Rights of LGBTQ+ as a Facet of the Fundamental Right to Liberty and Dignity

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Abstract

The LGBTQ+ community has historically faced societal discrimination and marginalization, with their fundamental rights often being violated. In recent years, however, there has been a growing recognition of the rights of the LGBTQ+ community, both at the national and international level. This research paper aims to explore the challenges faced by the LGBTQ+ community in India, particularly in the healthcare sector, and the role of human rights in addressing these issues also aims to analyse the legal and social challenges faced by the LGBTQ+ community in India, with a particular focus on the right to liberty and dignity. The paper delves into the historical context, current legal frameworks, and societal attitudes towards the LGBTQ+ community in both countries.

The study draws on a wide range of sources to provide a comprehensive understanding of the issues at hand. India has indeed witnessed significant progress in this domain, with the decriminalization of homosexuality and growing legal recognition of transgender rights; however, the LGBTQ+ community in the country continues to confront substantial challenges, ranging from social stigma to healthcare disparities

Keywords: *LGBTQ+ Rights, Supreme Court of India, Homosexuality, Healthcare, Human Rights*

Introduction

The rights of the LGBTQ+ community have been a subject of intense debate and discussion in India, both in legal and social spheres. India's LGBTQ+ individuals have endured a lengthy history of discrimination, marginalization, and societal prejudice, with their fundamental rights frequently violated. (Wandrekar & Nigudkar, 2020)

In recent years, however, there has been a growing recognition of LGBTQ+ rights in India, with landmark judicial decisions and legislative reforms aimed at addressing these issues. The Supreme Court's 2018 ruling in Navtej Singh Johar v. Union of India decriminalized consensual same-sex relations, a significant step forward in protecting the community's rights to liberty and dignity.

Despite these advancements, the LGBTQ+ community in India continues to face numerous challenges, particularly in the healthcare sector, where they often encounter discrimination, prejudice, and a lack of sensitivity from healthcare professionals. (Arora et al., 2022) The global systematic review reported routine discrimination, including some cases of physical and verbal violence during physical examination in healthcare settings, against LGBTQIA+ individuals. (Arora et al., 2022)

India, with its rich cultural and religious diversity, has had a complex relationship with the LGBTQ+ community. Historically, the LGBTQ+ identity was often celebrated and accepted in various forms, such as the recognition of the hijra community. However, the colonial legacy left an indelible mark on the legal and social status of the LGBTQ+ community in India, with the introduction of Section 377 of the Indian Penal Code, which criminalized consensual same sex relations. (Misra, 2009) The legal landscape in India has undergone a significant transformation in recent years, marked by landmark judicial decisions and legislative reforms aimed at addressing the rights of the LGBTQ+ community. (Das, 2021)

There seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The passage of the Transgender Persons Act in 2019 represented a significant step forward in recognizing the rights of transgender individuals in India. This legislation aimed to provide legal recognition and protection to the transgender community, ensuring their right to self-identify their gender, access welfare schemes, and be free from discrimination.

However, the LGBTQ+ community in India continues to face significant challenges, particularly in the healthcare sector. The healthcare system in India often lacks sensitivity and understanding towards the unique needs and experiences of LGBTQ+ individuals, leading to suboptimal healthcare outcomes. (Arora et al., 2022)

A study conducted by the authors highlights the impact of stigma and discrimination on the health and wellbeing of both men who have sex with men and transgender individuals. Transgender people experience health disparities and barriers to good healthcare services in India and worldwide.

These barriers include discriminatory treatment by healthcare providers, a lack of trained professionals who can offer appropriate care, and the refusal of many national health

systems and insurance programs to cover services for transgender individuals. (Sangamithra & Arunkumar, 2020)

The question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another‘s choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented.

Legislative Background

The legal treatises Fleta and Britton, which date back to 1290 and 1300 respectively, documented prevailing laws in England at the time. These treatises made references to sodomy as a crime.[1] The Buggery Act, 1533 was re-enacted in 1563 during the regime of Queen Elizabeth I, which penalized acts of sodomy by hanging. In 1861, death penalty for buggery was abolished in England and Wales. However, it remained a crime "not to be mentioned by Christians". (Homosexuality in Eighteenth-Century England: The Buggery Statute, 2013) The 1861 Act became the charter for enactments framed in the colonies of Great Britain. The Marginal Note of Section 377, refers to "Unnatural Offences". Section 377 reads as under:

*"**377. 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 of either description for a term which may extend to ten 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."

In 1957, the United Kingdom published the Wolfenden Committee Report which recognized how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. s(Wolfenden report, 2002) Pursuant to this Report, the House of Lords initiated legislation to de-criminalize homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalized homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.

The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognized to be violative of human rights. In

[1] John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century,* 292 (University of Chicago Press, 1980)

2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report[2] that 124 countries no longer penalize homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments.

Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognize partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children. For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognized in England and Wales. (Olson et al., 2012)

CONCEPTUAL DEVELOPMENT

In the early 20th century, there were many psychiatric theories which regarded homosexuality as a form of psychopathology or developmental arrest.[3] It was believed that normal development resulted in a child growing up to be a heterosexual adult, and that homosexuality was but a state of arrested development.[4]Homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion. Towards the end of the 20th century, this notion began to change, and the earlier theories gave way to a more enlightened perspective that characterized homosexuality as a normal and natural variant of human sexuality. Scientific studies indicated that human sexuality is complex and inherent.[5] Kurt Hiller in his speech delivered at the Second International Congress for Sexual Reform held at Copenhagen in 1928[6], stated:

> *"Same-sex love is not a mockery of nature, but rather nature at play…As Nietzsche expressed it in Daybreak, Procreation is a frequently occurring accidental result of one way of satisfying the sexual drive – it is neither its goal nor its necessary consequence. The theory which would make procreation the goal of sexuality is exposed as hasty, simplistic and false by the phenomenon of same-sex love alone. Nature's laws, unlike the laws formulated by the human mind, cannot be violated. The*

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[2] Aengus Carroll And Lucas Ramón Mendos, *Ilga Annual State Sponsored Homophobia Report 2017: A World Survey of Sexual Orientation Laws: Criminalization, Protection And Recognition,* 12th Edition, 2017, pp. 26-36.
[3] *Report of the Committee on Homosexual Offences and Prostitution,* 1957, at para 30.
[4] Benjamin J. Sadock *et al*., *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* (9th ed., 2009), at pp. 2060-89.
[5] Ibid.
[6] Great Speeches on Gay Rights (James Daley ed.; Dover Publications, 2010), at pp. 24-30

assertion that a specific phenomenon of nature could somehow be "contrary to nature" amounts to pure absurdity…To belong, not to the rule, not to the norm, but rather to the exception, to the minority, to the variety, is neither a symptom of degeneration nor of pathology."

INDIAN POSITION

The constitutional backdrop of the position of homosexuality in India is woven in the fabric of Article 14 (equality before law), Article 15 (prohibition of discrimination), Article 19 (freedom of expression) and Article 21 of the Constitution of India.

Article 14 of the Indian Constitution provides for equality before law and equal protection of the laws.

Article 15 prohibits discrimination on the grounds of "sex", which has been interpreted to include "sexual orientation" as well." (Joshi, 2010)

Article 19(a) guarantees the right to freedom of speech and expression, which has been held to include the right to choose one's sexual orientation and freely express the same.

Article 21 of the Constitution, which guarantees the right to life and personal liberty, has been interpreted to include the right to privacy, dignity and autonomy of the individual. In a landmark judgment in 2018, the Supreme Court of India struck down Section 377 of the Indian Penal Code, which had criminalized consensual same-sex relations, as unconstitutional. (Nanditha, 2020) (Joshi, 2010) The decriminalization of same-sex relations has led to a greater acceptance and visibility of the LGBTQ+ community in India, as they are now able to freely express their identities and demand equal rights without the fear of legal reperc ussions (Joshi, 2010) (Vijayakumar, 2021) (Misra, 2009).

However, despite the gains made, the LGBTQ+ community in India continues to face societal stigma, discrimination, and barriers in accessing basic rights and services. The transgender community, in particular, remains marginalized and vulnerable, with high rates of poverty, unemployment, and lack of access to healthcare.

The promulgation of the Transgender Persons Act, 2019, has been a positive step towards recognizing the rights of transgender persons and prohibiting discrimination against them. However, implementation challenges and lack of awareness about the Act persist. A lot more needs to be done to create an inclusive and affirmative environment for the LGBTQ+ community in India (Ahuja et al., 2018) (Jain, 2022) (Vijayakumar, 2021).

The essential ingredient required to constitute an offence under Section 377 is "carnal intercourse against the order of nature", which is punishable with life imprisonment, or imprisonment of either description up to ten years. Section 377 applies irrespective of gender,

age, or consent. The expression 'carnal intercourse' used in Section 377 is distinct from 'sexual intercourse' which appears in Sections 375 and 497 of the IPC. The phrase "carnal intercourse against the order of nature" is not defined by Section 377, or in the Code. The term 'carnal' has been the subject matter of judicial interpretation in various decisions. According to the New International Webster's Comprehensive Dictionary of the English Language[7], 'carnal' means:

· *Pertaining to* the *fleshly nature or to bodily appetites.*

· *Sensual; sexual.*

· *Pertaining to the flesh or to the body; not spiritual; hence* worldly.

The courts had earlier interpreted the term "carnal" to refer to acts which fall outside penile-vaginal intercourse, and were not for the purposes of procreation.

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In *Khanu* v. *Emperor*[8], the Sindh High Court was dealing with a case where the accused was found guilty of having committed Gomorrah *coitus per os* with a little child, and was convicted under Section 377. The Court held that the act of carnal intercourse was clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible. The Lahore High Court in *Khandu* v. *Emperor*[9] was dealing with a case wherein the accused had penetrated in the nostril of a bullock with his penis. The Court, while relying on the decision of the Sindh High Court in *Khanu* v. *Emperor* held that the acts of the accused constituted *coitus per os*, were punishable under Section 377. In *Lohana Vasantlal Devchand & Ors* v. *State*[10] the Gujarat High Court convicted two accused under Section 377 read with Section 511 of the IPC, on account of having carnal intercourse per anus, and inserting the penis in the mouth of a young boy. It was held that: "*…words used (in Section 377) are quite comprehensive and in my opinion, an act like the present act (oral sex), which was an imitative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable under Section 377 of the Indian Penal Code.*" Later this Court in *Fazal Rab Choudhary* v. *State of Bihar*[11] while reducing the sentence of

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[7] *The New International Webster's Comprehensive Dictionary of the English Language* (Deluxe Encyclopedic Edition, 1996)
[8] AIR 1925 Sind 286
[9] AIR 1934 Lah 261 : 1934 Cri LJ 1096
[10] AIR 1968 Guj 252
[11] (1982) 3 SCC 9

the appellant who was convicted for having committed an offence on a young boy under Section 377 IPC, held that: "*...The offence is one under Section 377 I.P.C., which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.*"

The test for attracting penal provisions under Section 377 changed over the years from non-procreative sexual acts in *Khanu* v. *Emperor,* to imitative sexual intercourse like oral sex in *Lohana Vasantlal Devchand* v. *State*, to sexual perversity in *Fazal Rab* v. *State of Bihar*. These cases referred to non-consensual sexual intercourse by coercion.

It is relevant to note that under Section 3 of the Mental Healthcare Act, 2017, determination of what constitutes a "mental illness" has to be done in accordance with nationally and internationally accepted medical standards, including the latest edition of the International Classification of Disease of the World Health Organization.

In India, the Indian Psychiatric Society has also opined that sexual orientation is not a psychiatric disorder. It was noted that: "*...there is no scientific evidence that sexual orientation can be* altered *by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.*"[12]

In *Navtej singh johar & ors. v. Union of India, through Secretary Ministry of law and justice,*[13] held that, "Section 377 does not criminalize particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct, regardless of gender identity and orientation. Those who indulge in carnal intercourse in the ordinary course, and those who indulge in carnal intercourse against the order of nature, constitute different classes. Persons falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. Section 377 merely defines a particular offence, and prescribes a punishment for the same. LGBT persons constitute a "miniscule fraction" of the country's population, and there have been very few prosecutions under this Section. Hence, it could not have been made a sound basis for declaring Section 377 to be ultra-vires Articles 14, 15, and 21. It was held that merely because Section 377, IPC has been used to perpetrate harassment, blackmail and torture to persons belonging to the LGBT community, cannot be a ground for challenging the vires of the Section. After noting that Section 377 was *intra vires*, this Court

[12] Indian Psychiatry Society: "Position statement on Homosexuality", IPS/Statement/02/07/2018 *available at* http://www.indianpsychiatricsociety.org/upload_images/imp_download_files/1531125054_1.pdf.

[13] writ petition (criminal) no. 76 of 2016

observed that the legislature was free to repeal or amend Section 377. The fallacy in the Judgment of *Suresh Kumar Koushal* is that, the offence of "carnal intercourse against the order of nature" has not been defined in Section 377. It is too wide, and open-ended, and would take within its sweep, and criminalize even sexual acts of consenting adults in private. In this context, it would be instructive to refer to the decision of a Constitution Bench of this Court in *A.K. Roy* v. *Union of India*[14] wherein it was held that, the requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact.Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding…."

The Judgment does not advert to the distinction between consenting adults engaging in sexual intercourse, and sexual acts which are without the will, or consent of the other party. A distinction has to be made between consensual relationships of adults in private, whether they are heterosexual or homosexual in nature.

Furthermore, consensual relationships between adults cannot be classified along with offences of bestiality, sodomy and non-consensual relationships. Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will. The choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination. Section 377 insofar as it criminalizes voluntary sexual relations between LGBT persons of the same sex in private, discriminates against them on the basis of their "sexual orientation" which is violative of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution. The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country

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[14] (1982) 1 SCC 271

who are equally entitled to the enforcement of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21. Fundamental Rights are guaranteed to all citizens alike, irrespective of whether they are a numerical minority. Modern democracies are based on the twin principles of majority rule, and protection of fundamental rights guaranteed under Part III of the Constitution. Under the Constitutional scheme, while the majority is entitled to govern; the minorities like all other citizens are protected by the solemn guarantees of rights and freedoms under Part III. The J.S. Verma Committee, in this regard, in paragraph 77 of its Report states that:

> *"We need to remember that the founding fathers of our Constitution never thought that the Constitution is 'mirror of perverse social discrimination'. On the contrary, it promised the mirror in which equality will be reflected brightly. Thus, all the sexual identities, including sexual minorities, including transgender communities are entitled to be totally protected. The Constitution enables change of beliefs, greater understanding and is also an equally guaranteed instrument to secure the rights of sexually despised minorities. "*

Even though Section 377 is facially neutral, it has been misused by subjecting members of the LGBT community to hostile discrimination, making them vulnerable and living in fear of the ever-present threat of prosecution on account of their sexual orientation.

The criminalization of "*carnal intercourse against the order of nature*" has the effect of criminalizing the entire class of LGBT persons since any kind of sexual intercourse in the case of such persons would be considered to be against the "*order of nature*", as per the existing interpretation. The conclusion in Suresh Kumar Koushal's case to await legislative amendments to this provision may not be necessary. Once it is brought to the notice of the Court of any violation of the Fundamental Rights of a citizen, or a group of citizens the Court will not remain a mute spectator, and wait for a majoritarian government to bring about such a change.

Given the role of this Court as the sentinel on the *qui vive*, it is the Constitutional duty of this Court to review the provisions of the impugned Section, and read it down to the extent of its inconsistency with the Constitution. In the present case, reading down Section 377 is necessary to exclude consensual sexual relationships between adults, whether of the same sex or otherwise, in private, so as to remove the vagueness of the provision to the extent it is inconsistent with Part III of the Constitution.

IN UNITED STATES OF AMERICA

The U.S. Supreme Court in *Lawrence* v. *Texas*[15] relied upon the Brief of the Amici Curiae[16] which stated: "*Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures* and *historical eras, and in a wide variety of animal species. There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation. According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience. Most or many gay men and lesbians experience little or no choice about their sexual orientation.*" The American Psychiatric Association in December 1973 removed 'homosexuality' from the Diagnostic and Statistical Manual of Psychological Disorders, and opined that the manifestation of sexual attraction towards persons of the opposite sex, or same sex, is a natural condition.[17]

IN SOUTH AFRICA

The Constitutional Court of South Africa in *National Coalition for Gay & Lesbian Equality* v. The Minister of Home Affairs, Case CCT 10/99,[18] made the following relevant observations: "Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution."

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[15] 539 U.S. 558(2003)

[16] Brief for the Amici Curiae American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Texas Chapter of the National Association of Social Workers in *Lawrence* v. *Texas* 539 U.S. 558(2003), available at http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf.

[17] Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5(4) Behavioral Sciences (2015), at p. 565. 62T

[18] 1999 (1) SA 6 (CC), Sachs J., concurring.

IN AUSTRALIA

The High Court of Australia in Ridgeway v The Queen 184 CLR 19, while examining the provisions of Section 122 of the Criminal Code Act 1995 which criminalize 'unnatural sexual intercourse' observed - "People who engage in sexual intercourse with persons of their own sex, or who engage in noncoital sexual activities with either same-sex or opposite-sex partners, are subject to great social disapproval and discrimination. They are also at risk of prosecution and penalties under s 122 of the Criminal Code. It is clear that the majority of Australians find homosexual activity morally repugnant and unacceptable. This reflects a body of belief in Australia that only heterosexual acts within the framework of marriage should be tolerated, and that sex acts between persons of the same sex are unnatural and immoral.

CONCLUSION

In light of the above, Section 377 which criminalizes consensual sexual relationships between adults, whether of the same sex or otherwise, in private, deserves to be read down to the extent of its inconsistency with the fundamental rights guaranteed under the Constitution.

Considering the narratives from various jurisdictions, it is clear that the criminalization of consensual samesex sexual activity has no scientific or public health justification. Laws that criminalize consensual same-sex sexual activity are in violation of the principles of equality, dignity and privacy guaranteed under the Constitution. The recognition of samesex relationships is not just about enabling the LGBT community to assert their identity but also an equally guaranteed instrument to secure the rights of sexually despised minorities.

The increasing global awareness in favour of decriminalization of consensual same-sex sexual activity demonstrates that such criminalization is based on long-standing prejudices against gender and sexual minorities. The reliance on the theory of conventional morality as a justification for criminalization of adult consensual sexual acts cannot be sustained in a constitutional democracy. Section 377 IPC, in so far as it criminalises consensual sexual acts, is clearly unconstitutional. Therefore, Section 377 should be partially struck down or read down to decriminalize consensual same-sex sexual activity between adults. The stirring message from the Supreme Court's landmark judgment decriminalizing gay sex is that social morality cannot trump constitutional morality. It is a reaffirmation of the right to love. In a 5-0 verdict, a Constitution Bench has corrected the flagrant judicial error committed by a two-member Bench in Suresh Kumar Koushal (2013), in overturning a reasoned judgment of the Delhi High Court reading down Section 377 of the IPC. The 2013 decision meant that the LGBTQ community's belatedly recognized right to equal protection of the law was

withdrawn on specious grounds: that there was nothing wrong in the law treating people having sex "against the order of nature" differently from those who abide by "nature", and that it was up to Parliament to act if it wanted to change the law against unnatural sex.

Based on the comparative analysis of various jurisdictions, it is clear that the decriminalization of consensual same-sex sexual activity is necessary to protect the fundamental rights and dignity of sexual minorities. The criminalization of queer sexualities has no scientific or public health justification and is a violation of the principles of equality, privacy, and individual autonomy enshrined in the Constitution. The recognition and legal protection of same-sex relationships is not merely about enabling the LGBTQ+ community to assert their identity, but also an equally guaranteed instrument to secure the rights and social inclusion of sexually marginalized groups.

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