have their wedding ceremony here regardless of their faith and sexual orientation”. Japan’s Constitution defines marriage as “mutual co-operation with the equal rights of husband and wife as basis”. This gender based language reflects the opinions of the majority of Japanese people. According to a 2013 IPSOS survey, only 24% of Japanese people believe same-sex couples should be allowed to marry legally.”


**UN Human Rights, Office of the High Commissioner, Briefing Notes, November 16, 2012, Spokesperson for the UN High Commissioner for Human Rights; Rupert Colville, Location: Geneva, Subject: Cameroon/Homophobia.

***The Huffington Post, ‘Shunkoin Temple in Kyota Helps Japan’s Same-Sex Couples Tie the Knot’, available at: www.huffingtonpost.com, accessed on December 12, 2014.
Except this, some NGOs (general and specific both), organisations and groups are also working in this area and progressing the movement not only at regional level but also international level. Out of all, Amnesty International, Human Rights Watch, ILGA, American Psychological Association are very significant. The American Psychological Association (APA) has a longstanding commitment to ending discriminatory practices targeting sexual minority persons. ‘Specifically, APA adopted a resolution on “Opposing Discriminatory Legislation and Initiatives Aimed at sexual minority Persons” in 2007, and another policy statement on “Transgender, Gender Identity, and Gender Expression Non-Discrimination” in 2008. As stated in these resolutions, not only is there no basis for discrimination against sexual minority individuals, but also such discrimination is harmful to their mental health and the public good’.

‘Same-sex marriages that were outlawed in California four-and-a-half years ago resumed in a rush after a federal appeals court took the “unusual but not unprecedented”, step of freeing couples to obtain marriage licences, before the U.S. Supreme Court had issued its final judgment in a challenge of the State’s voter-approved gay marriage ban’.

In furtherance to this, ‘the States have adopted a range of measures with a view to addressing homophobic and transphobic violence, including some highlighted in response to the note verbal soliciting inputs for the present report. New or strengthened anti-hate crime laws have been enacted in several States, including Albania, Chile, Finland, Georgia, Greece, Honduras, Malta, Montenegro, Portugal and Serbia. Such laws can play an important role in facilitating the prosecution and punishment of perpetrators of hate-motivated violence and in establishing homophobia and transphobia as aggravating factors for the purposes of sentencing. Other notable initiatives include the establishment of specialized hate crime prosecution units (Brazil, Honduras, Mexico, Spain), and an inter agency working group on urgent cases (Colombia); improved police training and sensitization (Canada, Denmark, France, Montenegro, Philippines) and new policing guidelines

(Spain, United Kingdom); national hotlines to report homophobic incidents (Brazil, Netherlands) and surveys to improve hate-crime data collection (Belgium, Flanders, Canada); a national task force on gender-and sexual orientation-based violence (South Africa); policies and protocols for ensuring the dignity and safety of transgender prisoners (Brazil, Canada); training materials on the rights of sexual minorities prisoners (Ecuador); and investigations by the human rights commission of allegations of torture and ill-treatment of sexual minorities and intersex detainees (Nepal)’.

‘The legal obligations of States to safeguard the human rights of sexual minority and intersex people are well established in international human rights law on the basis of the UDHR and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be born free from discrimination and the right to freedom of expression, association and peaceful assembly.’

Further, ‘The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for sexual minority people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights. The prohibition against discrimination on the basis of sexual orientation and gender identity is not limited to international human rights law. Courts in many countries have held such discrimination violates domestic Constitutional norms as well as international law’.

Lisa C. Connolly concludes in the paper titled “Anti-Gay Bullying in Schools: Are Anti-Bullying Statutes the Solution?” that ‘It is time for States to act. The acute threat to sexual minority youth from hateful, bias-motivated bullying is clear and each

276 Ibid.
tragic-and preventable-suicide by a child bullied because of his perceived sexual orientation makes the link more difficult to ignore.\(^{277}\)

‘The repercussions of India’s Supreme Court verdict re-criminalising gay sex were being felt as far afield as the U.S., advocacy groups for Lesbian, Gay, Bisexual and Transgendered (LGBT) community rights said this week (February, 2014). “While our friends in Pakistan, Bangladesh, Kenya, Jamaica, Guyana, and other places where South Asians live in the diaspora were excited in 2009,” when the Delhi High Court decriminalised gay sex, they now were in “a state of disbelief about the Supreme Court decision,” said Sapna Pandya, a co-founder of Humsafar International, a collective of trainers on sexual health and sexual identity issues among sexual minority South Asian communities. Her comments came at a panel discussion, organised by the South Asian Bar Association-DC, the American India Foundation, Khush DC and the sexual minority Bar Association of DC, which focused on both the legal issues and challenges to fundamental human rights in India posed by the Supreme Court ruling.\(^{278}\) Further, ‘The Supreme Court’s ruling in favour of Section 377 of the Indian Penal Code, which criminalises sexual acts “against the order of nature,” may have also influenced asylum-related policies in the U.S., as not more than ten days after that ruling a gay couple that fled India in 2012 for fear of persecution was granted asylum here.\(^{279}\)

‘A law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.-Vaughan, C. J. in Thomas v. Sorrell, 1677.\(^{280}\) Similarly, “To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos.”\(^{281}\) And “A law that changes every day is worse than no law at all”\(^{282}\). Pakistan has recently allowed the transgender marriage in Islam by issuing a ‘Fatwa’. At International level, this series of legalizing the homosexuality in general and same-sex marriage in particular has been continuous till today yet ‘only

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\(^{277}\) Lisa C. Connolly, ‘Anti-Gay Bullying in Schools-Are Anti-Bullying Statutes the Solution?’, 87 NYULR 282 (April 2012).


\(^{279}\) Ibid.


\(^{281}\) Id. at 37.

\(^{282}\) Id. at 28.
five countries Britain, Bolivia, Ecuador, Fiji, Malta in the world have given sexual minorities people equal Constitutional rights, global research group World Policy Analysis Centre (World) and the University of California, Los Angeles (UCLA) report which analysed the Constitutions of all 193 countries recognized by the United Nations.  

The international human rights law framework is a basis to protect the rights of sexual minorities. It also obligates the States to protect the same within the domestic laws as well. The next chapter discusses about the legal framework relating to sexual minorities within Indian context.

\[283\] Available at: http://www.reuters.com/article/us-global-lgbt-rights-idUSKCN0ZF1IC.