

CHANGING MORALS

Criminalization of Homosexual Activities, Their Impact on Rights of LGBT Community and Needed Reforms

By- Sinha A.

Hidayatullah National Law University

Atal Nagar, Chhattisgarh, India

anjalisinha.hnlu@gmail.com

WHY BRING THIS UP?

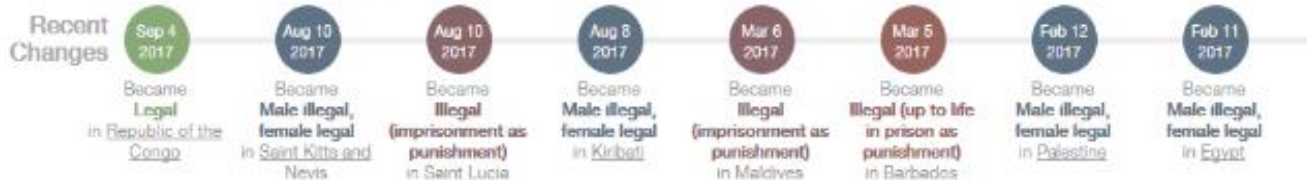
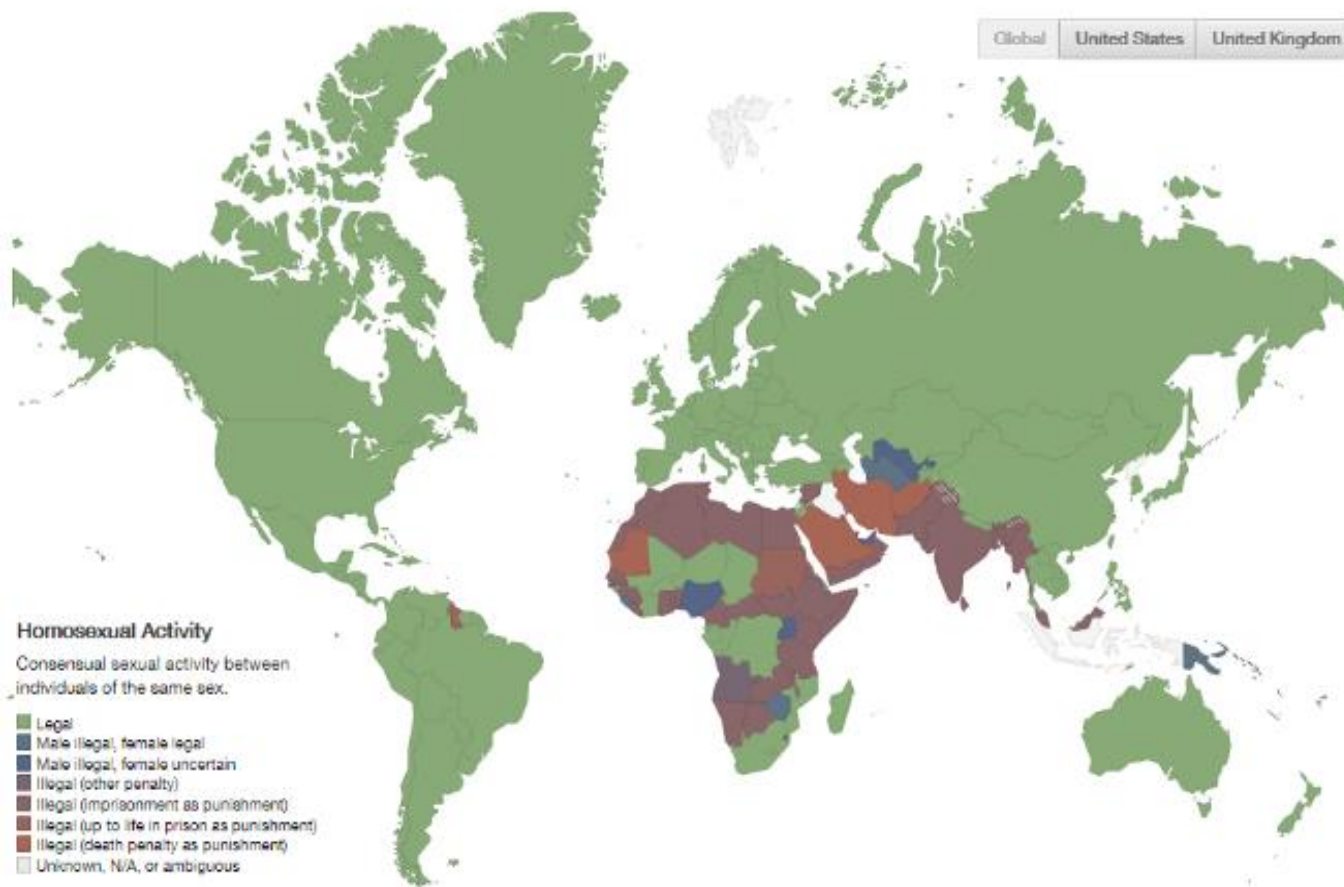
“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres...”

- *Lawrence v. Texas, US Supreme Court, 2003*



STATUS QUO?

While most of the developed countries have held homosexual practices as legal, a huge chunk of countries still consider such practices between consenting adults as criminal with sanctions as stringent as life imprisonment and death penalty.



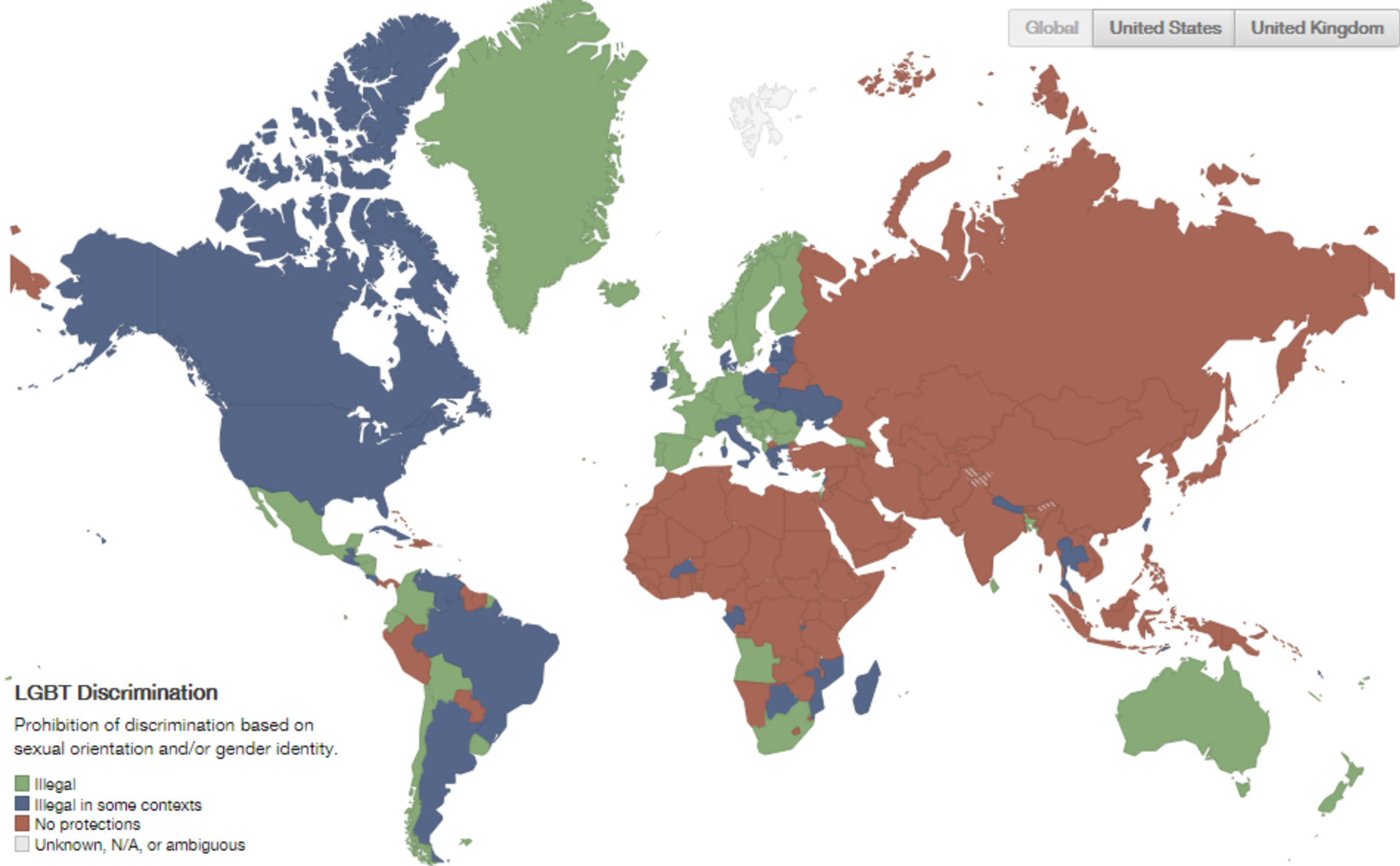
COMMON CONCEPTS OF THE RESEARCH

- **SEXUAL ORIENTATION** refers to a person's emotional and sexual attraction to persons of a different, same or more than one sex.
- This research analysis uses language of consensual same-sex practices or conduct and adult consensual sex, as for many people (and legal systems) around the world, it is not your sexual orientation that counts but your practice; individuals are discriminated against on the basis of what they do, or are presumed to be doing.
- The project report uses the term homosexuality equivocally to represent the Lesbian, Gay, Bisexual and Transgender community largely for the sake of brevity. Further, the term LGBT is sought because they are generally found in the human rights dialog. It is impracticable to completely reflect the multiplicity of terms and identities of the people and groups affected by the issues discussed here. The fact that these particular terms are used is not intended to internalize or fix individuals into an identity which for some is changeable over time and location.

CONSEQUENCES OF CRIMINALIZING HOMOSEXUALITY

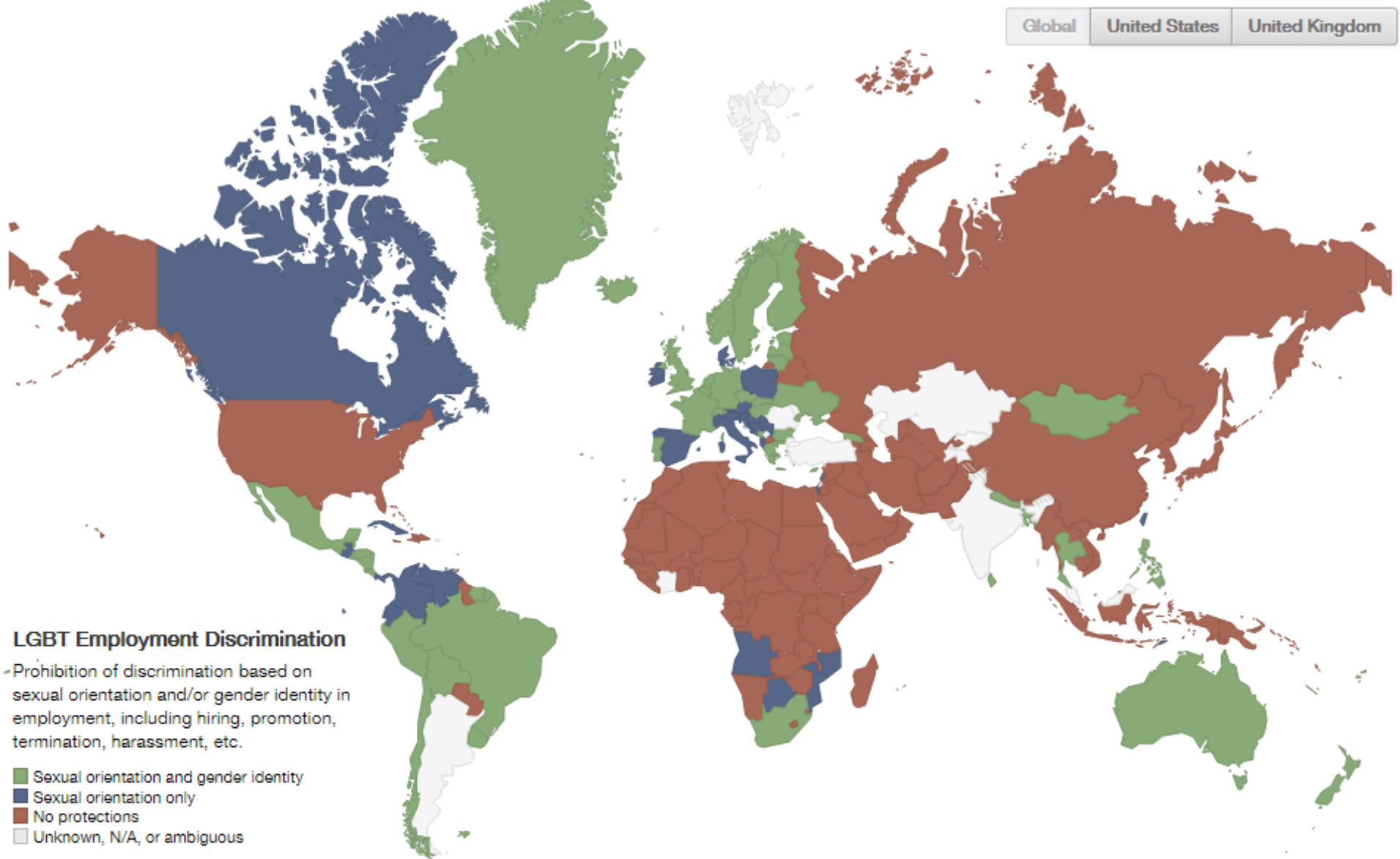
- give **legitimacy to the social taboos** against homosexuality which lead to prejudice and other human rights abuses
- **provoke or validate violence** against LGBT community, whether in custody, in prison, on the street or in the home.
- **allow** law enforcement officials to **invade the private dwellings of individuals** alleged to be engaging in consensual same-sex sex acts





Recent Changes

- Aug 15 2017**
 Became **Illegal in some contexts** in Gularat
- Jan 7 2017**
 Became **Illegal** in Peru
- Jan 1 2017**
 Became **Illegal** in Northwest Territories
- Jan 1 2017**
 Became **Illegal** in Sri Lanka
- Jan 1 2017**
 Became **Illegal** in Quebec
- Jan 1 2017**
 Became **Illegal** in Newfoundland and Labrador
- Dec 19 2016**
 Became **Illegal** in Nuevo León
- Dec 19 2016**
 Became **Illegal** in Nuevo León



Recent Changes

- Sep 16 2017**

Became **Sexual orientation only** in East Timor
- May 16 2017**

Became **Sexual orientation only** in Panama
- Jan 1 2017**

Became **Sexual orientation and gender identity** in Romania
- Jan 1 2017**

Became **Sexual orientation and gender identity** in Sri Lanka
- Jan 1 2017**

Became **Sexual orientation and gender identity** in Quebec
- Jan 1 2017**

Became **Sexual orientation and gender identity** in Northwest
- Jan 1 2017**

Became **Sexual orientation and gender identity** in Newfoundland
- Dec 19 2016**

Became **Sexual orientation and gender identity** in Nuevo León

HOW CRIMINALIZATION IS PROPAGATED

- Provisions may regulate complete sexual intercourse and the procuring of sex
- May regulate acts of intimacy that fall short of intercourse such as kissing in public
- explicitly criminalize sexual relations between men, and in some cases, between women
- May be detained on obscure charges like “loitering” (Argentina), “unruly behavior” (China), “habitual debauchery” (Egypt) or “disorderly conduct” (USA)
- May be subjected to discriminatory age of consent laws which effectively criminalizes behavior that is absolutely legal for heterosexual people



- In minority of countries, consensual same-sex relations are punishable by corporal punishment or the death penalty
- In 7 countries consensual same-sex relations can incur the death penalty
- In Iran, Mauritania, Nigeria, Qatar, Saudi Arabia, Sudan and Yemen men may be sentenced to death for homosexuality while in Iran, Nigeria, Qatar and Saudi Arabia women may face the death sentence for lesbianism
- Often vague terms are implemented for referring criminalization of sex between individuals of the same sex





SEXUAL ORIENTATION LAWS IN THE WORLD - OVERVIEW

ILGA, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION

MAY 2017
ILGA.ORG



CRIMINALISATION

72 STATES

DEATH		implemented in 8 States (or parts of)	14 Y - life (prison)	14 States
		not implemented in 5 States	Up to 14 Y	57 States
		Religious-based laws alongside the civil code: 19 States	'Promotion' laws	3 States
			No penalising law	

In green, yellow and orange countries, same-sex sexual acts were decriminalised or never penalised: 123 States

PROTECTION

85 STATES

Many States run concurrent protections

	Constitution	9 States
	Employment	72 States
	Various	63 States
	Hate crime	43 States
	Incitement to hate	39 States
	Ban on 'conversion therapy'	3 states

RECOGNITION

47 STATES

A small number of States provide for marriage and partnership concurrently

	Marriage	22 States		Joint adoption	26 States
	Partnership	28 States		2nd parent adoption	27 States

Separate detailed maps for these three categories are produced alongside this Overview map.

The data represented in these maps are based on State-Sponsored Homophobia: a World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition, an ILGA report by Aengus Carroll and Lucas Ramón Meneses. The report and these maps are available in the six official UN languages: English, Chinese, Arabic, French, Russian and Spanish on ILGA.org. This edition of the world map (May 2017) was coordinated by Aengus Carroll and Lucas Ramón Meneses (ILGA) and designed by Eduardo Enoki (eduardo.enoki@gmail.com).

The Research tries to Determine

**whether criminalizing homosexuality is
necessary to safeguard morality**

and

**whether indulging in homosexual behavior
essentially against the moral fiber of the
society**



Contemporary World and LGBT Rights



THE NEGATIVE STANCE

- Fazal Rab Choudary v. State of Bihar, (1982)
3 SCC 9.

“The offence is one under S. 377 IPC, which implies sexual perversity. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.”



- J. Albie Sachs, National Coalition for Gay and Lesbian Equality v. Ministry of Justice and others, [1998] {12} PCLR 1517.

“A state that recognises difference does not mean a state without morality or one without a point of view... It is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality... [which] are to be found in the text and spirit of the Constitution itself.”

- Bowers v. Hardwick, 478 U.S. 186 (1986).

consenting adults do not have a constitutional right to engage in homosexual acts in private; the “right to privacy” under Due Process Clause does not give homosexuals the right to engage in sodomy



LEAP TOWARDS LIBERTY

- Smith and Grady v. United Kingdom, (2000) 29 EHRR 493 (European Court of Human Rights).

“predisposed bias on the part of a heterosexual majority against a homosexual minority . . . cannot, of [itself], be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights [including their right to sexual identity as repeatedly affirmed]...”



IDEA OF CONSTITUTIONAL MORALITY

- Naz Foundation v. Union of India and Ors., 160 (2009) DLT 227.

“Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21.”

Further it declared that, *“Moral indignation, howsoever strong, is not a valid basis for overriding individual’s fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.”*



○ National Legal Services Authority versus Union of India, (2014) 5 SCC 438.

The Supreme Court recognized the rights of transgender individuals. The Court stated,

“We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the transgender community.”



WAY FORWARD

- United States v. Windsor, 570 U.S. 744 (2013).

Supreme Court held the Defense of Marriage Act, 1996, which defined marriage as one between man and woman, as unconstitutional

- Hollingsworth v. Perry, 558 U.S. 183 (2010).

same sex marriage was legalized in California

- Obergefell v. Hodges, 92 L. Ed. 2d 609.

Supreme Court held banning same-sex marriage in any state illegal in the United States as being opposed to the 14th Amendment's Equal Protection Clause



THANK YOU.

