In this chapter, an attempt has been made to focus a bird’s eye view on the LGBT Rights and Human Rights with International and Indian Scenarios with vividly delineation.

The Human Rights discourse that maintains every individual’s right to live freely provides a framework for individuals to choose and live a lifestyle that is centered on the same sex relationships. Thus, decriminalization of homosexuality, right to protection from human rights abuses/hate crimes and non-discrimination on the basis of sexual orientation should be on the agenda of any human rights organisation.

However, it was only in 1994, that an International Human Rights Organisation- Amnesty International finally publicly acknowledged that violence and abuse of lesbians and gay men because of their sexual orientation constituted an infringement of human rights.

Another ground-breaking verdict was issued by the United Nations Human Rights Committee in the case of Nicholas Toonen vs the State of Australia in which the committee acknowledged that the criminalization of homosexuality in the State of Tasmania, Australia was a violation of Articles 2 and 26 (right to privacy and right to equal protection under the law) of the International Covenant or Civil and Political Rights.

A decade of lesbian and gay activism and lobbying in the U.S and Europe has resulted in a few gains in terms of putting lesbian and gay rights on the human
rights agenda. Human rights groups in India have not yet raised the issues of lesbian and gay rights in spite of the stark criminalization faced by gay men and lesbian women. The only initiative undertaken was the conference on Gender Just Laws organised by women’s groups and human rights groups in 1996 where lesbian and gay rights were discussed openly on a broad platform with people from various backgrounds.

Lesbians and bisexuals, like other sexual minorities (transgenders, hijras, and prostitutes) challenge the norms of traditional families that are constructed on the premises of heterosexuality patriarchy, monogamy, and control of women’s sexuality. Inherent in this challenge, is the recognition of other kinds of families - single parent families, same-sex domestic partnerships, multiple adult related (and not just sexually) families, etc.

At one level, the accepted norm of the family needs to be questioned at its very roots. Simultaneously, the law should endeavour to broaden the legal definition of "family". We believe that the definition of the family must be looked at again and not just through the lens of hetero-patriarchy but also through various lenses that reflect lived realities.

The family is not a static institution as it appears to be, or as people discuss it. The overall function of the family is in essence the same in various societies - i.e., provision of legal heirs. In a majority of communities where social, caste and gender discrimination and hierarchical status exists, heterosexuality is the norm, and reproduction is the main function of the family. Another essential function of the family is to maintain and reproduce cultural and social values and carry them forward through generations. Violence against the powerless within the heterosexual, patriarchal family is an important "hidden" norm that has social sanction. This is because-family is considered to be a sacred institution, which should be maintained "at all costs" - even that of violence. Other forms and structures based on trust and faith and without defined hierarchies in the relationships between members do not have legal and social sanction because they
affect and violate the norms and values that are perpetuated by the heterosexual family structure of patriarchy.

Lesbianism by its very existence raises issues that the women's movement is concerned with, and therefore feels it is important to create and articulate a space for lesbian rights within the context of the women's movement.

Within the women's movement in India, lesbian issues have been raised occasionally over the past decade. The range of responses has varied from hostility and dismissal cautious acknowledgement. Rarely has acknowledgement led to action. We do recognise that an important reason for the lack of dialogue and action within the women's movement on this issue has been the lack of visibility of lesbian women in the movement with the exception of a few brave women I for whom there has been little or no support. This has then led to a vicious spiral where on the one hand, lesbian women do not "come out" because of lack of support or resources. On the other hand, because there are very few women who do "come out" their energies are expanded in survival, leaving very little left for activism/mobilisation or organisation within the movement.

However, in asserting the rights of lesbians and gay men to marriage/civil contract unions/domestic partnerships as a prerequisite the decriminalization of homosexuality and the protection of lesbians and gay men from human rights abuses and discrimination. Lesbian and gay rights have the following four sections:
1. Decriminalization of homosexuality.
2. Protection of lesbians, gay men and other sexual minorities from human rights abuses.
3. Anti-discrimination on the basis of sexual orientation.
4. Domestic partnerships for lesbians and gays.
5.1. DECRIMINALIZATION OF HOMOSEXUALITY

Section 377 of the Indian Penal Code (1860) criminalizes homosexual acts. This statute is based on the British law-Offences. Against the Person Act (1861) - which was subsequently instituted in all colonized countries, including India and Ireland? The experiences of gay men who have been threatened and violated - physically and emotionally - by this law have only been documented in the last decade.

The current usage of Section 377 is therefore, primarily by the police to sexually harass and blackmail gay men even though it is a criminal offence to blackmail people.

Section 377 has also been used to intimidate women - particularly those who have run away together, or those who have made their relationship known. The story of Tarulata/Tarun Kumar\(^2\) who, in 1987, underwent a female to male sex change operation and married Lila Chavda in 1989. They had met five years previously, when Tarulata's sister, who was running for elections, campaigned in Dasade. Muljibhai Chavda, Lila's father has gone to the Gujarat High Court saying that it is a lesbian relationship and that the marriage should be annulled. The petition contends that, "Tarunkumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children. Adoption of any unnatural mechanism does not create manhood and as such Tarunkumar is not a male." Muljibhai has called for criminal action under Section 377. The Gujarat High Court has accepted the petition in this case.

Parul and Mehernaaz\(^3\) (names changed in report) two young woman ran away from their respective homes and spent 10 months roaming around the country trying to live together. Finally they returned to Bombay only to be put in custody, as Parul's father had filed a case of kidnapping against Mehernaaz.

\(^2\) India Today, April 18th 1990.
\(^3\) Bombay Times (Times of India), August 8th, 1995.
5.1.1 Section 377: an annotation

1. It does not distinguish between consensual and coercive sex.
2. The act of sodomy, and not homosexuality per se, is a cognizable offence.
3. It has not been used in cases against lesbian women, except for intimidation, and in the exceptional case of Tarulata/Tarunkumar described earlier.
4. Heterosexual couples engaging in sodomy can be indicted under Section 377, and women often cite this as a cause for divorce.
5. It is currently being used actively by groups working to register cases of child sexual abuse, since the existing rape laws do not cover child sexual abuse. The clause in Section 377 "against the order of nature" is used in cases of sexual abuse of children.

5.1.2 The Cause for the Repeal of Section 377

First of all, the definition of “unnatural acts” is Victorian and obsolete. Consensual sex between two adults (over 18) should be protected by an individual's constitutional right to privacy. Further, section 377 violates Article 14 of the Constitution since it discriminates against persons on the basis of sex and therefore sexual orientation. In fact, this antiquated statute has been repealed even in Britain, the country of its origin.

Along with the repeal of Section 377, there is an urgent need for the enactment of a comprehensive sexual assault law which firstly, broadens the definition of sexual assault beyond the limited scope of 'penile penetration' (heterosexual or homosexual); and secondly differentiates assault on minors and adults. Such a law should also determine a common age of consent for sexual activity (lesbian, gay or heterosexual).

5.2 Protection from Human Rights Abuses/Hate Crimes

Men and women who are identifiably, openly lesbian and gay face violence and the persistent threat of violence. This may take the form of verbal and physical assault on the streets, death threats, and even murder. This has been justified "because he/she was gay".
It also takes the form of psychological violence on men and women who are subjected to shock therapy, aversion therapy and incarceration as "treatment" for their "problem". Many women have gone through the humiliation and trauma of having their bodies mutilated in this "normalisation" process. This happens even for women who are not transsexual (Le, who does not feel that they were born into the wrong sex or in the wrong body). In a society which sees the Possibility/of a relationship only between men and women, women who love women are considered aberrations and the medical community thus "cures" them by these extreme steps.


5.3 ANTI-DISCRIMINATION/ EQUAL OPPORTUNITY LAWS

The law reflects the prejudices and norms of existing societies, and thus marginalizes some members within the framework of society. This is the case all over the world. But it need not be so. In fact, the law should help counter the prejudices and protect the rights of marginalized sections. This would mean having clear anti-discrimination laws for the threatened communities. The enactment of such legislation would ensure that the rights of lesbians and gay men are protected particularly in the areas of housing, education, employment, insurance and health care.

Article 2 of the Universal Declaration of Human Rights states that, "No person should be discriminated against on the basis of race, sex, religion, caste, colour, or any other status." Many countries have introduced "Sexual Orientation" as a clause within this anti-discrimination framework.
5.3.1 Countries that have explicit Anti-discrimination laws incorporated in their legal statutes

In 1981 Norway introduced anti-discrimination legislation including lesbians and gays. Likewise in 1985 France, 1987 Denmark, 1993 Sweden, Holland, Ireland, 1993 New Zealand introduced The Human Rights Act which explicitly includes sexual orientation as a new ground for anti-discrimination in 1994, South Africa was the first country to explicitly safeguard the rights of lesbians and gays in the Constitutions. In 1996, the US Supreme Court ordered and that no state can pass legislation that discriminates against lesbians and gays. (Previously, different states had different statutes)

Despite the gains that have been made internationally on the enactment of anti-discrimination legislation, in the past two decades, new, regressive legislation has been introduced in U.K. in 1989 where Section 28 of the Local Government Act states that it is, "Illegal for local government to promote homosexuality", or teach 'acceptability of homosexuality as a pretended family relationship' in schools.

In practice, this has meant discrimination against lesbians and gays in employment in educational or health services by the State.

5.3.2 Cases of discrimination that have come to public attention in India

1. Leela Shrivastasav and Urmila Nusdeo - In February 1988, national dailies carried the highly sensationalised story of Leela and Urmila, two women constables of the Madhya Pradesh Special Armed Force who had been discharged from service because they were reported in the press as having married each other. The ostensible grounds for discharge were "Unauthorised absence" and, "Conduct unbecoming of Public Servants". The State is the largest employer and none of the service rules define homosexuality as an act

---

of misconduct. Clearly, the constitutional prohibition of discrimination and guarantee of equality of opportunity in employment do not hold in the case of lesbian women.

2. In January 1992, seven school-girls from Class ninth and tenth were expelled from a government high school in Thiruvananthapuram, Kerala for being a "lesbian grouping." The majority of the opinions expressed by the adults considered their behaviour as, "abnormal" or a "passing, adolescent phase." Few, if any, asserted anything to the contrary, or protested their expulsion.

5.4 DOMESTIC PARTNERSHIP RIGHTS

Beyond social recognition is the need for the legal rights that accrue to two people in marriage. Lesbian and gay families today do not have even recognition, let alone the rights that are taken for granted in heterosexual couples. Thus we feel that any discussion of family laws should include the rights of lesbians and gays to form families of their own choosing, and to be accepted as such, with all the rights and privileges that come from such an acceptance. Some of the rights and privileges that would put lesbian and gay relationships on par with heterosexual ones include:

1. The regulation of legal and financial rights and obligations
   a) Maintenance liability in the event of termination of partnership or death
   b) Joint insurance
   c) Social benefits - old age pension, single parent benefits
   d) Debt, mortgage loans
   e) Common property, inheritance

2. "Next of kin" privileges in the event of terminal illness / accident or death

3. Regulation of the rights and care of children
   a) Custody and maintenance
   b) Adoption
   c) Artificial insemination
   d) Child support from the State

4. Immigration rights for bi-national couples. This is already available in some countries such as Australia (where a non-related significant other can
immigrate), Norway (both partners need to be resident, one a national), New Zealand, Canada, and the Netherlands.

In Europe, registration of domestic partnerships is viewed from an economic angle, which benefits rich couples, and not poor couples, since the former gets tax benefits, and the latter lose State benefits provided to single people, if they were to register a domestic partnership. "Marriage" as a religious institution is still sacrosanct. It is the "contract", i.e. the economic, social and legal regulation of domestic affairs, which is accepted, while adoption, child custody and artificial insemination rights are still denied to lesbian and gay couples.

In addressing the issue of rights for lesbian and gay couples, there are two possible routes to enacting the legislation. In the first, the legislation enacted is the same as that for heterosexual couples and in the second, the legislation for lesbians and gays is separate from that for heterosexual couples.

In practice, in most countries, the latter route has been adopted and this has primarily been to assign certain economic and legal rights/benefits of heterosexual marriage contracts to homosexual unions. However, even in the most "progressive" countries, these rights are not fully equal to those enjoyed by heterosexual couples.

5.5 GENDER JUSTICE

True gender justice means not only laws for women and men in hetero-relations but justice that recognizes and gives rights to all people not within this paradigm. These include not just lesbians and gays, but also other marginalised peoples - transgenders, transsexuals, bisexuals and others. Only if people of all genders and their lived realities are reflected and recognized within law, and their human and family rights granted, only then can we have real and effective gender justice.

Keeping this in mind, Forum Against Oppression of Women (a group of which each one of us in the Working Group is a member) has included
homo-relational realities as part of a vision of gender-just laws\textsuperscript{7}, Homo-relational families, a lived reality in the Indian context, have been recognized on par with hetero-relational families. The laws governing such contracts have however been kept somewhat different because as stated in the draft on gender just laws.

"According to us although the status accorded to homosexual contracts has been equal, the laws governing these cannot be the same because we presume an inequality in all hetero relational realities. The terms of settlements and the rights of each individual in these realities are hence different from those of the persons in a hom- relational reality. Since gender is not the only factor that creates the power balance between two persons, these other differences are taken care of when referring to nights of the individuals in a homo-relational reality.

In keeping with this, the suggestions put forward about the rights of persons in a homo-relational partnership are as follows:

- Each partner has an equal right to the matrimonial home.
- Each person has the complete right over the property that they individually own at the time that the contract is made. Both partners have an equal share and jointly own all property that is subsequently acquired.
- Each partner is responsible for the well being of the other with. Greater responsibility on the one who is earning to meet the material needs of the other.
- Both partners are guardians of the children jointly adopted and are responsible for their welfare.

Similarly, at the time of dispute/breakdown of the partnership the following suggestions have been made:

- Either partner can ask for a divorce claiming irretrievable breakdown of the marriage. Such a divorce would get finalized six months after filing the petition.
- The property acquired during the relationship would be divided equally.

\textsuperscript{7} Forum against Oppression of Women. "Visions of Gender Just Realities", Bombay, Dec. 1995
• Either of the partners can have a right to maintenance or residence only if destitution is proved. The right to residence is for a maximum period of one year.
• If a child is adopted the responsibility for providing maintenance and residence to the child is with both parents.

This vision of partnership laws and recognition of homo-relational families is being presented in the context of re-looking at the family, of questioning the dominant understanding of the family as a hetero relational, monogamous and patrilocal unit. As started earlier, in doing so decriminalization and anti-decriminalization clauses as necessary parts of the law.

As the situation exists in India today, none of this is a reality. Acceptance of families and sexualities other than heterosexual ones has been a long battle all over the world. It is the work of various individual, and groups that have helped achieve some visibility and acceptance to all these issues. This meeting as a streaming point of such a collective struggle within the Indian context.

5.6 RIGHTS ISSUES RELATED TO BISEXUALITY

There is a limited amount of writing on bisexuality and experiences of bisexuals in India. Most references to bisexuality seems to be all (insignificant but politically correct) appendages in what is being called the lesbian, gay, bisexual, transgender (LGBT) Movement. Specific rights related issues affecting bisexuals, as bisexuals have not been addressed or even articulated. This unfortunate reality, perhaps, owes to the fact that there is no concept of a bisexual identity in the Indian context. Bisexuality issues do not occupy much space within either heterosexual or homosexual spaces and there is no separate bisexual space. To talk of bisexual rights would be to prematurely presume the existence of a bisexual identity, a bisexual community and a bisexual space. Keeping this in mind the scope of this article has been drawn out.

The present legal discourse on LGBT rights is barely a discourse on sexuality. It is constrained by the fact that same sex behaviour is criminalized.
Legal debate more or less starts and stops with Section 377 of the Indian Penal Code, which criminalizes same sex behaviour and in the bargain violates the right to life, the right to privacy, the right to equality and arguably, the right to freedom of expression. It also has the impact of making other rights, which form a part of the right to life, inaccessible. For e.g. the fear of prosecution and discrimination is a barrier in accessing essential health care related to same sex behaviour, such as treatment for anal STDs. As such, debate revolves around the rights guaranteed to everyone, but which are not presently available to LGBT, or which are being violated in the context of LGBT. The debate must now go beyond this and must look ahead into how we want the legal regime to change in order to make space for, and respect for different sexualities. In order to do so, there is a need to first conceptualize a right to sexuality, and then go on to the issue of gay rights, lesbian rights, bisexual rights etc.

5.7 THE RIGHT TO SEXUALITY

A question that needs to be answered before discussing the right to sexuality is why there is a need for such a right in the first place. At one level, sexuality and sex are at the centre of gender relations. The regulation of sex is a significant tool in maintaining the status quo of oppressive gender and economic structures. Change in the manner in which this control is maintained would be difficult without the development of consciousness of sexuality within individuals. At another level, sexuality is so basic to the self that its denial derogates against the very idea that each person has a fundamental human right to a wholesome life.

The legal regulation of sexual activity has largely been in order to promote the interests of a patriarchal economic structure. For example, the focus of law against adultery is ensuring that a man should not have to bear the responsibility of a child who does not belong to his lineage. Therefore there is presently no concept of a legal right to sexuality. However, recognition of limited aspects of what may constitute such a right includes:

- The right to a family life and marriage are considered fundamental rights, under Articles 21 and 19 of the Indian Constitution. The right to marry is also
recognized as a basic human right in international human rights conventions that are applicable in India.

- Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 10 of the international Covenant on Economic, Social and Cultural Rights. All these recognize the right of individuals to marry and form families.

- The right to privacy has been recognized in India to include the right to protect personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing.

- Conjugal rights, which are provided in various matrimonial laws, are the clearest recognition of a right to have sex. They basically imply that if one person in a marriage leaves the other, a court can order her/him to return.

- The right to non-discrimination on the basis of sexual orientation, which is available in some countries. This means that where such a right has been recognized, the State cannot discriminate against sexuality minorities and all laws would have to be in consonance with this principle of non-discrimination. This also means that laws that criminalize homosexuality would be invalid.

The heterosexual bias in the first three can hardly be ignored, but they at least recognise that the right to have "legitimate" sex should be respected. The only focus of these rights related to sexuality is the protection of the heterosexual, monogamous paradigm and does not extend to anything or anyone outside its parameters. Even within these parameters, the focus is the permanence of the institution and not sexuality or its expression. Other laws that contribute to the legal construction of sexuality are also based in the heterosexual and monogamous

---


9 An order for the restitution of conjugal rights is not practically enforceable, i.e. one cannot actually be forced to live with or to have sex with one's spouse. Implications of non-compliance with the order are that the spouse gets a ground for divorce, one's property could be attached and one's right to get maintenance may be affected.

10 The Constitution of the Republic of South Africa specifically provides a right against discrimination on the basis of sexual orientation, although none of the international human rights documents specifically state sexual orientation as a ground of non-discrimination, most of them contain the phrase 'any other status', some courts have interpreted this phrase to include sexual orientation, in India, there is no parallel interpretation as yet.
paradigm. This includes the laws of rape\textsuperscript{11}, offences relating to marriage\textsuperscript{12} and the infamous Section 377.

Very clearly then the two norms that predominantly determine the morality of sex and the legal construction of sexuality are heterosexuality and monogamy/fidelity. The movement towards a right to sexuality must contend with these in creating an environment where there is no fear or discrimination against particular types of sexuality.

The right against discrimination mentioned can be applicable in India only when there is an interpretation of the relevant provisions of the Constitution to include a right against discrimination on the basis of sexual orientation (or identity), or if the legislature makes a law to such effect. It is perhaps only after such legal intervention in India that further debate on a right to sexuality can be effectively advocated.

From a normative perspective, the right to sexuality ought to revolve around the right to an environment where one could: without fear of discrimination or violence, explore the terrain of one’s sexuality and the right to expression of one's sexuality. It should also entail the right to the development of lifestyles suited to the expression of various sexualities. This would imply the existence of a legal system that recognizes treats without discrimination and promotes all possible sexual orientations and gender identities just as the right to health implies that the state has a responsibility to ensure not just that health services are available, but also that they are accessible to all, the right to sexuality would imply that the state has a responsibility to ensure that all possible sexual orientations and gender identities have the space to be realized and to evolve. This would also imply a massive change in the dominant attitudes and stereotypes about sexuality in civil society and a responsibility on the state to take steps to promote such change.

\textsuperscript{11} Section 375 and 376 of the Indian Penal Code
\textsuperscript{12} Chapter XX of the Indian Penal Code, which includes offences such as Bigamy, Adultery and Enticing away a married woman
In order to realize the right to sexuality for all sexualities, it is necessary to understand the specific issues and tension points that may come up in the contexts of different sexualities. The present paper is concerned specifically with bisexuality.

5.8 BISEXUAL AND BISEXUALITY - DEFINITIONAL PROBLEMS

According to the Kinsey scale\(^{13}\), a person's sexuality may be placed on a scale of 0 to 6, where 0 implies that a person is totally heterosexual and 6 implies that a person is completely homosexual. Bisexuals are those in between, i.e. scoring between 2 and 5 on the scale. The explanation, although simplistic, clearly articulates that there are not just two types of sexual orientations. Years later, Fritz Klein came up with a grid to replace the Kinsey scale\(^{14}\). The grid takes into consideration the fact that sexual 'orientation' is an ongoing dynamic process and that many people change their orientation over time. It takes into account past sexual experiences, sexual identity, fantasy, attraction, emotional and social preferences and behaviour. This is a more holistic understanding of sexuality and provides greater scope for understanding bisexuality\(^{15}\).

Neither of these systems, however, is suited for an understanding of sexuality in terms of the myriad factors that go into its formation. Neither considers the gender identity of the bisexual as relevant, nor do they take into consideration the impact of gender differences on the nature of the sexual interaction between people. Their focus is simply the sexual act and at best, sexual attraction. Sexuality, it is submitted, cannot be understood in two-dimensional terms such as a scale or a graph. The understanding must include gender identity, gender relations and other social factors that influence sexual activity and attraction.

---


\(^{15}\) The term ‘bisexuality’ itself is based on a problematic understanding of gender, as it presumes the existence of just two genders. It does injustice to the complex interaction between gender and sexuality and flexibility in gender identity itself. Alternatives suggested include "Pansexual" and "Allsexual", since "bisexuality" is a better-known term, it has been retained for the purposes of this article, but its literal meaning has been changed to make more gender sensitive.
'Bisexual', for the purposes of this article, thus, is a person who is sexually attracted to or capable of being attracted to persons of more than one gender.

Definitions based on identity and on behaviour are undesirable in the Indian context as they are particularly limiting in the context of bisexuality. The politics of identity in the context of perceived biphobia\textsuperscript{16} in heterosexual and homosexual communities has been known to cramp self-identification\textsuperscript{17}, at the same time, the bisexual identity is not particularly developed in terms of a unique lifestyle or community, as are the gay and lesbian identities in urban centres. Neither is the bisexual identity political in the manner that the gay and lesbian Identities are. In some sense then the bisexual identity is less empowering than its homosexual counterparts and therefore, more bisexuals than care to openly identify themselves as such. Basing a definition on identity thus, would be inappropriate. Similarly, sexual behaviour may not have a direct correlation with one's sexual attraction to a given gender. Social and cultural factors affect the actual sexual behavior of a person making a definition based on behaviour incomplete.

There are different types of bisexuals those who identify as heterosexual and live heterosexual lives (married with children etc.) but who are so attracted to, or sexually active with people who are not of the opposite gender/sex. There are those who choose the gay or lesbian identities and live gay and lesbian lifestyle, but who are attracted to or sexually with those of the opposite gender/sex. There are those who alternate between heterosexual and homosexual identities over periods of time and those who have 'changed' or converted from one life style to another. Finally there are a small number of persons who identify themselves as bisexuals and who live lifestyles suited to their type of bisexuality. Very clearly, bisexuality questions the belief that sexual orientation is a static state of being. It opens the possibility of understanding sexuality as a dynamic and constantly evolving aspect of one's personality affected by experiences.

\textsuperscript{16} Biphobia is the expression of fear, hatred or prejudice towards bisexuals.
\textsuperscript{17} People's Union for Civil Liberties, Human Rights Violation Against Sexuality Minorities in India: a PUCL-K Fact- finding Report about Bangalore, 2001, pg. 48.
A definition of bisexuality that is based on attraction and capability for attraction keeps this option open and includes all these 'types' of bisexual each and every one of these people, just like heterosexually and homosexually identified people, ought to have the right to sexuality.

5.9 THE RIGHT TO SEXUALITY FROM A BISEXUAL CONTEXT

Heterosexuality as the norm is a common adversary to be deal with for all sexuality minorities. Displacement of heterosexuality as the norm will require societal change, which, to a large extent, falls outside the scope of the law. The law however, may be a useful tool in aiding the process by providing recourse against discrimination, recognizing Civil Rights of sexuality, minorities, and by recognizing different lifestyles in laws that to regulate Inter-personal relations and between individuals and society at large. This would also imply changes in laws that affect public dialogue on sexuality, such as the provisions dealing with obscenity and the right to information.

Bisexual, by definition means that the sexual orientation of a person is not linear, and that it is not completely expressed in a monosexual context. For bisexuality to be expressed, there must be space for sexual relations with people of more than one gender and thus, more than one person. The right to sexuality in the context of bisexuality then implies that the same legitimacy that is socially provided to monogamy be provided to partnerships that involve more than two people. It implies space for creation of alternative partnerships and lifestyles that are viable for bisexuals.

The value placed on 'fidelity' and monogamy is so deeply engrained that a substantial amount of energy in the dialogue between sexualities is spent on providing evidence that queers are also capable of monogamy, 'commitment' and long-standing relationships. The presumption that all people finally settle in monogamy seems to be common to the dominant heterosexual paradigm as well as the dominant homosexual paradigm. The issue is not whether monogamy is a good
or bad lifestyle choice, but that monogamy is a norm oppressive especially to the process of realization and expression of bisexuality\textsuperscript{18}.

From a bisexual context, thus, the realization of the right to sexuality entails not just a challenge to the imposition of heterosexuality, but also to the imposition of monogamy. The bisexual agenda would not be fulfilled in the recognition of same sex marriages or the recognition of property rights and employment benefits to same sex partners (if and when that happens). This is where the bisexual agenda departs from the dominant lesbian/gay agenda.

\textbf{5.10 IMPACT OF LAW ON BIOSEXUALS}

Whether it is criminal law or fundamental rights or rights under civil laws, the law reflects the dominant morality and supports the dominant economic structure. In doing so, it either discourages lifestyles and choices that are different from the dominant morality or actually criminalizes them. Section 377 criminalizes same sex behaviour. The drafters of the Section were not in a position to envisage identities based on sexuality and as such, focused purely on sexual acts. This implies that the criminal law is not concerned whether the people having sex identify as gay, lesbian, bisexual or otherwise. It is not concerned with whether on other occasions the criminal had sex with members of the opposite sex. In this regard, the criminal law applies to bisexuals as much as it does homosexual men and women\textsuperscript{19}, similarly, the impact of Section 377 on availability of safe spaces, opportunity to negotiate safer sex, access to medical services related to STDs without fear of prosecution and discrimination among other things affects bisexuals as much as it does other sexuality minorities.

\textsuperscript{18} In a ‘heterosexist’ world, which unfortunately seems to be the world we live in, it must be pointed out that the norm of monogamy is beneficial in certain contexts. Women's groups have been struggling with the inefficacy of bigamy laws for years now in cases where married women have been abandoned by their husbands. These contexts will have to be kept in mind while dealing with the norm of monogamy.

\textsuperscript{19} The question of whether Section 377 applies to same sex activity between women (whether Bisexual or Lesbian) is one that has been much debated. Section 377 has an explanation, which states that penetration is sufficient to constitute the carnal intercourse addressed by the provision. Firstly, it is not clear whether an explanation to this effect implies that penetration is necessary for the offence to be made out. Secondly, whether penetration means only penetration involving a penis is not yet clear. Whether Section 377 applies technically or not, it has been used as a tool of harassment against lesbians in the past.
Matrimonial laws are all based on the heterosexist monogamous paradigm. Certain personal laws provide legitimacy to polygamy, but in a heterosexist and patriarchal manner. Since the law does not recognise homosexual relationships as marriage, bisexuals who choose to be monogamous with members of the same sex are disadvantaged just as homosexuals who desire legal validity of their relationship and matrimonial rights. On the flip side, laws relating to bigamy do not affect bisexuals who have relationships outside marriage since homosexual partnerships are not recognized as marriages.

Bisexuality is, however, a ground for divorce i.e., most matrimonial laws provide a woman with a ground for divorce if her husband is guilty of sodomy. This implies that if a bisexual married man is shown to have had sex with another man, the woman he is married to automatically obtain a ground for divorce. These provisions apply to Hindus, Christians, Muslims and those married under the Special Marriage Act. In these personal laws, sodomy as a ground for divorce is available only to women and as such, if a bisexual woman is sexually active with a woman, it does not give her husband a ground for divorce. The Parsi law, however, is different from these statutes. Firstly, it provides the ground of 'unnatural offence' rather than sodomy, which would include sexual activity between women. Secondly, the ground is available to women as well as men. As such, Parsis can more easily divorce their bisexual spouses if they are involved in same sex behaviour. It must, however, be pointed out that where sodomy/unnatural offences are not specifically listed out as grounds for divorce, the term 'cruelty' may well be

20 In India, different matrimonial laws apply to people of different religions. Some of these religious laws have been made into statutes, i.e. laws made by the parliament.
21 Muslim men in certain circumstances may get married to more than one woman, whereas no personal law permits women to marry more than one man.
22 Section 10 of the Indian Divorce Act, 1869, Section 27 of the Special Marriage Act, 1954 and Section 13 of the Hindu Marriage Act, 1955, Section 32 of the Parsi Marriage and Divorce Act, 1936.
23 The legal definition of 'Hindu' practically includes all people of India except Christians, Muslims and Parsis. As such, Sikhs, Jains and Buddhists are also considered as Hindus for the purpose of law.
interpreted to include same sex behaviour by one's spouse. Cruelty is a ground for divorce in all matrimonial laws.\textsuperscript{24}

Provisions relating to adultery form a part of the chapter in the Indian Penal code that deals with "offenses related to marriage". Section 497\textsuperscript{25}, which defines Adultery, is amongst the most obvious articulations of patriarchy in our law. According to this section, whoever has 'sexual intercourse' with 'a person who is the wife of another man' and without the 'consent or connivance' of that man may be punished. The woman, in this provision is the property of the man she is married to. This is the interest that is protected by the provision. The provision is not applicable where a married man has sex with another man (married or unmarried) or a woman not presently in a marriage. The question in the context of bisexuality is whether a woman who has a sex with married woman is punishable under this provision. Although there is no legal pronouncement on the issue, it may be said that the provision would not apply for the following reasons.

'Sexual intercourse' is a requirement for the offence to be made out. The term has been interpreted in the context of rape law to require vagino-penile penetration. As such, non penetrative sex and non-vagino-penile penetrative sex fall outside the ambit of the provision.

The law presumes that a woman is not capable of making sexual decisions and thus cannot be punished under the provision. She is considered as the 'victim' of the crime an abettor or participant.\textsuperscript{26} Due to this patriarchal presumption, the law is not in a position to deal with a situation where both parties to a consensual sexual act are woman.

\textsuperscript{24} Except in the Indian Divorce Act, which requires that for a woman to get a divorce on the grounds of cruelty, there must be the presence of another ground such as adultery or bigamy? Section 10 of the Indian Divorce Act, 1869.
\textsuperscript{25} Section 497 reads - "adultery - who ever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to be offense of rape, is guilty of the offense of adultery and shall be punished with imprisonment of either description for a term which may extend to 5 years, or with fine, or with both. In such case, the wife shall be punished as an abettor"
\textsuperscript{26} Summitri Vishnu Vs Union of India, AIR 1985, SC 16-18.
The wordings of the remaining chapter on offenses relating to marriage, which will be considered when interpreting the provision, are very clearly concerned only with heterosexual sex. It is the non-recognition of minority sexualities that has exempted bisexuals from punishment in this provision.

The impact of various laws that depends on the recognition or non-recognition of bisexuality. Some laws like Section 377 and grounds of divorce recognize same sex behaviour and attach negative implications to it. Others do not envisage of same sex behaviour, and this leaves certain spaces open. In this context of the over criminalization of same sex behaviour, however, it must be said that these spaces are presently irrelevant. Their significance may grow only when Section 377 is done away with.

The discourse on sexual orientation presently functions on the polarisation of heterosexuality and homosexuality. Bisexuals in this polar world of words and spaces lie neither here nor there. Being the permanent outsiders bisexuals largely only has the option of identifying as homosexuals in homosexual spaces and heterosexuals in heterosexual spaces. The effect at a personal level is that a person may have a heterosexual or land homosexual relationship but never a 'bisexual relationship'. One may be 'this' or 'that' at different points of time but at no point of time be bisexual. There are no personal or political spaces where the sexuality of a bisexual may be expressed. Change in this situation is difficult to envisage but it is necessary to begin creating spaces where such a vision may be created. This requires the incorporation of bisexuality issues in the dominant sexuality discourse. This requires addressing biphobia in both heterosexual and homosexual spaces. Trauma, confusion and the lack of a sense of belonging to a community often lie deep within the realms of bisexuality. However people identify, they must understand that bisexuals are not 'fence sitters', or those who 'want the best of both worlds' and that bisexuals are not people who don't want to accept that they are homosexual, or heterosexuals who just want to identify as queer because it is politically correct.
Providing space for bisexuality issues implies shifting focus from identity and behaviour to the understanding of sexuality itself. It implies the deconstruction of the presumptions that operate in our understanding of human sexuality. It implies creating a less restrictive space for gender and sexuality identification and more fluidity in the meaning of gender. It further implies challenging not just the biases in heterosexism with respect to sexual orientation, but also the structure of heterosexism.

The law is, and may continue for a long time to be, based on presumptions of heterosexuality and monogamy. In the bargain, it leaves certain voids, which may on the one hand disadvantage queers and on the other leave spaces to be used fruitfully. Such will be the situation until there is a legal and social recognition of a comprehensive right to sexuality. The onus of sparking of such a conceptualization perhaps lies with the movement for the rights of sexuality minorities.

5.11 DECRIMINALIZATION

The first step in any move towards lesbian, gay and bisexual rights in India would, of necessity, be the repeal of Section 377 of the Indian Penal Code which criminalizes homosexual acts. Aside from the fact that it is used to blackmail and intimidate lesbians and gay men, the existence of such a law precludes the possibility of other legal rights - whether it is protection from discrimination, or partnership benefits.

There is generally little disagreement among progressive groups on the need to decriminalize "private, consensual acts of sex between two adults". However, currently Section 377 offers the only legal recourse for victims of child sexual abuse, and coercive sodomy. Since rape laws do not recognise sexual violations other than penile - vaginal penetration, the clause "against the order of nature" in Section 377 is unclear enough to be interpreted to cover child sexual abuse and coercive sodomy. The debate among progressive groups - in particular within the women's movement has centred on the need for sexual assault laws that explicitly prohibit child sexual abuse and coercive sodomy to be introduced, before Section 377 is repealed.
Women's groups have long campaigned for a comprehensive sexual assault bill in which Sections 376 (covering rape) and 377 are repealed, and new laws formulated. The Law Commission of India in its 172nd Report has produced a draft bill on sexual assault in which Section 377 is proposed to be repealed.

5.12 GAY RIGHTS

Homosexuality has for long been a tabooed subject - never spoken of, never discussed and yet practiced. The social outlook towards homosexuality was codified in the law in the severely punitive Section 377 of the Indian Penal code of 1860. Today, the Section stands out as an anachronism, in sharp variance with international law, covenants to which India is a signatory and the Indian Constitution itself27.

Patriarchal society has for centuries attempted to control human sexual behaviour through severe social and legal sanctions against any deviations from the stereotype family - male headed, heterosexual, and monogamous, child rearing, indissoluble. Sexual relations were confined to within the marriage and there too, to procreative rather than recreate purposes.

Challenge to the heterosexual family stereotype has always existed, but has gained momentum in this century with the growth of the women's movement, the sexual revolution and recently, gay liberation. In India, however, the majority of homosexuals lead secret and lonely lives, and those who do "come out" or get "caught" are often subject to severe censure, and under the Indian Penal Code, 1860, male homosexuals might even face the imprisonment.

5.13 POSITION IN UK

The King James Version of the Bible in Leviticus 20:13 states: “If a man also lie with mankind as he faith with a woman, both of them have committed an abomination. This shall surely be put to death; their blood shall be upon them”.

This exhortation and the destruction of Sodom and Gomorrah are seen as the source of criminalization of Sodomy by common law countries. The English buggery statute of 1533 prescribed death for sodomy and in several instances, executions were carried out. The 1861 Offences against the Person Act removed the death penalty for buggery, replacing it by sentences of between ten years and life. The Indian Penal Code, 1860 still prescribes similar punishments.

In 1885, the Criminal Law Amendment Act, made gross indecency, which includes all homosexual activities except 'buggery', punishable for the first time. In 1898, the laws on soliciting for "immoral purposes" were tightened and made to apply to male homosexuals. Lesbian activities were not acknowledged to exist and therefore were not proscribed. The Sexual Offences Act, 1956 consolidated all the existing law on the subject.

On the recommendation of the departmental committee on homosexual offences and prostitution under the chairmanship of Sir John Wolfenden, the Sexual Offences Act, 1967 was passed. It states: "A homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age 21 years", except with a person suffering from severe handicaps, on a UK merchant ship, and if any of the Armed Forces Acts forbids it. Punishments range from life for buggery on a boy under sixteen or a woman, to two years for gross indecency. Solicitation by men still remains an offence as defined in Section 32 of the 1956 Act.

The armed forces ban entry of homosexuals, but the parliamentary committee in May 1990, recommended dropping of the policy because it has resulted in "the loss to the services of some men and women of undoubted competence and good character".

---

5.14 POSITION IN US

Most states in the USA had sodomy statues of their own, and those that did not, incorporated the common law principles from the old English laws. At least half the statues still retain sodomy statues defining it variously. The age of consent also varies.

Foreigners/immigrants found to be homosexual are liable to be deported immediately. Homosexuals, both gay men and lesbians, are barred from the armed forces. Since 1943, when military psychiatrists redefined homosexuality as a medical disorder rather than a crime, the US armed forces have ousted between 80,000 and 100,000 gay men and lesbians.

5.15 POSITION IN INDIA

In India, homosexuality has traditionally been tolerated, even celebrated, although the Manu Smriti pronounces severe punishments for male as well as female homosexuality. The Kamasutra contains an entire chapter entitled 'Auparishtaka' (oral congress) and Vatsyayana, the author insists that the practice is permitted by the orders of the holy writ (Dharma Shastras) with just a few exceptions. One of the forms in which Shiva is worshipped is Ardhanarishwara, containing both the male and the female energies.

Alain Danielou in his book "Shiva and Dionysius" examines the tantric rite of anal penetration and goes on to state "the hermaphrodite, the homosexual and the transvestite have a symbolic value and are considered privileged beings, images of Ardhanarishwara.

The British obviously found the practice unchristian and abhorrent and in 1860, enacted the Indian Penal Code which in Section 377 states:

"Unnatural offences- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with
imprisonment for life, or with imprisonment or either description for a term which may extend to 10 years, and shall also be liable to fine”.

Explanation. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section The exact scope of this vague definition - "carnal intercourse against the order of nature" - has been a major subject of debate in the existing case law. It has generally been interpreted to include acts of anal sex (coitus per annum) as well as oral sex (coitus per os) between males. The possibility of this definition being extended to heterosexual acts of anal or oral sex also exists, but has not been tested. Consent of the other party is completely irrelevant for conviction, but it may be a relevant consideration while fixing the quantum of punishment.

5.16 RIGHT TO PRIVACY

In 1955, the American Law Institute Model Penal Code stated that every individual is entitled to protection "against state interference in his personal affairs when he is not harming others" and eliminated the sodomy statues. In 1957, the Wolfenden Committee (UK) stated that "it is not the function of criminal law to intervene in the lives of citizens or to seek to enforce any particular pattern of behaviour. There must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business." After examining extensive data and various arguments for and against. It recommended that private consensual sexual activity between adult males be removed from the operation of criminal law.

The Constitution of India guarantees that "No person shall be deprived of his life or personal liberty except according to procedure established by law." (Article 21). The provision has been through considerable judicial interpretation and a fledgling right to privacy has been read into the right to life and personal liberty.
In *Kharak Singh vs State of U.P*\(^{29}\), while considering the verse of certain police regulations which allowed surveillance, including domiciliary visit, stated that the right to privacy "is an essential ingredient of personal liberty" and that "nothing is more deleterious to man's physical happiness and or than a calculated interference with his privacy."

In *Govind Singh vs State of M.P*\(^{30}\) 1975 3 SCR 946 a right to privacy emanating from the right to personal liberty and the freedom of speech was contemplated.

The 5th and 14th Amendments to the U.S Constitution state that “no person shall be deprived of its life liberty or property, without due process of law" and a right to privacy, or a "right to be let alone" has been interpreted into these provisions for over a century. The concept initially evolved in response to the development of new sophisticated methods of surveillance, like wiretaps etc, akin to right to property. More recently, privacy of a human personality has also been recognized.

*Griswold vs Connecticut*\(^{31}\), in 1965, recognized the privacy of the bedroom of married couples" Following this principle, the U.S Supreme Court has held that private consensual acts of sodomy between married couples cannot be criminalized by state statues (Charles O. Cotnery Jerome Henry, 393 US 847 : *Buchatla vs. Bachelor* 4DI US489).

In *Einsenstadt vs Baird*\(^{32}\), the court held “the Griswold principle protected more than the marital relationship alone. It extended protection to persons who had a significant personal relationship and desired to choose for themselves, free from state pressures, whether or not they wanted to use contraception”.

---

\(^{29}\) AIR 1961, SC 1295  
\(^{30}\) 1975 3 SCR 946  
\(^{31}\) 381 (1965) US 479  
\(^{32}\) 405 (1972) US 438
In *Roey Wood* 33, it was held that a Texas abortion law could not prohibit voluntary abortions during the first 3 months of pregnancy, on the basis of a constitutional right to privacy. That right includes the privilege of an individual to plan his own affairs, for outside the areas of plainly harmful conduct, every American is left to sharp is own life as he thinks best, do what he pleases, go where he pleases”.

In spite of the recognition of these basic principles of human behaviour, the U.S Supreme Court has displayed singular lack of understanding when it comes to statutes criminalizing sodomy. The constitutionality of these statutes has been challenged several times and has largely been upheld.

Most recently in *Bowers vs Hardwick* (1986) 34, the State of Georgia statue which criminalized sodomy was challenged after a homosexual was charged with committing sodomy on a consenting male adult in the bedroom of his house. The U.S Court of Appeals for the Eleventh Circuit upheld the challenge and put the burden on the state "to provide that it has a compelling interest in regular such behaviour and that the statue was the most narrowly drawn means of achieving that end.

The U.S Supreme Court reversed the judgment with a narrow 5:4 margin. The dissenting judges observed “the concept of privacy embodies the moral fact that a person belongs neither to himself and not others nor to society as a whole”.

The question also came before the European Court of Hunan Rights in *Jeffry Dudgeon v Northern Ireland*. Jeffrey Dudgeon, 35 years old and consciously homosexual from the age of 14 lived in Belfast, Northern Ireland. He along with some others had been conducting a campaign aimed at bringing the law in Northern Ireland in line with that in England and wales 35.

33 410 US 113  
34 760 FZD 1202, 1986  

289
On 21 January 1976, the police went to his house, and seized personal papers including diaries and correspondence. He was asked to go to police station where he was questioned for almost 4½ hours about his sexual life. With a view to institute proceedings for gross indecency, the police sent his file to the Director (Public Prosecutions. One year later, in February 1977.

Mr. Dudgeon was informed that charges were not being pressed and his papers returned. W.J.Dudgeon petitioned the European Commission of Human Rights.

The European Court of Human Rights held: "the legislation complained of interferes with Dudgeon's right to respect for his private life guaranteed by Article 8.1 (ECOHRR) in so far as it prohibits homosexual acts committed in private between consenting males." On whether this breach was justified, the majority opinion was that it was not.

The fact that the authorities in Northern Ireland had refrained in the past years from prosecuting homosexual acts in private between consenting men over the age of 21 years and capable of valid consent and that no evidence was brought to show this had been injurious to the moral standards in the country was noted by the Court.

The Court accepted that in a democratic society some degree of regulation of male homosexual conduct is necessary, but that the present legislation was totally unjustified and its very existence caused anxiety, suffering and psychological distress to homosexual men.

As a result of this ruling, in October 1982, Northern Ireland issued an order in council bringing the law in line with that in England and Wales.
5.17 FREEDOM OF EXPRESSION AND EQUALITY

Article 19, Universal Declaration of Human Rights (UDHR) and Articles 18 and 19, International Covenant on Civil and Political Rights (ICCPR) guarantee the freedom of thought and expression. A right to freedom of speech and expression is recognized in Article 19(1) (a) of the Indian Constitution.

Article 2 UDHR bars "distinction of any kind such as race, colour, sex, language, opinion, national or social origin, property, birth or status." A similar right is recognized in Article 26 ICCPR, and in Articles 14 and 15 of our constitution as interpreted by the Supreme Court.

The Siracusa Principles recognise certain limitations, which can be put in the rights in the ICCPR, but also state in the "General Interpretative principles Relating to the Justification of Limitation".

"(9) No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2 para 1 of the UDHR”.

"(10) Whenever a limitation is required in the terms of the covenant to be necessary', this term implies the limitation,
a) is based on one of the grounds justifying limitation recognized by the relevant article of the covenant
b) responds of a pressing public or social need,
c) pursues a legitimate aim, and
d) is proportionate to that aim.

Any assessment of the necessity of a limitation shall be made on objective considerations”.

"(12) "The burden of justifying a limitation upon a right guaranteed by the Covenant lies with the state."

291
Attention must also be drawn to the fact that even in times of public emergency, the ICCPR prescribes in Article 4.1 that a derogation of the obligation is not allowed if involving "discrimination solely on the ground of race, colour, sex, language, religion or social origin." It is clear that the right against discrimination is not to be violated even in the most desperate times.

In the U.K., inspite of the 1967 amendment to the criminal law, serious onslaughts on the rights of gay men and lesbians continue. In 1986, the British government enacted Clause 28 banning the "promotion of homosexuality (as a) pretended family relationship."

Clause 25 of the Criminal Justice Bill, still under debate in the U.K., includes provisions for higher sentences for soliciting, procuring and indecency by gay men. The Children's Bill, 1991 seeks to ban lesbians and gay men from fostering children. Clearly, merely to decriminalize is not the end of the problem.

In India, the very existence of homosexuality is denied, and those who are 'found out' face severe ostracism and summary dismissal from their jobs. When Lila Srivastava & Urmila Namdeo decided to cement their long-standing friendship with marriage, they were dismissed from the police service without issuing a show cause notice. Though the authorities freely vocalized their fear for "discipline" in the ranks, on paper the reason for dismissal was "absence without leave."

5.18 SOCIAL NORMS

Homosexuality has been treated in various ways by society. A sin against god, a heresy which can only be absolved by fire, a sexual deviance which must be given deterrent punishment, a mental aberration that must be treated.

However, evidence is piling up that homosexuality is neither a disease nor a crime, but is inherent to human nature. 111(" Kinsey reports on male and female sexual behaviour (1948 and 1953) concluded that homosexual behaviour was neither unnatural, abnormal nor neurotic, but that it represented as "inherent
physiologic capacity", and is found "in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas."

To quote just one instance, a report from the Indiana Institute for Sex Research (Bell, Weinberg and Hammersmith, 1991) based on exhaustive questioning of persons of contrasting sexual orientation found that "there is no reason to think it would be an easier for homosexual men and women to reverse their sexual orientation than it would be for heterosexual (persons) to become predominantly or exclusively homosexual"

5.19 GAY MARRIAGES

In the United States, gay couples have often applied for a marriage licence, which has been refused. The United States Supreme Court has yet to rule on this question viz. whether a licence can be refused for marriage between gays. They have challenged the refusal to grant a marriage licence on several grounds viz. that refusal amounts to violation of their important right to freedom of association and that it is an invasion of their privacy. Decisions such as whether to use contraceptives or not, whether to have an abortion or not have also been protected by the right to privacy. Gays argued that their decision to choose with whom they have sexual relations must also be protected from needless government interference.

The gay family is not an unknown phenomenon in other countries. Lesbian mothers have had to fight protracted battles, often in court to gain custody of their children. Sometimes they have succeeded, as the fact of being a lesbian does not disentitle them to the care and custody of their children. Sometimes however they have been unsuccessful. Some courts have taken the view that a lesbian mother is not unfit to have custody of her child simply because she is gay. The Supreme Court of the United States had held that there is no conclusive presumption that an unwed father is not entitled to the custody of his child and it is impermissible to presume as a matter of law, that all unwed fathers are incompetent parents. The
decision must also be applicable to unwed mothers. It must also follow that it is impermissible to presume that all lesbian mother or gay fathers are unfit parents.

5.20 PUBLIC EMPLOYMENT

Public employment in India constitutes a major source of employment. The Constitution of India while guaranteeing equality before law, explicitly guarantees equality of opportunity in matters of employment and prohibits discrimination on grounds of sex. The discharge of Urmila and Leela from the M.P. police force raises the legitimate question as to whether they have been discriminated against in the matter of public employment by the State alone of the numerous rules and regulations of service in the State Governments or the Central Government define homosexuality as an act of misconduct. Thus, the Madhya Pradesh Government can justify the dismissal of Urmila and Leela only by accusing them of violating the notorious, catch all clauses being guilty of "conduct unbecoming of public servants".

There has been much litigation in the US on discrimination against gays and denial of employment opportunities on the ground of their homosexuality. However, to dismiss or discharge or deny employment to homosexuals on the mere ground that he or she is gay would be a clear denial of equality before law and would call for the protection of law in the matter of public employment. It could be successfully argued that there is no nexus between the fact of being gay and the employment in question. If an employee's conduct does not interfere with the effective performance of his or her job, the discharge or dismissal would be a clear act of victimization.

The struggle for gay rights has been long and continuous. There is no doubt that Urmila and Leela will also face societal prejudices both outside and inside court. However, the struggle against the discharge from public employment of Urmila and Leela will at least provide the starting point of a long legal battle for the rights of gays. The case, if and when it goes to court, will be a major trendsetter not only on the rights of gays but also on discrimination in public employment.
Since homosexuality is an immutable part of a person's being, the state has no right to treat his or her sexual behaviour as criminal, and under Article 2 UDHR, and Article 26 ICCPR, such a person has a right against discrimination on the ground' of sexual preference. It is of no use to a person to allow him a homosexual inclination, without the right to freely express this sexuality in his conduct, without fear that such expression will lead to retributive attacks on his person, his family, or his job.

The burden of proof is on the Indian state to show why Section 377 IPC is retained in spite of the fact that it is seldom used and then largely in cases of non-consensual sex will minors, and is used by the police and some sections of the public to terrorize and blackmail.

The Indian State must show why social and legal controls on heterosexual behaviour cannot be extended to homosexuals, and they are given the respect and acceptance due to them.

5.21 DOMESTIC PARTNERSHIPS

In interesting contrast to other countries, in India, the demand for same-sex marriages has come most forcefully from women. All the cases of same-sex marriages reported in the media have been those of women seeking to find a means to validate their relationships. In 1988, it was Leela and Urmila in Bhopal in 1998, it was Sweta and Simmi in Patna. This is even more remarkable when one considers how compulsory heterosexual marriage is for women in India. The "legality" of the contract these couples have attempted to forge varies from the customary exchange of garlands in a temple, to undertaking maitri karar (a quasi legal friendship contract), to filing a signed and witnessed affidavit (stating they are married) with the court, or even, attempting to get the registrar of marriages to issue a license. Besides the women who have had the courage to declare their love publicly in order to live together, several other pairs of women in the intervening decade have been reported as running away together, undergoing sex change.
operations in order to be together or, sometimes, tragically making suicide pacts together rather than be separated.

Further, it has been a women’s group - Forum Against Oppression of Women (FAOW) that has taken the initiative in broadening the definition of family and articulating a framework for same-sex marriages within the context of family laws in India. In challenging the patriarchal, heterosexual definitions of the family, FAOW is one of the few women’s groups to actually draft an alternative vision of marriage, and the only group to explicitly include lesbian and gay relationships as valid companionship contracts.

It has been argued both in India and elsewhere that as long as lesbian and gay relationships are not criminalized, there is no need to go to the extent of providing for same-sex marriage contracts. The reasons why it is perceived as unnecessary vary depending on the context, and the political perspective. For instance, in India, many groups and individuals believe that the existence of strong homo-social spaces and the relative tolerance of homosexuality in our societies, preclude the need for same-sex marriages.

In countries like the U.S, where proposals for same-sex marriage are being publicly debated there is the expected opposition from conservative and religious groups. There are also lesbians and gays who are not in favour of same-sex marriages and there has been much debate on the issues. Ultimately though, the critical question is whether an individual has the choice of entering a same-sex marriage in society.

In the absence of equal marriage rights, lesbian and gay couples are excluded from the automatic rights, privileges and benefits society attaches to a marriage contract - no joint custody and adoption rights; no health insurance coverage, or other employment benefits usually extended to spouses; no joint tax

37 Refer Same Sex Marriage: Pros and Cons - A reader, ed. Andrew Sullivan, Vintage Books, New York: 1997. Also refer to select Bibliography (Legal issues section) in this volume for more titles on the debate)
returns; no survivor benefits; no rights to immigrate as a lesbian or gay partner; no guardianship rights as Karen Thompson of Minnesota, U.S.A, found out most painfully, when a 7 year court battle did not grant her guardianship of her partner Sharon Kowalski who had become quadriplegic in an accident.

Legalization of Registered partnerships in some countries and cities go part of the way toward covering this huge gap in rights. In June 2000, Iceland and Spain were the first country to give same-sex marriage fully equal legal status to civil marriage between heterosexuals (including the rights to adoption, which had been excluded from the earlier Registered Partnership Act).

FAOW's paper is included in this chapter, along with the Datch Same-Sex Marriage Act as prototypes of marriage contracts for same-sex couples. Before that, however, here is a brief run-down of the international status on domestic partnerships.

5.22 RIGHTS TO MARRIAGE - THE INTERNATIONAL LEGAL SCENARIO

Denmark was the first country to introduce domestic partnership legislation for same-sex couples with the introduction of the Danish Partnership Act in 1989. The other Scandinavian countries followed the Danish example almost immediately. By 1995, these countries recognized each other's Acts.

The limitations of domestic partnerships as defined so far in the Scandinavian countries is that first, of course, they indicate legal and not religious sanction. Second, and more importantly, they are not the legal equivalent of heterosexual marriage, since they impose restrictions on immigration and on adoption. Adoption of a child is possible only in heterosexual marriage. Although an individual can adopt, i.e. legally be a single parent, the same-sex partner cannot become co-guardian,

This restriction was removed in June 2000 in Iceland and Spain, and in April 2001 in the Netherlands and indications are that the other Scandinavian countries will introduce the similar legislation.

In a pioneering effort in Brazil, gay and lesbian rights advocates initiated a bill in Parliament for a Partnership law in August 1997. The bill ensures rights to inheritance, succession, welfare benefits, joint-income declaration, and right to nationality in case of a foreign partner and joint income in order to buy a house. If approved, the law will possibly serve as an important precedent for the whole region, stimulating similar changes in other Latin American and Caribbean countries.

The history of attempts in the U.S. to register same-sex marriages in court begins in the early 1970's. In the first major decision dealing with the issue, Bakery Nelson, two men filed a suit after a courthouse clerk declined to issue them a marriage license because they were of the same sex. The Minnesota Supreme Court first held that the language of the state marriage statute precluded same-sex marriage because marriage, by definition, involves a man and a woman. This circular argument - "marriage by definition involves a man and woman because that's how we've defined it" has been used along with biblical quotations quite frequently in the subsequent years in different states where gay men and lesbians have filed for marriage licenses. Ironically, now lesbians and gay men can marry only in religious ceremonies performed by clergy, who do not find such unions of love sinful.

In another noteworthy example, a complaint to the Illinois Department of Human Rights by two men who said they wanted to get married was dismissed because "sexual preference is not a protected class" under the Illinois Human Rights Act. Journalist, Rex Wockner and activist Paul Varnell filed the test-case complaint, after the Cook County Clerk and the State Attorney General's office told them they could not have a marriage license. They appealed the decision, with the new argument possibly for the first time ever that the discrimination they
encountered was not on the basis of sexual orientation, but rather on the basis of sex, since homosexuals are permitted to marry each other in Illinois as long as one of them is a male homosexual and the other a female homosexual.

Although the Wockner case was unsuccessful, the argument of discrimination on the grounds of sex was used again in Hawaii, when the issue of same-sex marriage exploded into mainstream public attention both in the U.S. and internationally. The Hawaii Supreme Court in *Boehry Lewin* Haw. 530,852 P.2d 44 (1993) ruled that the state must show the compelling interest in order to ban same-sex marriages, since the prohibition of such marriages violated the state constitutional ban on gender discrimination. Though the court did not make a final ruling on the issue, it sent the case back to the lower court with instructions to apply the highest level of constitutional scrutiny to Hawaii's Marriage Law. The trial court found in *Baehr vs. Mike*, 1996 WL 694235 Cir. Ct. Haw. No. 91-1394 Dec 3, 1996) at the state had failed to establish such a compelling state interest. In effect, it is meant for the same sex marriages were legal in Hawai.

The backlash to this judgement from the right wing, conservative forces in the U.S. been enormous. Congress responded in 1996 with the introduction of the Defence of Marriage Act (H.R. 3396, 104th Cong., 2d Sess.) or DOMA. The Bill denies certain federal benefits and entitlements to same-sex marriage partners by defining marriage as a union between a man and a woman. It also allows states to ban same-sex marriages within their borders, and not to recognize such marriages performed in other states. Critics of the bill argued that Republicans were pushing it for political purposes. Yet on September 10, 1996, the Senate passed DOMA by a vote of 85/14, and on September 21, 1996, Democratic President Bill Clinton signed the Act into law.

A state by state battle was begun in the U.S., where, according to a report issued by Lambda Legal Defence and Education Fund, as of September 4, 1996, 15 states have passed anti-marriage bills. Intense lobbying by the lesbian and gay community has prevented anti-marriage bills from advancing in the other states.
The challenges to the anti-gay-marriage laws continue. In February 1998, echoing the Hawaian judgement, an Alaskan Superior Court judge ruled against Alaska's ban on the same sex marriages, ordering the state to show cause as to why it should be able to regulate who the people marry. An Anchorage gay couple of almost 20 years, Jay Brause and Gene Dugan, filed a suit against the ban passed by the Alaskan legislature in 1996. The ruling does not legalise the same-sex unions in Alaska; but forces the state to prove a compelling reason why such unions should be illegal. Superior Court Judge Peter Michalski said "choosing a partner is a fundamental right and the State Constitution protects both the traditional choice and the non-traditional choice"

Finally the breakthrough came in July 2000, with the State of Vermont's Civil Union Act, which gave lesbian and gay couples all the rights (and over 300 legal benefits) enjoyed by heterosexual married couples. Lesbian and gay couples not resident in Vermont can also avail of the provision for Civil Unions, and a majority of the unions registered have been of out-of-state couples. However, the battle continues, as those who would defend the civil marriage (for heterosexual couples) are lobbying for the repeal or amendment of this law.

Cities in the U.S. that have conferred limited domestic partnership rights to lesbian and gay couples include New York City, Madison in Wisconsin, Takoma Park in Maryland; Berkeley, San Francisco, Paolo Alto in California and Santa Cruz, West Hollywood. Each of these cities has variations in the extent of benefits available under such legislation. In general, however, the benefits of probate and tax law are denied to same-sex couples. For example, if a partner in a same-sex relationship dies, under law, the surviving partner is not entitled to any of the deceased's property, unless the deceased provided for such an entitlement in a will.

Several companies and other institutions in the US have also formulated policies that recognise domestic partners when they issue employment benefit policies, housing, health insurance etc. Some examples of state agency recognition of same-sex relationships include some of the following. New York’s state housing
authority extended the definition of "family members" to include gay couples in matters concerning rent regulated apartments (1993). In another more recent example, the city of Sacramento introduced legislation in 1998 to allow domestic partners to qualify for California's Family Care and Medical Leave Act.

A growing number of private employers are also offering a wide range of domestic partnership benefits. In 1982, the Village Voice in New York was the first to do so. Today, 23% of companies employing more than 5000 workers provide health benefits to non-traditional partners. Some of the big names include IBM, Microsoft, Prudential Insurance, Time Warner, Lotus Development Corporation, Xerox; Home Box Office, etc.

5.23 CIVIL LAWS AFFECTING GAY MEN AND LESBIANS

Apart from Section 377 of the Indian Penal Code (and the Armed Forces Acts), no other laws directly deal with homosexuals. It is as if homosexuality does not exist in India at all. Because of this ostrich like attitude there is no overt discrimination against gay men and lesbians. The covert discrimination against homosexuals, however, runs throughout the gamut of laws. This operates at two levels. First, the family law regime is based entirely on heterosexual premises. Under all systems of personal laws, marriages can only be between persons of opposite sex. Succession and property rights are based either on blood relations or relations by marriage. Secondly, all laws (outside the confines of family laws) concerning entitlement to assets upon death of a person are also based exclusively upon heterosexual premises confined to relations by marriage and blood. Thirdly, because of the moral stigma attached to homosexuality per se, gay men and lesbians are affected by a number of laws that criminalize actions and other objects considered as immoral or scandalous according to the governing ethics of society.

Criminal Laws: other adverse effects of Section 377 of the Indian Penal Code

Criminalization of male homosexuality under Section 377 of the Indian Penal Code has the potential of leading to many adverse spin-off effects beyond prosecution under the section itself.
a) Even though lesbianism is not explicitly criminalized, it is very easy to treat it as something immoral or depraved or indecent and this can have major impact on lesbians,

b) **Section 292 of the India Penal Code** punishes obscenity and makes it a criminal offense. The current definition of obscenity can lead to its misuse against gay and lesbian writings.

Section 292 (1) which defines obscenity states:

"(1) For the purposes of Sub section (2) a book, pamphlet, paper, writing, drawing, painting, representation or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect or, (where it comprises two or more distinct items) the effect of anyone of its items, is, if taken as a whole, such items and to deprave and corrupt as to persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it".

As male homosexuality is a criminal offence, the presumption is that is something depraved and can corrupt minds and bodies of persons. Any writing or painting on gay issues can be banned by branding them as obscene. Thus without criminalizing it is very easy to treat homosexuality as something immoral or depraved or indecent; and this can have major impact on gay men and lesbians. Simultaneously it is necessary to fight for legal and moral recognition of gay and lesbian relations.

c) **The Dramatic Performances Act, 1876** empowers the State to ban any play which according to it is scandalous or is likely to deprave the spectators gay or lesbian play can easily be banned under this provision. Similar is the case with books and periodicals.

d) Under the Indecent Representation of Women Act, 1986, indecent representation of women is defined as depiction of the figure of a woman or her body which is likely to deprave or corrupt public morality or morals. Any
book, photograph or picture, which contains such indecent representation in any form, can be banned.

e) The Juvenile Justice Act, 1980, deals with neglected juveniles and juvenile delinquents. The State has the power to take away a 'neglected juvenile' from the care of parents and put the child in a child care home. What is of the crucial importance is the definition of neglected juvenile. The law defines a neglected juvenile as one whose parent or parents are 'unfit' or associate with a person who leads an immoral or depraved life. This definition is potentially dangerous for gay and lesbian couples who may be bringing up one or the other's child. By using the argument of Section 377 or even independent of it, it can be claimed that a gay or lesbian parent is unfit as he or she is depraved, and leading an immoral life.

We shall now have a look at some of the non-criminal laws that affect gay men and lesbians.

5.24 LABOUR LAWS

Under all labour and service laws, being convicted of an offence involving moral turpitude is treated as a major misconduct punishable with dismissal from the service. Under certain laws, it is not even necessary for a person to be convicted for moral turpitude but a mere opinion of the employer that an employee is guilty of moral turpitude is enough reason for the employee to lose his or her job. Moral turpitude is defined as anything that is shocking by the present moral standards of society and in many cases adultery has already been held to be an offence involving moral turpitude. Employers can easily consider homosexuality to be an offence involving moral turpitude and this would be a constantly hanging sword over employees and would also prevent them from openly declaring or discussing their sexual orientation.

Various benefits are available under the Labour laws to heirs and legal representatives at the time of death of the employee. Due to the scheme of these
Acts, a relationship that is not based on blood or marriage is not recognized for entitlement to these benefits. Some of the provisions of the relevant labour laws are listed below:

5.24.1 Employees' Provident Fund Act, 1952

Under this Act, an employee is entitled to claim a Provident Fund upon retirement / resignation / termination. The employee can nominate a person who will receive the Provident Fund in case of his/her death. Regulation, which deals with nomination, reads:

"(3) If a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid."

Regulation 2(g) defines family.
"Family means,

In the case of male member, his wife, his children, whether married or unmarried, his dependent parents and his deceased son's widow and children ....

In the case of a female member, her husband, her children, whether married or unmarried, her dependent parents, her husband's dependent parents and her deceased son's widow and children ..."

Thus, a gay or lesbian couple cannot nominate his or her companion for receiving the Provident Fund. Besides that, under the Provident Fund Act, if no nomination is made, the Provident Fund will go to heirs as per the personal laws. As a result, even here, a gay or lesbian couple loses out.

Similarly, under the Employees’ Family Pension Scheme, pension is payable only to 'family' members as defined through blood and marriage relationships.
5.24.2 Payment of Gratuity Act, 1972

The situation is similar under the Gratuity Act, which deals with payment of gratuity to an employee at the time of his or her retirement/termination/death.

Nomination can be made by the employee and the nominee is to receive the gratuity if the employee dies.

Section 6 deals with nomination and reads:

"(3) If an employee has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such employee in favour of a person not belonging to his family shall be invalid."

Here again, "family" is defined by blood and heterosexual marriage:
S. 2(h) defines 'family'.

'family' in relation to an employee, shall be deemed to consist of - in the case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and widow and the children of his predeceased son, if any, in case of a female employee, herself, her husband, her children whether married or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any ...

5.24.3 Workmen's Compensation Act, 1923

This Act provides that in case of death caused by injury at the work place, dependents of an employee are entitled to receive the compensation from the employer. At a superficial level this appears to be a major departure from other laws, in that, the entitlement to compensation is based on dependency. However, the bias of the law is exposed in its definition of 'dependants'. Dependent' means any of the following relatives of a deceased workman, namely: "a widow, a minor
legitimate son, an unmarried daughter, or a widowed mother; and, if wholly
dependent on the earnings of the workman at the time of his death, a son or a
daughter who has attained the age of 18 years and who is infirm ... "

5.24.4 Employees' State Insurance Act, 1948

This Act deals with medical aid and benefits to employees or just the
employee but even his/her family members are entitled to receive subsidized
medical treatment from ESI doctors and hospitals. As in other labour laws, 'family'
is defined in a very restricted manner to include only relationships by blood or
marriage.

Under this Act, if death is caused due to employment injury, the dependants
of the employee are entitled to compensation. Here again, 'dependants' are defined
in a very narrow manner to only include relations by blood or marriage.

5.24.5 Insurance Laws

1. Insurance Act, 1938

This is the Central law dealing with insurance policies including life
insurance policies. While purchasing a policy the insured person is required to give
the name of his/ her nominee. Under Section 39 of the Act, the insured person can
nominate any person irrespective of whether he or she is a legal representative.
This clause is a very pleasant departure from other laws dealing with nominees
since it allows anyone to be nominated for the policy amount. However, owing to
judicial interpretation, any potential use of this law by gay men and lesbians has
been nullified. Various High Courts as well as the Supreme Court have repeatedly
held that a nominee only acts as an agent for the legal heirs of the deceased person.
Thus, the nominee is only meant for collecting the insurance money but the money
actually belongs to the heirs and has to be paid over to the heirs.


This Act provides for compensation for the public at large (non-workers)
regarding accidents arising out of handling hazardous products. However, in the
case of the death of a person only his/ her legal representatives are entitled to claim the insurance amount.

5.25 HOUSING LAWS

Laws concerning housing are State laws and vary from one State to another. Merely by way of example we have dealt with the housing law in Maharashtra. Houses can either be owned or be rented. Most of the houses in urban agglomerations, which are owned are in housing co-operative societies. These are governed by the Maharashtra Co-operative Societies Act, 1960. Any person can buy a flat in a society and become a member. It is similarly possible for two persons (whether related or not) to jointly buy a flat in a society and become the member and associate member. In such a case both persons have equal rights to the flat. Thus, it is possible for a gay or lesbian couple to jointly purchase a flat in a co-operative society. If a flat in a society stands singly in the name of a person, under Section 30, she/he can make nomination in favour of any person of his/her choice. Nomination is with a view to ensure smooth transition after the death of the flat owner. However, here again, nomination is merely for the purposes of facilitation and does not create any rights in favour of the nominee as she/he acts only as the agent for the heirs. Similarly, under the Bombay Rent Act, 1947, on the death of a tenant, the tenancy passes to the tenant's heirs. A gay or lesbian tenant cannot even will away the tenancy to his or her companion.

We have only given a representative sample of the status of gay men and lesbians under the Indian laws. The same bias runs through the gamut of the entire legal structure.

What stops homosexual couples even today from entering into a contract which protects their rights.

First, the central civil law problem facing gay men lesbians today is that they do not all within the definition of 'family' and are not considered 'heirs' under law. Any individual's status as a member of a family or as a legal heir or dependent does not depend on contract but on law. Contract cannot change this status.
Second, under Section 23 of the Indian Contract Act, any contract or agreement for an object forbidden by law or considered immoral or opposed to public policy is considered an unlawful and void agreement, giving no legal rights.

It is quite clear that, in terms of laws, the following need to be done and fought or simultaneously:

- Homosexuality must be decriminalized.
- Gay and Lesbian relations should be treated as 'moral' relations and not something that is depraving, corrupting or scandalizing.
- It is equally important to fight for legal acceptance of gay and lesbian companionships as constituting families. This can only be done by either amending the existing family laws or by providing a separate law legitimizing contracts amongst gay men and lesbians which gives the couples quasi-marital rights. It is also important to have a law which can across the existing laws and redefines the phrases 'family' heirs and legal representatives to include gay and lesbian companions.

5.26 PROTECTION FROM VIOLENCE

‘Violence’ is a complex phenomenon, and consequently the declaration of its intersections with the legal terrain is highly contested. Although it would not be possible to address all of these complexities, in this section some of the key issues relevant to lesbian, gay and bisexual communities in India are identified.

If one accepts the premise that violence is a means of social control exercised by dominant groups, violence against lesbians, gays, and bisexual and transgender people is Justifiably conceptualized as a manifestation of the homophobia of dominant heterosexual society. In societies where homosexuality is defined as immoral, illegal or abnormal, these ideological formulations become the epistemic justification for the overt manifestation violence. The law itself codifies this violence through sodomy statutes, religious proscriptions against
homosexuality, and the psychological classification of homosexuality as "abnormal\(^39\)."

Even in countries where "decriminalization" has occurred, because of the persistence of the ideology of homosexuality as immoral and abnormal, social violence continues in the form of hate crimes and the exclusion of sexual minorities from civil rights to equal protection under the law. The limited legal protection in the form of anti-discrimination and anti-hate crime legislation are merely attempts to contain the violence, and do not recognize the structural power differential that produces such violence is the first place.

Emergent sexual rights analyses probe a deeper understanding of the inter-sections of violence against women, sexual minorities (lesbian, gay, and bisexual and transgender people) and sex workers, and view violence as an exertion of hetero-patriarchal control over expression of gender non-conformity\(^40\). That is, violence is not a consequence of the "identity" or "sexual behaviour" of the person per se, but a consequence of their transgression of the hetero-patriarchally defined gender roles. For instance, in many societies, as long as people fulfill their gender role obligations of "marriage and family", their sexual behaviour is "allowed".

Indian groups working on the issues of sexual minorities have recently begun to not only document violence against these communities through fact-finding reports and research studies (rather than simply rely on newspaper reports), but also to strategically use the information in legal initiative; and to educate the public. The following sections discuss a typology of violence experienced by sexual minorities in the Indian context.


5.26.1 Physical Violence

Public Violence

Though the police routinely engage in blackmail, extortion, physical and sexual harassment of gay men, periodically there are official (though not necessarily stated) "social cleansing" drives initiated by the police in gay cruising areas of cities. In the early 1990s, such a drive in Delhi was the catalyst for one of the first public rally and protest by lesbian and gay activists. The recent drive initiated by the Bangalore police prompted the Peoples Union of Civil Liberties-Kamataka to initiate a fact-finding report documenting the extent of the human rights violations.

The vandalism of the Shiv Sena hordes that destroyed property and tore down posters at theatres screening Deepa Mehta's film Fire is also an example of public violence. Although the legal battle to re-open the show was "won", the impunity of the offenders, as well as the fact that the producer "voluntarily" removed the names of the lesbian characters in the film puts in question the nature of the victory.

Perhaps more insidious, is the fact that much of the counter-protest was rooted in the right to protection of freedom of expression, rather than an articulation of lesbian rights. Here too, one comes up against the knotty question of whether (and the extent to which) the right to freedom of speech can include hate speech.

Private Violence

Within the private sphere, lesbians and gay men can be (and frequently are) subjected to physical and sexual assault from family, strangers or partners. Like all victims of torture, beatings, and rape however, reporting of the incidents is low. This is due not only to the victim's sense of shame and guilt about being a victim of violence, but also to their very valid fear that disclosure of their sexual orientation

---

will cause further ill-treatment (by police, medical or other social institutions). There is one documented case of murder (see The Story of NP), however, given the constraints on reporting, it is quite possibly the tip of the iceberg.

Also within the private sphere is the issue of same-sex assault. The debate on legal interventions in cases of same-sex sexual assault has recently been initiated in India with the Law Commission of India’s 172nd Report (LCC172) Review of Rape Laws, in which Section 377 is proposed to be deleted and the provisions of the amendments to the laws on sexual assault made gender neutral. The intent of the bill was including the sexual abuse of boy children within the ambit of sexual assault legislation (previously such cases were inadequately prosecuted under Section 377). However, whether intended or not the LCI-172 now includes the potential recognition of same sex assault. In the absence of positive legal and Social recognition of lesbian and gay existence in India. LGBT organizations are concerned that, given the societal power imbalances, these provisions may be used against them, This chapter includes certain information representing some aspects of this debate.

5.26.2 Medical and psychiatric abuse

In 1973, the American Psychiatric Association (APA) formally removed the classification of homosexuality as a psychiatric disorder in the Diagnostic and Statistical Manual (DSM). The other widely used diagnostic classification is the International Classification of Diseases (ICD) of the World Health Organization (WHO), which classified homosexual zryas a mental disorder until 1993. The ICD-ID still contains the code F66.1 forego-dystonic sexual domination. This code is for individuals who are certain about their sexual preference and who seek treatment because of associated psychological and behavioral disorders associated with it. Note, the ICD-10 uses the term sexual orientation in conjunction with ego-dystonic as opposed to homosexuality. This is a neutral term, which can be interpreted to mean ego-dystonic heterosexuality as well, That is, technically a heterosexual person could say they were experiencing distress, and they wanted to

42 Full text of the Report available at http://www.nic.in/lawcom/rapelaws.htm
become homosexual or even asexual. The critical question is whether mental health professionals would notice these subtleties of language. In India, mental health professionals generally follow the ICD-10, and in practice, it is probable that many of those who follow ICD-10 would justify "conversion therapy", even if they do not consider homosexuality an abnormality.

A related, and equally pernicious issue is the classification of "gender identity disorder" (GID). Both the DSM-4 and the ICD-10 have classifications for GID which include catena to determine when an individual's strong and persistent identification with the opposite gender would justify sex re-assignment surgery. These classifications are also being contested, a debate which cannot be entered into here. What is pertinent in the Indian context is even if one accepts the classification, the disturbing questions that merit further attention are first, the knowledge and attitudes of mental health professionals in dealing with the issue of GID. Second, the question of how many ostensibly GID clients are actually men and women who are homosexual, but who feel they cannot live as homosexual given the rigid gender role perceptions in our society.

In India, the emergent lesbian and gay movement has begun to take up the issue of the psychiatric labelling of homosexuality as a disorder and the practice of conversion therapy. In May 2001, the Milan Project, a program of Naz Foundation India Trust, Delhi, filed a formal complaint with the National Human Rights Commission of India (NHRC). Complaint diary 3920 concerns a case of reported psychiatric abuse involving a patient at the All India Institute of Medical Sciences (AIIMS), Delhi, who received almost four years of treatment, aimed at the conversion of his homosexuality. The treatment reportedly involved two components: counselling therapy and drugs. During counselling therapy sessions, the doctor explicitly told the patient that he needed to curb his homosexual fantasies, as well as start making women rather than men the objects of his desire. The doctor also administered drugs intended to change the sexual orientation of the

43 Bina Fernandez and Gomathy N. B. Study on Violence against lesbians. Tata Institute of Social Sciences (forthcoming)
44 Email action alert from Shaleen Rakesh of the Milan Project
patient, providing loose drugs from his stock rather than disclosing the identity of the drug through formal prescription. The patient reports experiencing serious emotional and psychological trauma and damage, as well as a feeling of personal violation, due to these actions.

The complaint filed with the National Human Rights Commission had two objectives. One was to get it to formally recommend to all relevant Indian psychiatric bodies, the issuance of an official statement that homosexuality is not a disease that requires a cure. The other was to recommend to the National Commission to Review the Working of the Constitution (NCRW) a clause providing protection from discrimination on the basis of sexual orientation is included in the Indian Constitution. However, this case was dismissed at the threshold by the NHRC without going into merits, and the oral view expressed by the judges was that till such time as long as Section 377 existed, nothing could be done.

5.26.3 Emotional abuse

This category of violence falls almost entirely in the domain of family relationships. In India, not only heterosexuality, but marriage is compulsory, and parents pressurized their children to conform to these roles and obligations, even if they know about their children's sexual orientation. Resistance is met by emotional blackmail, verbal abuse, often to the point where the offspring are compelled to cut off relationships with their family and leave the home. Inevitably, in a patriarchal society, this pressure is more concentrated for women. This is an arena where legal redress gets foreclosed by the conception of "privacy" of the family. Even when the abuse by family escalates into physical abuse or (beatings or incarceration) redress is often rendered difficult by these notions of privacy.

5.26.4 Internalization of violence

Perhaps the most damaging form of violence is when it is internalized. This is manifested in emotions of guilt, shame and depression about sexual orientation. There is little if any documentation in India of the extent of suicides due to internalization of social non-acceptance of homosexuality. Studies in other
societies however do show significant co-relations, In India, what we have begun to document are the increasing trend of lesbian joint suicides.  

5.27 PERSPECTIVES ON GAY AND LESBIAN RIGHTS

The Human Rights Law Network (HRLN) started in 1989 at an all India conference on human rights held at Bombay. Since then, it has been working on the areas of human rights and law. During this period, the Network has organised and co-organised national level conferences on communalism and law in Delhi, 1992, environment and law in Bangalore in 1994 and on gender just laws in Bombay in 1996. Its core consists of a group of about 15 lawyers and legal activists working from Bombay. One of its major activities is to fight public interest litigation on the issues concerning human rights violations. It also turns the Indian Peoples' Tribunal (IPT) which has, in the last three years, done six major fact-finding reports. These include reports on Narmada oustees, the situation of tribal’s in Rajaji National Park, the condition of women and children in Kashmir, the slum situation in Bombay, the plight of earthquake victims in Latur, etc. It has also recently started India Centre for Human Rights and Law (ICHRL): a library and documentation centre specializing in documentation of human rights violations and training of activists in dealing with human rights violations. Besides that we also regularly come out with publications such as 'Environmental Activists Handbook', 'Handbook on Prisoners' Rights', etc.

As is obvious from our activities, we define human rights in the broadest possible sense including women's rights, rights of minorities, rights concerning environment, housing, health, prisoners, workers, etc. Individual as well as community rights need to be defended so long as they do not trample upon similar rights of other individuals inside or outside the community. Individual freedom and privacy need complete protection, and we do not recognise the State as the moral big brother. Any law that tramples on this freedom is a violation of human rights. It is in this context that we understand and respect rights of gay men and lesbians. We believe that it should be an important task of human rights

45 See Two too many in this section.
organizations to help preserve these rights, and to fight against any curtailment of these rights. Each individual's sexual orientation and preference concerning companionship is entirely the choice of the individual concerned, and the State should act in a manner to give much more free space for these expressions. At the same time we should not be misunderstood as trying to justify gay, lesbian, and bisexual rights out of a principle of toleration of all kinds of individual behaviour. Such would be the case if we believed that homosexuality is unnatural but is to be tolerated as an individual freedom. This is possibly the position of some of the human rights organizations throughout the country. We do not believe that there is anything deviant or unnatural about being homosexual but it is as much 'straight' as heterosexuality. It is in this context that we talk not of liberties and concessions to homosexuals, but of rights of homosexuals.

Our organization’s link with the gay, lesbian, and bisexual rights movement is fairly recent, and started with co-organisation of the Gender Just Laws workshop held in Bombay in 1996 that had a separate session on gay, lesbian, and bisexual rights. The individuals who started our organisation in 1989 have always been sympathetic to the movement; partly, because of the left tradition they come from, and partly because of old associations and friendship with gay men and lesbians. In India, however, the human rights' movement as a whole has failed to address the question of gay men and lesbians in any significant or serious way. We attribute it to four reasons.

Many of the human rights groups have historical linkages with traditional left and Maoist parties. Some of them are direct fronts of these parties while others, even though not organizationally linked, still have leading individuals who are members of these parties or are strongly influenced by their ideology. They consider a discussion of sexuality to be more particular even heterosexuality as a frivolous, petty bourgeois deviation. They, like their parent organizations, view homosexuality as a capitalist aberration, arising out of imperialistic influence.
Those human right group's that do not come from these background, still tacitly accept the sexual mote of the liberal tradition that condemns homosexuality as unnatural and deviant.

Some of the human rights organizations have stopped openly condemning homosexuality; but even their toleration of homosexuality is based on a patronizing attitude of looking at gay men and lesbians as frustrated individuals who have undergone a traumatic childhood. Besides that they have no idea of the extent of prevalence of homosexuality and believe that it is either something that happens in urban high class societies or within the four walls of Tihar jail.

Lastly, human rights organizations of all kinds are influenced by the movements around them. It was only the pressure of the women's movement that has forced human rights organizations to now take up women's issues. Similar is the case with environmental issues, etc. In the absence of at least a somewhat strong gay, lesbian, and bisexual movement, it is difficult to imagine human rights organizations giving the issue any notable prominence.

The Indian State as is the case in most countries deals with homosexuality in two ways. At a sexual level, it makes homosexuality a crime and a punishable offence. At the level of companionship, it sweeps these relationships under the carpet and completely ignores the existence of any companionship not dependent on heterosexuality (and even within heterosexual relationships confined only to marital relationships), thereby denying crucial rights to homosexual couples. Therefore it becomes necessary to battle at both the levels with two-fold approaches as cited beneath:

(i) By de-criminalizing the homosexuality and ;
(ii) By getting the legal status for homosexual relationships that is otherwise granted only to heterosexual relationships.

5.28 CONCLUSION

Thus beyond any skepticism we can say that the U.S. Supreme Court's, momentous verdict allowing same-sex marriages across that country sparked
celebrations among the LGBT community and expressions of support from others. Implicit in every such celebration or voice of support is the expectation that other societies too would follow suit, if not in recognizing the same-sex marriages, at least in ending open discrimination based on the medieval prejudice. The community's long battle for equal rights has reached its logical conclusion there. The court ruled that the bond of marriage cannot be limited to the opposite-sex couples. Supreme court has made considerable progress in recognizing the liberty of the individuals with alternative sexual orientation and their right to equal treatment before the law. Instead of hiding behind traditional arguments to the effect that legal questions concerning personal relations such as marriage be best decided by elected bodies, the court has said that the 'due process' and 'equal protection' clauses in the 14th amendment to the U.S. constitution are as available to the gay community as anyone else when it comes to marrying a person of his or her choice, including of the same gender. It is inevitable that such a ruling occasions an evaluation of where India stands. Indian law on homosexuality continues to be retrograde. The restraint that the Court has shown in not striking down Section 377 in the light of *Suresh Kumar Koushal vs. Naz Foundation* and the reasoning that it should be left to the legislature to decide whether or not to decriminalize homosexuality, fell short of Indian judicial standards. There are several cogent arguments including some that figure in the U.S. Supreme Court's majority opinion in favour of judicial intervention to uphold the individual liberties. Now that the judicial opportunity has been lost, the legislature cannot shirk its responsibility any longer. It may seem unlikely that parties embroiled in electoral politics will risk antagonizing conservative sections of society. However, progressive parties and liberal parliamentarians should come forward with amendments to delete or at least dilute Section 377 of the IPC. An outdated provision cannot be allowed to violate fundamental rights and offend human dignity by remaining on the statue book. Before epilogue to this chapter, it is an apt to quote here the buzz words: "In all regions of the world, LGBT people suffer discrimination at work, at home, at school, in all aspects of daily life ... no custom or tradition, no cultural values or religious beliefs can justify depriving a human being of his or her rights". - Ban Ki Moon, Secretary General of the UNO.