**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CRIMINAL ORIGINAL JURISDICTION**

**WRIT PETITION (CRIMINAL) NO. 76 OF 2016**

**NAVTEJ SINGH JOHAR & ORS. …Petitioner(s)**

**VERSUS**

**UNION OF INDIA**
**THR. SECRETARY**
**MINISTRY OF LAW AND JUSTICE …Respondent(s)**

**WITH**

**WRIT PETITION (CIVIL) NO. 572 OF 2016**
**WRIT PETITION (CRIMINAL) NO. 88 OF 2018**
**WRIT PETITION (CRIMINAL) NO. 100 OF 2018**
**WRIT PETITION (CRIMINAL) NO. 101 OF 2018**
**WRIT PETITION (CRIMINAL) NO. 121 OF 2018**

**J U D G M E N T**

**Dipak Misra, CJI (for himself and A.M. Khanwilkar, J.)**

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## A. Introduction

Not for nothing, the great German thinker, Johann Wolfgang von Goethe, had said, "*I am what I am, so take me as I am*" and similarly, Arthur Schopenhauer had pronounced, "*No one can escape from their individuality*". In this regard, it is profitable to quote a few lines from John Stuart Mill:-

> "But society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency of personal impulses and preferences."

The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. Irreplaceability of individuality and identity is grant of respect to self. This realization is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality. In the present case, our

deliberation and focus on the said concept shall be from various spectrums.

2. Shakespeare through one of his characters in a play says "What's in a name? That which we call a rose by any other name would smell as sweet". The said phrase, in its basic sense, conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which it or a person is called. Getting further deeper into the meaning, it is understood that the name may be a convenient concept for identification but the essence behind the same is the core of identity. Sans identity, the name only remains a denotative term. Therefore, the identity is pivotal to one's being. Life bestows honour on it and freedom of living, as a facet of life, expresses genuine desire to have it. The said desire, one is inclined to think, is satisfied by the conception of constitutional recognition, and hence, emphasis is laid on the identity of an individual which is conceived under the Constitution. And the sustenance of identity is the filament of life. It is equivalent to authoring one's own life script where freedom broadens everyday. Identity is equivalent to divinity.

3. The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from the shackles of such bondage and is able to work towards full development of his/her personality that we can call ourselves a truly free society. The first step on the long path to acceptance of the diversity and variegated hues that nature has created has to be taken now by vanquishing the enemies of prejudice and injustice and undoing the wrongs done so as to make way for a progressive and inclusive realisation of social and economic rights embracing all and to begin a dialogue for ensuring equal rights and opportunities for the “less than equal” sections of the society. We have to bid adieu to the perceptions, stereotypes and prejudices

deeply ingrained in the societal mindset so as to usher in inclusivity in all spheres and empower all citizens alike without any kind of alienation and discrimination.

4. The natural identity of an individual should be treated to be absolutely essential to his being. What nature gives is natural. That is called nature within. Thus, that part of the personality of a person has to be respected and not despised or looked down upon. The said inherent nature and the associated natural impulses in that regard are to be accepted. Non-acceptance of it by any societal norm or notion and punishment by law on some obsolete idea and idealism affects the kernel of the identity of an individual. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions. It can be viewed from another angle. An individual in exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her.

5. The eminence of identity has been luculently stated in ***National Legal Services Authority v. Union of India and others***[1], popularly

[1] (2014) 5 SCC 438

known as ***NALSA*** case, wherein the Court was dwelling upon the status of identity of the transgenders. Radhakrishnan, J., after referring to catena of judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. The learned Judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre-and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Elaborating further, he said:-

> "Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity,

> therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."

6. Adverting to the concept of discrimination, he stated:-

> "The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female."

7. Dealing with the legality of transgender identity, Radhakrishnan, J. ruled:-

> "The self-identified gender can be either male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity, as already indicated, refers to a person's internal sense of being male, female or a transgender, for example hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender"."

8. Sikri, J., in his concurring opinion, dwelling upon the rights of transgenders, laid down that gender identification is an essential component which is required for enjoying civil rights by the community. It is only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to the said

community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's licence, the right to education, employment, health and so on. Emphasising on the aspect of human rights, he observed:-

> "…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 Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender."

The aforesaid judgment, as is manifest, lays focus on inalienable "gender identity" and correctly connects with human rights and the constitutionally guaranteed right to life and liberty with dignity. It lays stress on the judicial recognition of such rights as an inextricable component of Article 21 of the Constitution and decries any discrimination as that would offend Article 14, the "fon juris" of our Constitution.

9. It has to be borne in mind that search for identity as a basic human ideal has reigned the mind of every individual in many a

sphere like success, fame, economic prowess, political assertion, celebrity status and social superiority, etc. But search for identity, in order to have apposite space in law, sans stigmas and sans fear has to have the freedom of expression about his/her being which is keenly associated with the constitutional concept of “identity with dignity”. When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one’s orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to subserve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay. 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. At the core of the concept of identity lies self-determination, realization of one’s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and

values or principles that are, to put in a capsule, "constitutionally permissible". As long as it is lawful, one is entitled to determine and follow his/her pattern of life. And that is where the distinction between constitutional morality and social morality or ethicality assumes a distinguished podium, a different objective. Non-recognition in the fullest sense and denial of expression of choice by a statutory penal provision and giving of stamp of approval by a two-Judge Bench of this Court to the said penal provision, that is, Section 377 of the Indian Penal Code, in ***Suresh Kumar Koushal and another v. Naz Foundation and others***[2] overturning the judgment of the Delhi High Court in ***Naz Foundation v. Government of NCT of Delhi and others***[3], is the central issue involved in the present controversy.

**B. <u>The Reference</u>**

10. Writ Petition (Criminal) No. 76 of 2016 was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of the Indian Penal Code (for short, "IPC") to be unconstitutional. When the said Writ Petition was listed before a three-Judge Bench on

[2] (2014) 1 SCC 1
[3] (2009) 111 DRJ 1

08.01.2018, the Court referred to a two-Judge Bench decision rendered in ***Suresh Koushal*** (supra) wherein this Court had overturned the decision rendered by the Division Bench of the Delhi High Court in ***Naz Foundation*** (supra). It was submitted by Mr. Arvind Datar, learned senior counsel appearing for the writ petitioners, on the said occasion that the two-Judge Bench in ***Suresh Koushal*** (supra) had been guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality. A contention was also advanced that the interpretation placed in ***Suresh Kumar*** (supra) upon Article 21 of the Constitution is extremely narrow and, in fact, the Court has been basically guided by Article 14 of the Constitution. Reliance was placed on the pronouncement in ***NALSA*** case wherein this Court had emphasized on "gender identity and sexual orientation". Attention of this Court was also invited to a nine-Judge Bench decision in ***K.S. Puttaswamy and another v. Union of India and others*** [4] wherein the majority, speaking through Chandrachud, J., has opined that sexual orientation is an essential component of rights guaranteed under the Constitution which are not

[4] (2017) 10 SCC 1

formulated on majoritarian favour or acceptance. Kaul, J, in his concurring opinion, referred to the decision in ***Mosley v. News Group Newspapers Ltd.*** [5] to highlight that the emphasis for individual's freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest.

11. The further submission that was advanced by Mr. Datar was that privacy of the individual having been put on such a high pedestal and sexual orientation having been emphasized in the ***NALSA*** case, Section 377 IPC cannot be construed as a reasonable restriction as that would have the potentiality to destroy the individual autonomy and sexual orientation. It is an accepted principle of interpretation of statutes that a provision does not become unconstitutional merely because there can be abuse of the same. Similarly, though a provision on the statute book is not invoked on many occasions, yet it does not fall into the sphere of the doctrine of desuetude. However, ***Suresh Koushal***'s case has been guided by the aforesaid doctrine of desuetude.

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[5] [2008] EWHC 1777 (QB)

12. Appreciating the said submissions, the three-Judge Bench stated that:-

> "Certain other aspects need to be noted. Section 377 IPC uses the phraseology "carnal intercourse against the order of nature". The determination of order of nature is not a constant phenomenon. Social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution. What is natural to one may not be natural to the other but the said natural orientation and choice cannot be allowed to cross the boundaries of law and as the confines of law cannot tamper or curtail the inherent right embedded in an individual under Article 21 of the Constitution. A section of people or individuals who exercise their choice should never remain in a state of fear. When we say so, we may not be understood to have stated that there should not be fear of law because fear of law builds civilised society. But that law must have the acceptability of the Constitutional parameters. That is the litmus test.
>
> It is necessary to note, in the course of hearing on a query being made and Mr. Datar very fairly stated that he does not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. As far as the first aspect is concerned, that is absolutely beyond debate. As far as the second aspect is concerned, that needs to be debated. The consent between two adults has to be the primary pre-condition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the apsects in a cumulative manner, we are of the

> view, the decision in Suresh Kumar Koushal's case (supra) requires re-consideration."

The three-Judge Bench expressed the opinion that the issues raised should be answered by a larger Bench and, accordingly, referred the matter to the larger Bench. That is how the matter has been placed before us.

**C. <u>Submissions on behalf of the petitioners</u>**

13. We have heard Mr. Mukul Rohatgi, learned senior counsel assisted by Mr. Saurabh Kirpal, learned counsel appearing for the petitioners in Writ Petition (Criminal) No. 76 of 2016, Ms. Jayna Kothari, learned counsel for the petitioner in Writ Petition (Civil) No. 572 of 2016, Mr. Arvind P. Datar, learned senior counsel for the petitioner in Writ Petition (Criminal) No. 88 of 2018, Mr. Anand Grover, learned senior counsel for the petitioners in Writ Petition (Criminal) Nos. 100 of 2018 and 101 of 2018 and Dr. Menaka Guruswamy, learned counsel for the petitioner in Writ Petition (Criminal) No. 121 of 2018. We have also heard Mr. Ashok Desai, Mr. Chander Uday Singh, Mr. Shyam Divan and Mr. Krishnan Venugopal, learned senior counsel appearing for various intervenors in the matter. A compilation of written submissions has been filed by the petitioners as well as the intervenors.

14. We have heard Mr. Tushar Mehta, learned Additional Solicitor General for the Union of India, Mr. K. Radhakrishnan, learned senior counsel appearing in Interlocutory Application No. 94284 of 2018 in Writ Petition (Criminal) No. 76 of 2016, Mr. Mahesh Jethmalani, learned senior counsel appearing in Interlocutory Application No. 91147 in Writ Petition (Criminal) No. 76 of 2016, Mr. Soumya Chakraborty, learned senior counsel appearing in Interlocutory Application No. 94348 of 2018 in Writ Petition (Criminal) No. 76 of 2016, Mr. Manoj V. George, learned counsel appearing for Apostolic Alliance of Churches & Utkal Christian Council and Dr. Harshvir Pratap Sharma, learned counsel appearing in Interlocutory Application No. 93411 of 2018 in Writ Petition (Criminal) No. 76 of 2016.

15. It is submitted on behalf of the petitioners and the intervenors that homosexuality, bisexuality and other sexual orientations are equally natural and reflective of expression of choice and inclination founded on consent of two persons who are eligible in law to express such consent and it is neither a physical nor a mental illness, rather they are natural variations of expression and free thinking process and to make it a criminal offence is offensive of the well established

principles pertaining to individual dignity and decisional autonomy inherent in the personality of a person, a great discomfort to gender identity, destruction of the right to privacy which is a pivotal facet of Article 21 of the Constitution, unpalatable to the highly cherished idea of freedom and a trauma to the conception of expression of biological desire which revolves around the pattern of mosaic of true manifestation of identity. That apart, the phrase “order of nature” is limited to the procreative concept that may have been conceived as natural by a systemic conservative approach and such limitations do not really take note of inborn traits or developed orientations or, for that matter, consensual acts which relate to responses to series of free exercise of assertions of one’s bodily autonomy. It is further argued that their growth of personality, relation building endeavour to enter into a live-in relationship or to form an association with a sense of commonality have become a mirage and the essential desires are crippled which violates Article 19(1)(a) of the Constitution. It is urged that the American Psychological Association has opined that sexual orientation is a natural condition and attraction towards the same sex or opposite sex are both naturally equal, the only difference being that the same sex attraction arises in far lesser numbers.

16. The petitioners have highlighted that the rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7-8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma. The impact of sexual orientation on an individual's life is not limited to their intimate lives but also impacts their family, professional, social and educational life. As per the petitioners, such individuals (sexual minorities in societies) need protection more than the heterosexuals so as to enable them to achieve their full potential and to live freely without fear, apprehension or trepidation in such a manner that they are not discriminated against by the society openly or insidiously or by the State in multifarious ways in matters such as employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals and other similar rights arising from live-in relationships which, after the decision in ***Indra Sarma v. V.K.V. Sarma***[6], is recognized even by the "Protection of Women from Domestic

[6] (2013) 15 SCC 755

Violence Act, 2005" for various kinds of live-in relationships. The same protection, as per the petitioners, must be accorded to same sex relationships.

17. It is urged by the learned counsel for the petitioners that individuals belonging to the LGBT group suffer discrimination and abuse throughout their lives due to the existence of Section 377 IPC which is nothing but a manifestation of a mindset of societal values prevalent during the Victorian era where sexual activities were considered mainly for procreation. The said community remains in a constant state of fear which is not conducive for their growth. It is contended that they suffer at the hands of law and are also deprived of the citizenry rights which are protected under the Constitution. The law should have treated them as natural victims and sensitized the society towards their plight and laid stress on such victimisation, however, the reverse is being done due to which a sense of estrangement and alienation has developed and continues to prevail amongst the members belonging to the LGBT group. Compulsory alienation due to stigma and threat is contrary to the fundamental principle of liberty.

18. The petitioners have referred to the decision of this Court in ***NALSA*** case wherein transgenders have been recognized as a third gender apart from male and female and have been given certain rights. Yet, in view of the existence of Section 377 in the IPC, consensual activities amongst transgenders would continue to constitute an offence. Drawing inspiration from the ***NALSA*** case, the petitioners submit that the rights of the LGBT group are not fully realized and they remain incomplete citizens because their expression as regards sexuality is not allowed to be pronounced owing to the criminality attached to the sexual acts between these persons which deserves to be given a burial and, therefore, the rights of the LGBT community also need equal, if not more, constitutional protection. Accordingly, the petitioners are of the view that Section 377 of the IPC be read down qua the LGBT community so as to confine it only to the offence of bestiality and non-consensual acts in view of the fact that with the coming into force of the Criminal Law (Amendment) Act, 2013 and the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the scope of sexual assault has been widened to include non peno-vaginal sexual assault and also

criminalize non-consensual sexual acts between children thereby plugging important gaps in the law governing sexual violence in India.

19. The petitioners have also submitted that Section 377, despite being a pre-constitutional law, was retained post the Constitution coming into effect by virtue of Article 372 of the Constitution, but it must be noted that the presumption of constitutionality is merely an evidentiary burden initially on the person seeking to challenge the vires of a statute and once any violation of fundamental rights or suspect classification is prima facie shown, then such presumption has no role. In the case at hand, the petitioners face a violation of their fundamental rights to an extent which is manifestly clear and it is a violation which strikes at the very root or substratum of their existence. The discrimination suffered at the hands of the majority, the onslaught to their dignity and invasion on the right to privacy is demonstrably visible and permeates every nook and corner of the society.

20. It is the argument of the petitioners that Section 377, if retained in its present form, would involve the violation of, not one but, several fundamental rights of the LGBTs, namely, right to privacy, right to dignity, equality, liberty and right to freedom of expression. The

petitioners contend that sexual orientation which is a natural corollary of gender identity is protected under Article 21 of the Constitution and any discrimination meted out to the LGBT community on the basis of sexual orientation would run counter to the mandate provided under the Constitution and the said view has also gained approval of this Court in the ***NALSA*** case.

21. The petitioners have also relied upon the view in ***K.S. Puttaswamy*** (supra) to advance their argument that sexual orientation is also an essential attribute of privacy. Therefore, protection of both sexual orientation and right to privacy of an individual is extremely important, for without the enjoyment of these basic and fundamental rights, individual identity may lose significance, a sense of trepidation may take over and their existence would be reduced to mere survival. It is further urged that sexual orientation and privacy lie at the core of the fundamental rights which are guaranteed under Articles 14, 19 and 21 of the Constitution and in the light of the decision in ***Puttaswamy*** (supra), it has become imperative that Section 377 be struck down. It is contended that the right to privacy has to take within its ambit and sweep the right of every individual, including LGBTs, to make decisions as per their

choice without the fear that they may be subjected to humiliation or shunned by the society merely because of a certain choice or manner of living.

22. Having canvassed with vehemence that sexual orientation is an important facet of the right to privacy which has been raised to the pedestal of a cherished right, the learned counsel for the petitioners have vigorously propounded that sexual autonomy and the right to choose a partner of one's choice is an inherent aspect of the right to life and right to autonomy. In furtherance of the said view, they have relied upon the authorities in ***Shakti Vahini v. Union of India and others***[7] and ***Shafin Jahan v. Asokan K.M.***[8] wherein it has been clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution.

23. According to the petitioners, there is no difference between persons who defy social conventions to enter into inter-religious and inter-caste marriages and those who choose a same sex partner in the sense that the society may disapprove of inter-caste or inter-religious marriages but this Court is for enforcing constitutional rights.

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[7](2018) 7 SCC 192

[8]AIR 2018 SC 1933 : 2018 (5) SCALE 422

Similarly, as per the petitioners, even if there is disapproval by the majority of the sexual orientation or exercise of choice by the LGBT persons, the Court as the final arbiter of the constitutional rights, should disregard social morality and uphold and protect constitutional morality which has been adverted to by this Court in several cases, including ***Manoj Narula v. Union of India***[9], for that is the governing rule. It is argued that the Delhi High Court in ***Naz Foundation*** (supra) has referred to and analysed the concept of constitutional morality and ultimately struck down Section 377 IPC clearly stating that carnal intercourse between homosexuals and heterosexuals with consent cannot be an offence.

24. The LGBT persons cannot, according to the petitioners, be penalized simply for choosing a same sex partner, for the constitutional guarantee of choice of partner extends to the LGBT persons as well. Learned counsel for the petitioners and the supporting intervenors have submitted that sexual orientation, being an innate facet of individual identity, is protected under the right to dignity. To bolster the said argument, reliance has been placed upon ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi***

[9] (2014) 9 SCC 1

***and others***[10] and ***Common Cause (A Registered Society) v. Union of India and another***[11] wherein it was held that the right to life and liberty, as envisaged under Article 21, is meaningless unless it encompasses within its sphere individual dignity and right to dignity includes the right to carry such functions and activities as would constitute the meaningful expression of the human self.

25. It is submitted that Section 377 is an anathema to the concept of fraternity as enshrined in the Preamble to our Constitution and the Indian Constitution mandates that we must promote fraternity amongst the citizens sans which unity shall remain a distant dream.

26. The petitioners have further contended that Section 377 is violative of Article 14 of the Constitution as the said Section is vague in the sense that carnal intercourse against the order of nature is neither defined in the Section nor in the IPC or, for that matter, any other law. There is, as per the petitioners, no intelligible differentia or reasonable classification between natural and unnatural sex as long as it is consensual in view of the decision of this Court in ***Anuj Garg and others v. Hotel Association of India and others***[12] which lays down the principle that classification which may have been treated as

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[10](1981) 1 SCC 608
[11](2018) 5 SCC 1
[12](2008) 3 SCC 1

valid at the time of its adoption may cease to be so on account of changing social norms.

27. Section 377, as argued by the petitioners, is manifestly arbitrary and over-broad and for the said purpose, immense inspiration has been drawn from the principles stated in ***Shayara Bano v. Union of India and others***[13] , for making consensual relationship a crime on the ground that it is against the order of nature suffers from manifest arbitrariness at the fulcrum.

28. It is the case of the petitioners that Section 377 violates Article 15 of the Constitution since there is discrimination inherent in it based on the sex of a person's sexual partner as under Section 376(c) to (e), a person can be prosecuted for acts done with an opposite sex partner without her consent, whereas the same acts if done with a same-sex partner are criminalized even if the partner consents. The petitioners have drawn the attention of this Court to the Justice J.S Verma Committee on Amendments to Criminal Law which had observed that 'sex' occurring in Article 15 includes sexual orientation and, thus, as per the petitioners, Section 377 is also violative of Article 15 of the Constitution on this count.

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[13](2017) 9 SCC 1

29. It is argued with astuteness that Section 377 has a chilling effect on Article 19(1)(a) of the Constitution which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means and that Section 377 constitutes an unreasonable exception and is thereby not covered under Article 19(2) of the Constitution. To buttress the said stance, reliance is placed upon the decision in ***S. Khushboo v. Kanniammal and another***[14] wherein it has been held that law should not be used in such a manner that it has a chilling effect on the freedom of speech and expression. Additionally, the view in ***NALSA*** case has also been strongly pressed into service to emphasize that the said decision clearly spells out that the right under Article 19(1)(a) includes one's right to expression of his/her self-identified gender which can be expressed through words, action, behaviour or any other form.

30. The petitioners have also contended that Section 377 violates the rights of LGBT persons under Article 19(1)(c) and denies them the

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[14](2010) 5 SCC 600

right to form associations. Similarly, such persons are hesitant to register companies to provide benefits to sexual minorities due to the fear of state action and social stigma. Further, a conviction under Section 377 IPC renders such persons ineligible for appointment as a director of a company.

31. It is averred that Section 377 IPC, by creating a taint of criminality, deprives the LGBT persons of their right to reputation which is a facet of the right to life and liberty of a citizen under Article 21 of the Constitution as observed by this Court in ***Kishore Samrite v. State of U.P. and others***[15] and ***Umesh Kumar v. State of Andhra Pradesh and another***[16] to the effect that reputation is an element of personal security and protected by the Constitution with the right to enjoyment of life and liberty. This right, as per the petitioners, is being denied to the LGBT persons because of Section 377 IPC as it makes them apprehensive to speak openly about their sexual orientation and makes them vulnerable to extortion, blackmail and denial of State machinery for either protection or for enjoyment of other rights and amenities and on certain occasions, the other concomitant rights are affected.

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[15](2013) 2 SCC 398
[16](2013) 10 SCC 591

32. The petitioners have advanced their argument that Section 377 IPC impedes the ability of the LGBTs to realize the constitutionally guaranteed right to shelter. To illustrate the same, the petitioners have drawn the attention of the Court to the fact that LGBTs seek assistance of private resources such as Gay Housing Assistance Resources (GHAR) in order to access safe and suitable shelter and this is an indication that the members of this community are in need of immediate care and protection of the State.

33. The decision in ***Suresh Koushal*** (supra), as per the petitioners, is per incuriam as the view observed therein has failed to take into account the amendment to Section 375 IPC which has rendered sexual 'carnal intercourse against the order of nature' between man and woman as permissible. Section 377, on the other hand, has continued to render same sex carnal intercourse as an offence, even if it is consensual. Further, the petitioners have assailed the decision of this Court in ***Suresh Koushal's*** case on the ground that the view in the said decision on classification is contrary to the 'impact or effect test', for the result, in ultimate eventuality, leads to discrimination. Thus, the petitioners have contended that after ***Puttaswamy*** (supra), the view in ***Suresh Koushal*** (supra) needs to be overruled and the

proper test would be whether Section 377 IPC can be enacted by the Parliament today after the decisions of this Court in ***NALSA (***supra) and ***Puttaswamy*** (supra) and other authorities laying immense emphasis on individual choice.

34. It is further contended that LGBT persons are deprived of their rights due to the presence of Section 377 as they fear prosecution and persecution upon revealing their sexual identities and, therefore, this class of persons never approached this Court as petitioners, rather they have always relied upon their teachers, parents, mental health professionals and other organizations such as NGOs to speak on their behalf. It is urged that the appellants in ***Suresh Koushal*** (supra) led this Court to assume that LGBT persons constitute only a minuscule fraction whereas most of the studies indicate that they constitute at least 7-8% of the population and that apart, rights are not determined on the basis of percentage of populace but on a real scrutiny of the existence of right and denial of the same. It is the stand of the petitioners that majority perception or view cannot be the guiding factor for sustaining the constitutionality of a provision or to declare a provision as unconstitutional.

**D. Submissions on behalf of the respondents and other intervenors**

35. The respondent, Union of India, has, vide affidavit dated 11th July, 2018, submitted that the matter at hand was referred to a Constitution Bench to decide as to whether the law laid down in ***Suresh Koushal*** (supra) is correct or not and the only question referred to this Bench is the question of the constitutional validity of criminalizing 'consensual acts of adults in private' falling under Section 377 IPC.

36. Further, the Union has submitted that so far as the constitutional validity of Section 377 IPC, to the extent it applies to 'consensual acts of adults in private', is concerned, the respondent leaves the same to the wisdom of this Court.

37. The respondent has also contended that in the event Section 377 IPC so far as 'consensual acts of adults in private' is declared unconstitutional, other ancillary issues or rights which have not been referred to this Bench for adjudication may not be dealt with by this Bench as in that case, the Union of India expresses the wish to file detailed affidavit in reply, for consideration of other issues and rights would have far reaching and wide ramifications under various other laws and will also have consequences which are neither

contemplated in the reference nor required to be answered by this Hon'ble Bench.

38. The respondent has submitted that allowing any other issue (other than the constitutional validity of Section 377 IPC) to be argued and adjudicating the same without giving an opportunity to the Union of India to file a counter affidavit may not be in the interest of justice and would be violative of the principles of natural justice.

39. Another set of written submissions has been filed by Shri K. Radhakrishnan, senior counsel, on behalf of intervenor-NGO, Trust God Ministries. The said intervenor has submitted that the observations of this Court in ***Puttaswamy*** (supra), particularly in Para 146, virtually pre-empt and forestall the aforesaid NGO from raising substantial contentions to the effect that there is no uncanalised and unbridled right to privacy and the said right cannot be abused. Further, the intervenor has contended that there is no personal liberty to abuse one's organs and that the offensive acts proscribed by Section 377 IPC are committed by abusing the organs. Such acts, as per the intervenor, are undignified and derogatory to the constitutional concept of dignity and if any infraction is caused to the concept of

dignity, then it would amount to constitutional wrong and constitutional immorality.

40. It is also the case of the intervenor that issues pertaining to the constitutional and other legal rights of the transgender community, their gender identity and sexual orientation have been exhaustively considered in the light of the various provisions of the Constitution and, accordingly, reliefs have been granted by this Court in ***NALSA*** (supra). It is contended by the intervenor that no further reliefs can be granted to them and the prayers made by them is only to abuse privacy and personal liberty by transgressing the concepts of dignity and public morality.

41. As per the intervenor, Section 377 rightly makes the acts stated therein punishable as Section 377 has been incorporated after taking note of the legal systems and principles which prevailed in ancient India and now in 2018, the said Section is more relevant legally, medically, morally and constitutionally.

42. To illustrate this, the intervenor has drawn the attention of this Court to W. Friedmann from *'Law in a Changing Society'* wherein he has observed that to prohibit a type of conduct which a particular society considers worthy of condemnation by criminal sanctions is

deeply influenced by the values governing that society and it, therefore, varies from one country to another and one period of history to another.

43. Further, it has been contended by the intervenor that persons indulging in unnatural sexual acts which have been made punishable under Section 377 IPC are more susceptible and vulnerable to contracting HIV/AIDS and the percentage of prevalence of AIDS in homosexuals is much greater than heterosexuals and that the right to privacy may not be extended in order to enable people to indulge in unnatural offences and thereby contact AIDS.

44. It is also the case of the intervenor that if Section 377 is declared unconstitutional, then the family system which is the bulwark of social culture will be in shambles, the institution of marriage will be detrimentally affected and rampant homosexual activities for money would tempt and corrupt young Indians into this trade.

45. Written submissions have also been filed on behalf of Mr. Suresh Kumar Koushal, intervenor, submitting therein that the argument of the petitioners that consensual acts of adults in private have been decriminalized in many parts of the world and, therefore, it deserves to be decriminalized in India as well does not hold good for

several reasons inasmuch as the political, economic and cultural heritage of those countries are very different from India which is a multicultural and multi-linguistic country.

46. The intervenor has contended that since fundamental rights are not absolute, there is no unreasonableness in Section 377 IPC and decriminalizing the same would run foul to all religions practised in the country, and, while deciding the ambit and scope of constitutional morality, Article 25 also deserves to be given due consideration.

47. Another application for intervention, being I.A No. 91250 of 2018, was filed and the same was allowed. It has been contended by the said intervenor that in the attempt that Section 377 is struck down, it would render the victims complaining of forced acts covered under the existing Section 377 IPC remediless as the said Section not only impinges on carnal intercourse against the order of nature between two consenting adults but also applies to forced penile non- vaginal sexual intercourse between adults. This, as per the intervenor, would be contrary to the decision of this Court in ***Iqbal Singh Marwah and another v. Meenakshi Marwah and another***[17].

[17] (2005) 4 SCC 370

48. The applicant has also submitted that in the event consenting acts between two same sex adults are excluded from the ambit of Section 377 IPC, then a married woman would be rendered remediless under the IPC against her bi-sexual husband and his consenting male partner indulging in any sexual acts.

49. The intervenor has suggested that the alleged misuse of Section 377 IPC as highlighted by the petitioners can be curbed by adding an explanation to Section 377 IPC defining 'aggrieved person' which shall include only non-consenting partner or aggrieved person or wife or husband or any person on their behalf on the lines of Section 198(1) of Code of Criminal Procedure, 1973. This, as per the applicant, would curb any mala fide complaint lodged by authorities and vindictive or mischievous persons when the act complained of is 'consenting act' between two persons. Further, the applicant has submitted that this Court may be pleased to identify that the courts shall take cognizance of an offence under Section 377 IPC only on a complaint made by an aggrieved person. Such an approach, as per the applicant, inherently respects consent and also protects from interference and safeguards the privacy and dignity of an individual under Article 21 of the Constitution.

50. The applicant has also contended that the constitutionality of any legislation is always to be presumed and if there is any vagueness in the definition of any section, the courts have to give such a definition which advances the purpose of the legislation and that the courts must make every effort to uphold the constitutional validity of a statute if that requires giving a stretched construction in view of the decisions of this Court in ***K.A. Abbas v. Union of India and another***[18] and ***Rt. Rev. Msgr. Mark Netto v. State of Kerala and others***[19].

51. The applicant, through his learned counsel Mr. Harvinder Chowdhury, submits that if the right to privacy as recognized in ***Puttaswamy*** (supra) is allowed its full scope and swing, then that itself would rule out prosecution in all cases of consensual unnatural sex between all couples, whether heterosexual or homosexual, and without having to engage in reading down, much less striking down of, the provisions of Section 377 IPC in its present form. This is so because the State cannot compel individuals engaging in consensual sexual acts from testifying

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[18] (1970) 2 SCC 780
[19] (1979) 1 SCC 23

against one another as it involves a breach of privacy unless the consent itself is under challenge and one cannot be a consenting victim of a crime so long as the consent is legally valid.

52. Submissions have also been advanced on behalf of Raza Academy, intervenor, through its learned counsel Mr. R.R Kishore, who has contended that homosexuality is against the order of nature and Section 377 rightly forbids it. Prohibition against carnal intercourse involving penetration into non-sexual parts of the body does not constitute discrimination as laws based on biological reality can never be unconstitutional, for if a male is treated as a male, a female as a female and a transgender as a transgender, it does not amount to discrimination.

53. The applicant has submitted that the purpose of criminal law is to protect the citizens from something that is injurious and since carnal intercourse between two persons is offensive and injurious, it is well within the State's jurisdiction to put reasonable restrictions to forbid such aberrant human behaviour by means of legislation, for it is the duty of the State that people with abnormal conduct are prohibited from imperiling the life, health and security of the

community. Unrestrained pleasure, and that too of a lascivious nature, is not conducive for the growth of a civilized society, such inordinate gratification needs to be curbed and, thus, prohibition against carnal intercourse as defined in Section 377 IPC does not violate the constitutional rights of a person.

54. Another application for intervention, being I.A No. 9341 of 2011, was filed and allowed. The applicant, in his written submissions, after delineating the concept of immorality, has submitted that the doctrine of manifest arbitrariness is of no application to the present case as the law is not manifestly or otherwise arbitrary, for Section 377 criminalizes an act irrespective of gender or sexual orientation of the persons involved. The universal application of the said provision without any gender bias is the touchstone of Part III of the Constitution and is not arbitrary as there is no intentional or unreasonable discrimination in the provision.

55. The applicant has drawn the attention of this Court to the case of ***Fazal Rab Choudhary v. State of Bihar***[20] wherein this Court held that the offence under Section 377 IPC implies sexual

[20](1982) 3 SCC 9

perversity. Further, it is the case of the applicant that there should not be identical transplantation of Western ideology in our country which has also been a matter of concern for this Court in ***Jagmohan Singh v. State of U.P.***[21]

56. The applicant, after citing the case of ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and others***[22], has stressed upon the fact that the interest of a citizen or a section of the society, howsoever important, is secondary to the interest of the country or community as a whole and while judging the reasonability of restrictions imposed on fundamental rights, due consideration must also be given to the Directive Principles stated in Part IV. In view of these aforesaid submissions, the applicant has submitted that fundamental rights may not be overstretched and the Directive Principles of State Policy which are fundamental in the governance of the country cannot be neglected, for they are not less significant than what is fundamental in the life of an individual as held in ***Kesavananda Bharati v. Union of India***[23].

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[21] (1973) 1 SCC 20
[22] (2005) 8 SCC 534
[23] (1973) 4 SCC 225

57. Another application for intervention, being I.A. No. 76790 of 2018, has been filed by Apostolic Alliance of Churches and the Utkal Christian Council. The applicants have submitted that the Court, while interpreting Section 377 IPC, has to keep in mind that there can be situations where consent is obtained by putting a person in fear of death or hurt or consent can also be obtained under some misconception or due to unsoundness of mind, intoxication or inability to understand the nature and the consequences of the acts prohibited by Section 377 IPC.

58. The applicant has also advanced the argument that Section 377 IPC in its present form does not violate Article 14 of the Constitution as it merely defines a particular offence and its punishment and it is well within the power of the State to determine who should be regarded as a class for the purpose of a legislation and this, as per the applicant, is reasonable classification in the context of Section 377 IPC.

59. Further, the applicant has contended that Section 377 IPC is not violative of Article 15 of the Constitution as the said Article prohibits discrimination on the grounds of only religion, race, caste,

sex, place of birth or any of them but not sexual orientation. The word ‘sexual orientation’, as per the applicant, is alien to our Constitution and the same cannot be imported within it for testing the constitutional validity of a provision or legislation. As per the applicant, if the word 'sex' has to be replaced by 'sexual orientation', it would require a constitutional amendment.

60. It is also the case of the applicant that the Yogyakarta principles which have been heavily relied upon by the petitioners to bolster their stand have limited sanctity inasmuch as they do not amount to an international treaty binding on the State parties and there are no inter-governmentally negotiated international instruments or agreed human rights treaties on the issue of LGBTs.

61. Further, the applicant has submitted that there is no requirement to reconsider the decision of this Court in ***Suresh Koushal*** (supra) wherein it was held that there is a presumption of constitutionality of a legislation and the Court must adopt self-restraint and thereby refrain from giving birth to judicial legislation. In the applicant's view, the legislative wisdom of the Parliament must be

respected and it must be left to the Parliament to amend Section 377 IPC, if so desired.

62. The applicant has contended that if the prayers of the petitioners herein are allowed, it would amount to judicial legislation, for the Courts cannot add or delete words into a statute. It is stated that the words 'consent' and/or 'without consent' are not mentioned in Section 377 IPC and, therefore, the Courts cannot make such an artificial distinction. To buttress this stand, the applicant has relied upon the decision of this Court in ***Sakshi v. Union of India and others***[24] wherein it was observed that the attention of the Court should be on what has been said and also on what has not been said while interpreting the statute and that it would be wrong and dangerous for the Court to proceed by substituting some other words in a statute since it is well settled that a statute enacting an offence or imposing a penalty has to be strictly construed.

63. The applicant has also drawn the attention of this Court to the decision in ***Union of India and another v. Deoki Nandan Aggarwal***[25] wherein it was observed that the Court cannot rewrite,

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[24](2004) 5 SCC 518

[25]1992 Supp. (1) SCC 323

recast or re-frame the legislation for the good reason that it has no power to legislate since the power to legislate has not been conferred upon the Court and, therefore, the Courts cannot add words to a statute or read words into it which are not there. The Courts are to decide what the law is and not what it should be.

64. It is also the case of the applicant that the decriminalization of Section 377 IPC will open a floodgate of social issues which the legislative domain is not capable of accommodating as same sex marriages would become social experiments with unpredictable outcome.

65. Further, it is the contention of the applicant that decriminalization of Section 377 IPC will have cascading effect on existing laws such as Section 32(d) of the Parsi Marriage and Divorce Act, 1936; Section 27(7)(1A) A of the Special Marriage Act, 1954 which permits a wife to present a petition for divorce to the district court on the ground,—(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; Section 10(2) of the Indian Divorce Act, 1869 and Section 13(2) of the Hindu Marriage Act, 1955.

## E. Decisions in *Naz Foundation* and *Suresh Koushal*

66. We shall now advert to what had been stated by the Delhi High Court in ***Naz Foundation*** and thereafter advert to the legal base of the decision in ***Suresh Koushal'***s case. The Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. The High Court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and that sex-discrimination cannot be read as applying to gender simpliciter. Discrimination, as per the High Court's view, on the basis of sexual orientation is grounded in stereotypical judgments and generalization about the conduct of either sex.

67. Another facet of the Indian Constitution that the High Court delineated was that of inclusiveness as the Indian Constitution reflects this value of inclusiveness deeply ingrained in the Indian society and nurtured over several generations. The High Court categorically said that those who are perceived by the majority as deviants or different are not to be, on that score, excluded or ostracised. In the High Court's view, where a society displays

inclusiveness and understanding, the LGBT persons can be assured of a life of dignity and non-discrimination.

68. It has been further opined by the High Court that the Constitution does not permit any statutory criminal law to be held captive of the popular misconceptions of who the LGBTs are, as it cannot be forgotten that discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual. That apart, the High Court had taken the view that social morality has to succumb to the concept of constitutional morality.

69. On the basis of the aforesaid reasons, the High Court declared Section 377 IPC violative of Articles 14, 15 and 21 of the Constitution in so far as it criminalises consensual sexual acts of adults in private, whereas for non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors, the High Court ruled that Section 377 IPC was valid.

70. The Delhi High Court judgment was challenged in ***Suresh Koushal*** (supra) wherein this Court opined that acts which fall within the ambit of Section 377 IPC can only be determined with reference to the act itself and to the circumstances in which it is executed.

While so opining, the Court held that Section 377 IPC would apply irrespective of age and consent, for Section 377 IPC does not criminalize a particular people or identity or orientation and only identifies certain acts which, when committed, would constitute an offence. Such a prohibition, in the Court's view in ***Suresh Koushal*** (supra), regulates sexual conduct regardless of gender identity and orientation.

71. The Court further observed that 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 and the people falling in the latter category cannot claim that Section 377 IPC suffers from the vice of arbitrariness and irrational classification. The Court further observed that while reading down Section 377 of the Indian Penal Code, it cannot be overlooked that only a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted under Section 377 of the Indian Penal Code which cannot, therefore, be made a sound basis for declaring Section 377 IPC *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.

72. The submission advanced by the respondents therein to the effect that the provision had become a pernicious tool for perpetrating harassment, blackmail and torture on those belonging to the LGBT community was repelled by stating that such treatment is neither mandated by the Section nor condoned by it and the mere fact that the Section is misused by police authorities and others is not a reflection of the *vires* of the Section, though it might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 of the Indian Penal Code.

**F. <u>Other judicial pronouncements on Section 377 IPC</u>**

73. Presently, we may refer to some of the judgments and the views taken therein by this Court as well as by the High Courts on Section 377 IPC so as to have a holistic perspective.

74. While interpreting the said provision, the Courts have held that the provision stipulates certain acts, which when committed, would constitute a criminal offence. In ***Childline India Foundation and another v. Allan John Waters and others***[26], the Court was dealing with carnal intercourse against the order of nature when the material on record showed that the accused Nos. 2 and 3 used to have sex

[26] (2011) 6 SCC 261

and fellatio with PWs 1 and 4. The Court opined that the ingredients of Section 377 IPC were proved and, accordingly, restored the conviction and sentence of 6 years' rigorous imprisonment and confirmed the imposition of fine. In ***Fazal Rab Choudhary*** (supra), although the Court convicted the accused under Section 377 IPC, yet it took note of the absence of any force in the commission of the act. The Court also took into account the prevalent notions of permissive society and the fact that homosexuality has been legalized in some countries. In view of the same, the Court reduced the sentence of 3 years imposed on the accused to 6 months opining that the aforesaid aspects must also be kept in view as they have a bearing on the question of offence and quantum of sentence.

75. A reference may be made to ***Khanu v. Emperor***[27] which was also alluded to in ***Suresh Koushal***'s case. We deem it appropriate to reproduce a part of ***Khanu***'s decision to understand how the courts in India had understood the word "carnal intercourse against the order of nature". The said passage reads thus:-

> "The principal point in this case is: whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has

[27] AIR 1925 Sind 286

thereby committed an offence under Section 377 of the Penal Code.

Section 377 punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings. Is the act here committed one of carnal intercourse? If so, it is 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. Intercourse may be defined as mutual frequent action by members of independent organisation. Commercial intercourse [is thereafter referred to; emphasis is made on the reciprocity].

By a metaphor the word intercourse like the word commerce is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy. …

It is to be remembered that the Penal Code does not, except in Section 377, render abnormal sexual vice punishable at all. In England indecent assaults are punishable very severely. It is possible that under the Penal Code, some cases might be met by prosecuting the offender for simple assault, but that is a compoundable offence and in any case the patient could in no way be punished. It is to be supposed that the legislature intended that a Tigellinus should carry

> on his nefarious profession perhaps vitiating and depraving hundreds of children with perfect immunity?
>
> I doubt not, therefore, that coitus per os is punishable under Section 377 of the Penal Code."

76. In ***Suresh Koushal***'s case, there has also been a reference to the decision of the Gujarat High Court in ***Lohana Vasantlal Devchand v. State***[28] wherein the issue presented before the High Court was whether an offence under Section 377 read with Section 511 IPC had been committed on account of the convict putting his male organ in the mouth of the victim, if the act was done voluntarily by him. A contention was raised that there was no penetration and, therefore, there could not have been any carnal intercourse. The High Court referred to a passage from the book 'Pyschology of Sex' [29] authored by Mr. Havelock Ellis which reads thus:-

> "While the kiss may be regarded as the typical and normal erogenic method of contrectation for the end of attaining tumescene, there are others only less important. Any orifical contact 'between persons of opposite sex' is sometimes almost equally as effective as the kiss in stimulating tumescene; all such contacts, indeed, belong to the group of which the kiss is the type, Cunnilinctus (often incorrectly termed cunnilingus) and fellatio cannot be regarded as unnatural for they have their prototypic forms among animals, and they are found among various savage

[28] AIR 1968 Guj 252

[29] 'Psychology of Sex' Twelfth Impression, 1948, London

> races. As forms of contrecttion and aides to tumescene they are thus natural and are sometimes regarded by both sexes as quintessential forms of sexual pleasure, though they may not be considered aesthetic. They become deviations, however, and this liable to be termed "perversions", when they replace the desire of coitus""

77. After referring to the definition of sodomy, the pronouncement in ***Khanu*** (supra), Stroud's Judicial Dictionary, 3rd Edition and Webster's New 20th Century Dictionary, unabridged, 2nd Edition, the Gujarat High Court opined thus:-

> "In the instant case, there was an entry of a male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said without any doubt in my mind that the act in question will amount to an offence, punishable under Section 337 of the Indian Penal Code."

78. The decision in ***State of Kerala v. Kundumkara Govindan and another***[30] has also been reproduced in ***Suresh Koushal***'s case. The High Court of Kerala held thus:-

> "*18.* Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the respondents can escape conviction under Section 377 of the Penal Code. The counsel of the respondents contends (in this argument the Public Prosecutor also

[30] 1969 Cri LJ 818 (Ker)

supports him) that sexual act between the thighs is not intercourse. The argument is that for intercourse there must be encirclement of the male organ by the organ visited; and that in the case of sexual act between the thighs, there is no possibility of penetration.

*19.* The word 'intercourse' means 'sexual connection' (*Concise Oxford Dictionary*). In *Khanu* v. *Emperor* the meaning of the word 'intercourse' has been considered: (AIR p. 286)

'Intercourse may be defined as mutual frequent action by members of independent organisation.'

Then commercial intercourse, social intercourse, etc. have been considered; and then appears:

'By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.'

Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.

*20.* Then about penetration. The word 'penetrate' means in the *Concise Oxford Dictionary* 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place,

fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.

*21.* Unnatural offence is defined in Section 377 of the Penal Code; whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence. The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the thighs of another is an unnatural offence. In this connection, it may be noted that the act in Section 376 is 'sexual intercourse' and the act in Section 377 is 'carnal intercourse against the order of nature'.

*22.* The position in English law on this question has been brought to my notice. The old decision of *R.* v. *Samuel Jacobs*[31] lays down that penetration through the mouth does not amount to the offence of sodomy under English law. The counsel therefore argues that sexual intercourse between the thighs cannot also be an offence under Section 377 of the Penal Code. In *Sirkar* v. *Gula Mythien Pillai Chaithu Maho Mathu*[32] a Full Bench of the Travancore High Court held that having connection with a person in the mouth was an offence under Section 377 of the Penal Code. In a short judgment, the learned Judges held that it was unnecessary to refer to English Statute Law and English text books which proceeded upon an interpretation of the words sodomy, buggery and bestiality; and that the words used in the Penal Code were very simple and wide enough to include all acts against the order of nature. My view on the question is also that the words of Section 377 are simple and wide enough to include any carnal intercourse against the order of nature within its ambit. Committing intercourse

[31] 1817 Russ & Ry 331 : 168 ER 830 (CCR)

[32] (1908) 14 TLR Appendix 43 (Ker)

> between the thighs of another is carnal intercourse against the order of nature."

79. In ***Calvin Francis v. State of Orissa***[33], the Orissa High Court had reproduced certain passages from *Corpus Juris Secundum, Vol. 81, pp. 368-70*. We may reproduce the same:-

> "A statute providing that any person who shall commit any act or practice of sexual perversity, either with mankind or beast, on conviction shall be punished, is not limited to instances involving carnal copulation, but is restricted to cases involving the sex organ of at least one of the parties. The term 'sexual perversity' does not refer to every physical contact by a male with the body of the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplishing abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or copulating the mouth of one person with the sexual organ of another is guilty of the offence a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex."

80. Referring to the said decision, the two-Judge Bench in ***Suresh Koushal***'s case has opined:-

> "60. However, from these cases no uniform test can be culled out to classify acts as "carnal intercourse against the order of nature". In our opinion the acts which fall within the ambit of Section 377 IPC can only be determined with reference to the act itself and the circumstances in which it is executed. All the

[33] 1992 (1) OLR 316

> aforementioned cases refer to non-consensual and markedly coercive situations and the keenness of the Court in bringing justice to the victims who were either women or children cannot be discounted while analysing the manner in which the section has been interpreted. We are apprehensive of whether the court would rule similarly in a case of proved consensual intercourse between adults. …"

81. From the aforesaid analysis, it is perceptible that the two-Judge Bench has drawn a distinction between the "class" and the "act" that has been treated as an offence. On a plain reading of the provision, it is noticeable that the "act" covers all categories of persons if the offence is committed. Thus, the seminal issue that emerges for consideration, as has been understood by various High Courts and this Court, is whether the act can be treated as a criminal offence if it violates Articles 19(1)(a) and 21 of the Constitution. Therefore, the provision has to be tested on the anvil of the said constitutional provisions. Additionally, it is also to be tested on the touchstone of Article 14 especially under the scanner of its second limb, that is, manifest arbitrariness. For adjudging the aforesaid facets, certain fundamental concepts which are intrinsically and integrally associated with the expression of a person who enjoys certain inalienable natural rights which also have been recognized under the Constitution are required to be addressed. In this context, the individuality of a person

and the acceptance of identity invite advertence to some necessary concepts which eventually recognize the constitutional status of an individual that resultantly brushes aside the "act" and respects the dignity and choice of the individual.

## G. The Constitution – an organic charter of progressive rights

82. A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by this Court in the case of ***Chief Justice of Andhra Pradesh and others v. L.V.A. Dixitulu and others***[34] that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.

83. In the case of ***Saurabh Chaudri and others v. Union of India and others***[35], it was observed:-

> "Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law

[34] (1979) 2 SCC 34
[35] (2003) 11 SCC 146

> must change. Horizons of constitutional law are expanding."

84. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. The following observations made in the case of ***Ashok Kumar Gupta and another v. State of U.P. and others***[36] further throws light on this role of the courts:-

> "Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

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[36] (1997) 5 SCC 201

85. The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature. The argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights. In this regard, the observations in ***Video Electronics Pvt. Ltd. and another v. State of Punjab and another***[37] are quite instructive:-

> "Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations."

86. Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire

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[37] (1990) 3 SCC 87

length and breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'. It is the duty of the courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that the society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

87. In ***Ashok Kumar Gupta*** (supra), the Court had observed that common sense has always served in the court's ceaseless striving as a voice of reason to maintain the blend of change and continuity of order which are *sine qua non* for stability in the process of change in a parliamentary democracy. The Court ruled that it is not bound to

accept an interpretation which retards the progress or impedes social integration. The Court further observed that it is required to adopt such interpretation which would give the ideals set out in the Preamble to the Constitution aided by Part III and Part IV a meaningful and living reality for all sections of the society.

88. It is through this armoury of expansive dynamism that the courts have been able to give an all-inclusive interpretation to the fundamental rights enshrined in Part III of our Constitution. This is borne testimony by the decisions of the constitutional courts which have evolved views for extending the protection of fundamental rights to those who have been deprived of the enjoyment of the same. If not for such an approach adopted by the courts, our Constitution and its progressive principles would have been rendered ineffective and the dynamic charter would be reduced to a mere ornate document without any purpose or object.

89. The Court, as the final arbiter of the Constitution, has to keep in view the necessities of the needy and the weaker sections. The role of the Court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not

only the State and the society at large but also at the hands of their very own family members. The development of law cannot be a mute spectator to the struggle for the realisation and attainment of the rights of such members of the society.

90. The authority in ***NALSA*** is one such recent illustration where the rights of transgenders as a third sex was recognized which had been long due in a democracy like ours. This Court ruled: -

> "It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern realty. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.
>
> As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights."

The 'living document' concept finds place in several international authorities as well. The courts in other jurisdictions have

endorsed the view that the Constitution is forever evolving in nature and that a progressive approach is mandated by the principles inherent in the Constitution itself.

91. The Supreme Court of Canada, while giving an expansive interpretation to marriage by including same-sex unions within its encompass, in ***Re: Same Sex Marriage***[38], has observed:-

> "The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."

92. As early as the 1920s, the Supreme Court of the United States in the case of ***State of Missouri v. Holland***[39], while making a comparison between the 'instrument in dispute' and the 'Constitution', had made the following observations with regard to the nature of the Constitution:-

> "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and

[38][2004] 3 S.C.R. 698
[39] 252 U.S. 416 (1920)

> has cost their successors much sweat and blood to prove that they created a nation."

93. In one of his celebrated works, Judge Richard Posner made certain observations which would be relevant to be reproduced here:-

> "A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law [as the Connecticut law banning contraceptives] would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? This would mean that a state could require everyone to marry, or to have intercourse at least once a month, or it could take away every couple's second child and place it in a foster home.... We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution."[40]

94. Thus, it is demonstrable that expansive growth of constitutional idealism is embedded in the theory of progress, abandonment of *status quoist* attitude, expansion of the concept of inclusiveness and constant remembrance of the principle of fitting into the norm of change with a constitutional philosophy.

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[40]Posner, Richard: *(1992) Sex and Reason,* Harvard University Press, pg. 328. ISBN 0-674-80280-2

## H. Transformative constitutionalism and the rights of LGBT community

95. For understanding the need of having a constitutional democracy and for solving the million dollar question as to why we adopted the Constitution, we perhaps need to understand the concept of transformative constitutionalism with some degree of definiteness. In this quest of ours, the ideals enshrined in the Preamble to our Constitution would be a guiding laser beam. The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution. The Court in ***State of Kerala and another v. N.M. Thomas and others***[41] observed that the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.

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[41] AIR 1976 SC 490

96. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.

97. It is this ability of a Constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies. The Constitution would become a stale and dead testament without

dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the raison d'etre for the Constitution.

98. The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the *sentinel on qui vive* for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.

99. The purpose of transformative constitutionalism has been aptly described in the case of ***Road Accident Fund and another v. Mdeyide***[42] wherein the Constitutional Court of South Africa, speaking in the context of the transformative role of the Constitution of South Africa, had observed:-

> "Our Constitution has often been described as "transformative". One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socio-economic rights,

[42] 2008 (1) SA 535 (CC)

> people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy."

100. In ***Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others***[43], the Constitutional Court of South Africa opined:-

> "The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which there is equality between men and women and people of all races". In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it."

101. ***Davies***[44] understands transformation as follows:-

> "Transformation which is based on the continuing evaluation and modification of a complex material and ideological environment cannot be reduced to a scientific theory of change, like those of evolution or the halflife of radioactive substances ... practical change occurs within a climate of serious reflection,

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[43] [2004] ZACC 15

[44] Asking the Law Question: The Dissolution of Legal Theory 205 (2002), Margaret Davies.

> and diversity of opinion is in my view absolutely essential as a stimulus to theory."

102. ***A J Van der Walt***[45] has metaphorically, by comparing 'constitutional transformation' to 'dancing', described the art of constitutional transformation to be continually progressive where one does not stop from daring to imagine alternatives and that the society could be different and a better place where the rights of every individual are given due recognition:-

> "However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress - from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyitoyi jurisprudence... I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.

103. Again, the Supreme Court of South Africa in ***President of the Republic of South Africa v. Hugo***[46] observed that the prohibition on unfair discrimination in the interim Constitution seeks not only to

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[45] Van der Walt, Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J. S. APR. L. 258 (2001)

[46](1997) 6 B.C.L.R. 708 (CC)

avoid discrimination against people who are members of disadvantaged groups but also that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.

104. Equality does not only imply recognition of individual dignity but also includes within its sphere ensuring of equal opportunity to advance and develop their human potential and social, economic and legal interests of every individual and the process of transformative constitutionalism is dedicated to this purpose. It has been observed by ***Albertyn & Goldblatt***[47]:-

> "The challenge of achieving equality within this transformation project involves the eradication of systemic forms of discrimination and material disadvantage based on race, gender, class and other forms of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."

105. In ***Investigating Directorate: Serious Economic Offences and others v. Hyundai Motor Distributors (Pty) Ltd and others: In***

[47] *Albertyn & Goldblatt,* Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality, 14 S. AFR. J. HUM. RTS. 248 (1998)

***Re Hyundai Motor Distributors (Pty) Ltd and others v. Smit NO and others***[48], the Constitutional Court of South Africa observed:-

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.
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> > ... The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."

106. The society has changed much now, not just from the year 1860 when the Indian Penal Code was brought into force but there has also been continuous progressive change. In many spheres, the sexual minorities have been accepted. They have been given space after the ***NALSA*** judgment but the offence punishable under Section 377 IPC, as submitted, creates a chilling effect. The freedom that is required to be attached to sexuality still remains in the pavilion with

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[48] 2001 (1) SA 545 (CC)

no nerves to move. The immobility due to fear corrodes the desire to express one's own sexual orientation as a consequence of which the body with flesh and bones feels itself caged and a sense of fear gradually converts itself into a skeleton sans spirit.

107. The question of freedom of choosing a partner is reflective from a catena of recent judgments of this Court such as ***Shafin Jahan*** (supra) wherein the Court held that a person who has come of age and has the capability to think on his/her own has a right to choose his/her life partner. It is apposite to reproduce some of the observations made by the Court which are to the following effect:-

> "It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible."

108. Recently, in ***Shakti Vahini*** (supra), the Court has ruled that the right to choose a life partner is a facet of individual liberty and the Court, for the protection of this right, issued preventive, remedial and

punitive measures to curb the menace of honour killings. The Court observed:-

> "When the ability to choose is crushed in the name of class honour and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large."

109. An argument is sometimes advanced that what is permissible between two adults engaged in acceptable sexual activity is different in the case of two individuals of the same sex, be it homosexuals or lesbians, and the ground of difference is supported by social standardization. Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.

110. The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights

and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights. It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However, it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.

## I. Constitutional morality and Section 377 IPC

111. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of

the State for the betterment of each and every individual citizen of the State.

112. In one of the Constituent Assembly Debates, Dr. Ambedkar, explaining the concept of constitutional morality by quoting the Greek historian, George Grote, said:-

> "By constitutional morality, Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution wall not be less sacred in the eyes of his opponents than his own."[49]

113. Our Constitution was visualized with the aim of securing to the citizens of our country inalienable rights which were essential for fostering a spirit of growth and development and at the same time ensuring that the three organs of the State working under the aegis of the Constitution and deriving their authority from the supreme document, that is, the Constitution, practise constitutional morality. The Executive, the Legislature and the Judiciary all have to stay alive to the concept of constitutional morality.

[49] Constituent Assembly Debates, Vol. 7 (4th November 1948)

114. In the same speech[50], Dr. Ambedkar had quoted George Grote who had observed:-

> "The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves."[51]

This statement of Dr. Ambedkar underscores that constitutional morality is not a natural forte for our country for the simple reason that our country had attained freedom after a long period of colonial rule and, therefore, constitutional morality at the time when the Constituent Assembly was set up was an alien notion. However, the strengthening of constitutional morality in contemporary India remains a duty of the organs of the State including the Judiciary.

115. The society as a whole or even a minuscule part of the society may aspire and prefer different things for themselves. They are perfectly competent to have such a freedom to be different, like different things, so on and so forth, provided that their different tastes and liking remain within their legal framework and neither violates any statute nor results in the abridgement of fundamental rights of any

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[50] Ibid
[51] Grote, *A History of Greece*. Routledge, London, 2000, p. 93.

other citizen. The Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of constitutional morality.

116. It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.

117. Any asymmetrical attitude in the society, so long as it is within the legal and constitutional framework, must at least be provided an environment in which it could be sustained, if not fostered. It is only when such an approach is adopted that the freedom of expression including that of choice would be allowed to prosper and flourish and

if that is achieved, freedom and liberty, which is the quintessence of constitutional morality, will be allowed to survive.

118. In ***Government of NCT of Delhi v. Union of India and others***[52], one of us (Dipak Misra, CJI) observed:-

> "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity."

119. The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or

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[52] 2018 (8) SCALE 72

popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality.

120. We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a section of the society, notwithstanding the fact whether the said section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability. The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number.

121. In this regard, we have to telescopically analyse social morality vis-à-vis constitutional morality. It needs no special emphasis to state that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, howsoever small part of

the society, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality.

122. In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.

123. We must not forget that the founding fathers adopted an inclusive Constitution with provisions that not only allowed the State, but also, at times, directed the State, to undertake affirmative action to eradicate the systematic discrimination against the backward sections of the society and the expulsion and censure of the vulnerable communities by the so-called upper caste/sections of the society that existed on a massive scale prior to coming into existence of the Constituent Assembly. These were nothing but facets of the majoritarian social morality which were sought to be rectified by bringing into force the Constitution of India. Thus, the adoption of the

Constitution, was, in a way, an instrument or agency for achieving constitutional morality and means to discourage the prevalent social morality at that time. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness.

124. While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution.

## J. Perspective of human dignity

125. While discussing about the role of human dignity in gay rights adjudication and legislation, Michele Finck[53] observes:-

> "As a concept devoid of a precise legal meaning, yet widely appealing at an intuitive level, dignity- can be easily manipulated and transposed into a number of legal contexts. With regard to the rights of lesbian and gay individuals, dignity captures what Nussbaum described as the transition from "disgust" to "humanity." Once looked at with disgust and considered unworthy of some rights, there is

[53]The role of human dignity in gay rights adjudication and legislation: A comparative perspective, Michele Finck, International Journal of Constitutional Law, Volume 14, Jan 2016, page no.26 to 53

> increasing consensus that homosexuals should no longer be deprived of the benefits of citizenship that are available to heterosexuals, such as the ability to contract marriage, on the sole ground of their sexual orientation. Homosexuals are increasingly considered as "full humans" disposing of equal rights, and dignity functions as the vocabulary that translates such socio-cultural change into legal change"

126. The Universal Declaration of Human Rights, 1948 became the Magna Carta of people all over the world. The first Article of the UDHR was uncompromising in its generality of application: All human beings are born free and equal in dignity and rights. Justice Kirby succinctly observed:-

> "This language embraced every individual in our world. It did not apply only to citizens. It did not apply only to 'white' people. It did not apply only to good people. Prisoners, murderers and even traitors were to be entitled to the freedoms that were declared. There were no exceptions to the principles of equality."[54]

127. The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The constitutional courts

[54]Human Rights Gay Rights by Michael Kirby, Published in 'Humane Rights' in 2016 by Future Leaders

of our country have solemnly dealt with the task of assuring and preserving the right to dignity of each and every individual whenever the occasion arises, for without the right to live with dignity, all other fundamental rights may not realise their complete meaning.

128. To understand a person's dignity, one has to appreciate how the dignity of another is to be perceived. Alexis de Tocqueville tells us[55]:-

> "Whenever I find myself in the presence of another human being, of whatever station, my dominant feeling is not so much to serve him or please him as not to offend his dignity."

129. Every individual has many possessions which assume the position of his/her definitive characteristics. There may not be any obsession with them but he/she may abhor to be denuded of them, for they are sacred to him/her and so inseparably associated that he/she may not conceive of any dissolution. He/she would like others to respect the said attributes with a singular acceptable condition that there is mutual respect. Mutual respect abandons outside interference and is averse to any kind of interdiction. It is based on the precept that the individuality of an individual is recognized, accepted and respected. Such respect for the conception of dignity

[55]56, New York State Bar Journal (No 3. April, 1984), p.50

has become a fundamental right under Article 21 of the Constitution and that ushers in the right of liberty of expression. Dignity and liberty as a twin concept in a society that cares for both, apart from painting a grand picture of humanity, also smoothens the atmosphere by promoting peaceful co-existence and thereby makes the administration of justice easy. In such a society, everyone becomes a part of the social engineering process where rights as inviolable and sacrosanct principles are adhered to; individual choice is not an exception and each one gets his/her space. Though no tower is built, yet the tower of individual rights with peaceful co-existence is visible.

130. In ***Common Cause (A Regd. Society)*** (supra), one of us has observed that human dignity is beyond definition and it may, at times, defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism, but what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling.

131. In ***Maneka Gandhi v. Union of India and another***[56], Krishna Iyer, J. observed that life is a terrestrial opportunity for unfolding personality and when any aspect of Article 21 is viewed in a truncated manner, several other freedoms fade out automatically. It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning.

132. Dignity is that component of one's being without which sustenance of his/her being to the fullest or completest is inconceivable. In the theatre of life, without possession of the attribute of identity with dignity, the entity may be allowed entry to the centre stage but would be characterized as a spineless entity or, for that matter, projected as a ruling king without the sceptre. The purpose of saying so is that the identity of every individual attains the quality of an "individual being" only if he/she has the dignity. Dignity while expressive of choice is averse to creation of any dent. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented. Such a situation urges the conscience of the final constitutional arbiter to

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[56] (1978) 1 SCC 248

demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary pre-requisite that consent is the real fulcrum of any sexual relationship.

133. In this context, we may travel a little abroad. In ***Law v. Canada (Minister of Employment and Immigration)***[57] capturing the essence of dignity, the Supreme Court of Canada has made the following observations:-

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is

[57] 1999 1 S.C.R. 497

> enhanced when laws recognise the full place of all individuals and groups within Canadian society."

134. It is not only the duty of the State and the Judiciary to protect this basic right to dignity, but the collective at large also owes a responsibility to respect one another's dignity, for showing respect for the dignity of another is a constitutional duty. It is an expression of the component of constitutional fraternity.

135. The concept of dignity gains importance in the present scenario, for a challenge has been raised to a provision of law which encroaches upon this essential right of a severely deprived section of our society. An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.

136. The European Court of Justice in ***P v. S***[58] in the context of rights of individuals who intend to or have undergone sex reassignment has observed that where a person is dismissed on the ground that he or she intends to undergo or has undergone gender

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[58] Judgment of 30 April 1996. P v S and Cornwall County Council Case C-13/94. paras. 21-22.

reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. To tolerate such discrimination would tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.

137. In ***Planned Parenthood of Southeastern Pa. v. Casey***[59], the United States Supreme Court had opined that such matters which involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

138. From the aforesaid pronouncements, some in different spheres but some also in the sphere of sexual orientation, the constitutional courts have laid emphasis on individual inclination, expression of both emotional and physical behaviour and freedom of choice, of course, subject to the consent of the other. A biological engagement, in contradistinction to going to a restaurant or going to a theatre to see a film or a play, is founded on company wherein both the parties have consented for the act. The inclination is an expression of choice that

[59]505 U.S. 833 (1992)

defines the personality to cumulatively build up the elevated paradigm of dignity. Be it clarified that expression of choice, apart from being a facet of dignity, is also an essential component of liberty. Liberty as a concept has to be given its due place in the realm of dignity, for both are connected with the life and living of a persona.

**K. <u>Sexual orientation</u>**

139. After stating about the value of dignity, we would have proceeded to deal with the cherished idea of privacy which has recently received concrete clarity in ***Puttaswamy***'s case. Prior to that, we are advised to devote some space to sexual orientation and the instructive definition of LGBT by Michael Kirby, former Judge of the High Court of Australia:-

"Homosexual: People of either gender who are attracted, sexually, emotionally and in relationships, to persons of the same sex.

Bisexual: Women who are attracted to both sexes; men who are attracted to both sexes.

Lesbian: Women who are attracted to women.

Gay: Men who are attracted to men, although this term is sometimes also used generically for all same-sex attracted persons.

Gender identity: A phenomenon distinct from sexual orientation which refers to whether a person identifies as male or female. This identity' may exist whether there is "conformity or non-conformity" between their physical or biological or birth sex and their psychological sex and the way they express it through physical characteristics, appearance and conduct. It applies whether, in the Indian sub-continent, they identify as hijra or kothi or by another name.

Intersex: Persons who are born with a chromosomal pattern or physical characteristics that do not clearly fall on one side or the other of a binary malefemale line.

LGBT or LGBTIQ: Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer minorities. The word 'Queer' is sometimes used generically, usually by younger people, to include the members of all of the sexual minorities. I usually avoid this expression because of its pejorative overtones within an audience unfamiliar with the expression. However, it is spreading and, amongst the young, is often seen as an instance of taking possession of a pejorative word in order to remove its sting.

MSM: Men who have sex with men. This expression is common in United Nations circles. It refers solely to physical, sexual activity by men with men. The expression is used on the basis that in some countries - including India - some men may engage in sexual acts with their own sex although not identifying as homosexual or even accepting a romantic or relationship emotion."[60]

140. Presently, we shall focus on the aspect of sexual orientation. Every human being has certain basic biological characteristics and acquires or develops some facets under certain circumstances. The first can generally be termed as inherent orientation that is natural to his/her being. The second can be described as a demonstration of his/her choice which gradually becomes an inseparable quality of his/her being, for the individual also leans on a different expression because of the inclination to derive satisfaction. The third one has the proclivity which he/she maintains and does not express any other inclination. The first one is homosexuality, the second, bisexuality and third, heterosexuality. The third one is regarded as natural and the first one, by the same standard, is treated to be unnatural. When the second category

[60]Sexual Orientation & Gender Identity – A New Province of Law for India, J. Michael D. Kirby, Tagore Lectures, 2013

exercises his/her choice of homosexuality and involves in such an act, the same is also not accepted. In sum, the 'act' is treated either in accord with nature or against the order of nature in terms of societal perception.

141. The Yogyakarta Principles define the expression "sexual orientation" thus:-

> "Sexual Orientation" is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."

142. In its study, the American Psychological Association has attempted to define "sexual orientation" in the following manner:-

> "Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men. women or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions. Research over several decades has demonstrated that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex."[61]

143. From the aforesaid, it has to be appreciated that homosexuality is something that is based on sense of identity. It is the reflection of a

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[61] American Psychological Association, "Answers to Your Questions for a Better Understanding of Sexual Orientation & Homosexuality," 2008

sense of emotion and expression of eagerness to establish intimacy. It is just as much ingrained, inherent and innate as heterosexuality. Sexual orientation, as a concept, fundamentally implies a pattern of sexual attraction. It is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity. That apart, on occasions, due to a sense of mutuality of release of passion, two adults may agree to express themselves in a different sexual behaviour which may include both the genders. To this, one can attribute a bisexual orientation which does not follow the rigidity but allows room for flexibility.

144. The society cannot remain unmindful to the theory which several researches, conducted both in the field of biological and psychological science, have proven and reaffirmed time and again. To compel a person having a certain sexual orientation to proselytize to another is like asking a body part to perform a function it was never designed to perform in the first place. It is pure science, a certain

manner in which the brain and genitals of an individual function and react. Whether one's sexual orientation is determined by genetic, hormonal, developmental, social and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.[62]

145. The statement of the American Psychological Association on homosexuality which was released in July 1994 reiterates this position in the following observations:-

> "The research on homosexuality is very[7] clear. Homosexuality is neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals. Nor is homosexuality a matter of individual choice. Research suggests that the homosexual orientation is in place very early in the life cycle, possibly even before birth. It is found in about ten percent of the population, a figure which is surprisingly constant across cultures, irrespective of the different moral values and standards of a particular culture. Contrary to what some imply, the incidence of homosexuality in a population does not appear to change with new moral codes or social mores. Research findings suggest that efforts to repair homosexuals are nothing more than social prejudice garbed in psychological accouterments."
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> (Emphasis is ours)

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[62] UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

146. In the said context, the observations made by Leonard Sax to the following effect are relevant and are reproduced below:-

> "Biologically, the difference between a gay man and a straight man is something like the difference between a left-handed person and a right-handed person. Being left- handed isn't just a phase. A left-handed person won't someday magically turn into a right-handed person.... Some children are destined at birth to be left-handed, and some boys are destined at birth to grow up to be gay."

147. The Supreme Court of Canada in the case of ***James Egan and John Norris Nesbit v. Her Majesty The Queen in Right of Canada and another***[63], while holding that sexual orientation is one of the grounds for claiming the benefit under Section 15(1) as it is analogous to the grounds already set out in the list in Section 15(1) and the said list not being finite and exhaustive can be extended to LGBTs on account of the historical, social, political and economic disadvantage suffered by LGBTs, has observed:-

> "Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds."

148. It is worth noting that scientific study has, by way of keen analysis, arrived at the conclusion as regards the individual's

[63] [1995] 2 SCR 513

inherent orientation. Apart from orientation, as stated earlier, there can be situations which influence the emotional behaviour of an individual to seek intimacy in the same gender that may bring two persons together in a biological pattern. It has to be treated as consensual activity and reflective of consensual choice.

## L. Privacy and its concomitant aspects

149. While testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been recently proclaimed in ***Puttaswamy*** (supra). We shall not delve in detail upon the concept of the right to privacy as the same has been delineated at length in ***Puttaswamy*** (supra). In the case at hand, our focus is limited to dealing with the right to privacy vis-à-vis Section 377 IPC and other facets such as right to choice as part of the freedom of expression and sexual orientation. That apart, within the compartment of privacy, individual autonomy has a significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of

his/her identity. The said identity under the constitutional scheme does not accept any interference as long as its expression is not against decency or morality. And the morality that is conceived of under the Constitution is constitutional morality. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society. Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela — "to deny people their human rights is to challenge their very humanity."

150. Article 12 of the Universal Declaration of Human Rights, (1948) makes a reference to privacy by stating:-

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

151. Similarly, Article 17 of the International Covenant of Civil and Political Rights, to which India is a party, talks about privacy thus:-

> "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

152. The European Convention on Human Rights also seeks to protect the right to privacy by stating:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

153. In the case of ***Dudgeon v. United Kingdom***[64], privacy has been defined as under:-

[64] [1981] 4 EHRR 149

> "Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis - it is "the right to be let alone"."

154. In ***R. Rajagopal v. State of Tamil Nadu and others***[65], while discussing the concept of right to privacy, it has been observed that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and it is a "right to be let alone", for a citizen has a right to safeguard the privacy of his/her own, his/her family, marriage, procreation, motherhood, child-bearing and education, among other matters.

155. The above authorities capture the essence of the right to privacy. There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.

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[65] (1994) 6 SCC 632

156. Justice Blackmun, in his vigorous dissent, in the case of ***Bowers, Attorney General of Georgia v. Hardwick et al.***[66], regarding the "right to be let alone", referred to ***Paris Adult Theatre I v. Slaton***[67] wherein he observed that only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality. Justice Blackmun went on to observe:-

> "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. … In a variety of circumstances, we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."

157. In ***A.R. Coeriel and M.A.R. Aurik v. The Netherlands***[68], the Human Rights Committee observed that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or

[66] *Bowers v. Hardwick*, 478 U.S. 186 (1986)
[67] 413 U.S. 49 (1973)
[68] Communication No. 453/1991, para. 10.2

alone. The Committee was of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.

158. We may also usefully refer to the views of the Human Rights Committee in ***Toonen v. Australia***[69] to the effect that the introduction of the concept of arbitrariness is intended to guarantee that every interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances. The requirement of reasonableness implies that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

159. The South African Constitutional Court in ***National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others***[70] has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It lays down that privacy recognises that we all have a right to a sphere of private

[69]Communication No. 488/1992, U.C. Doc CCPR/C/ 50/D 488/ 1992, March 31, 1994, para. 8.3
[70] 1998 (12) BCLR 1517 (CC)

intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. The Court admitted that the society had a poor record of seeking to regulate the sexual expression of South Africans. It observed that in some cases, as in this one, the reason for the regulation was discriminatory; the law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory does not, however, prevent it at the same time from being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in Section 14. The Court emphasized that the importance of a right to privacy in the new constitutional order should not be denied even while acknowledging the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case

constitutes, at the same time and independently, a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.

160. At home, the view as to the right to privacy underwent a sea-change when a nine-Judge Bench of this Court in ***Puttaswamy*** (supra) elevated the right to privacy to the stature of fundamental right under Article 21 of the Constitution. One of us, Chandrachud, J., speaking for the majority, regarded the judgment in ***Suresh Koushal*** as a discordant note and opined that the reasons stated therein cannot be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. Further, he observed that the reasoning in ***Suresh Koushal***'s decision to the effect that "a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" is not a sustainable basis to deny the right to privacy.

161. It was further observed that the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular, and the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

162. The test of popular acceptance, in view of the majority opinion, was not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection. The Court noted that the discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream', but in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are any less sacred than those conferred on other citizens.

163. As far as the aspect of sexual orientation is concerned, the Court opined that it is an essential attribute of privacy and discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Court was of the view that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

164. Regarding the view in ***Suresh Koushal***'s case to the effect that the Delhi High Court in ***Naz Foundation*** case had erroneously relied upon international precedents in its anxiety to protect the so-called

rights of LGBT persons, the nine-Judge Bench was of the opinion that the aforesaid view in ***Suresh Koushal*** (supra) was unsustainable. The rights of the lesbian, gay, bisexual and transgender population, as per the decision in ***Puttaswamy*** (supra), cannot be construed to be "so-called rights" as the expression "so-called" seems to suggest the exercise of liberty in the garb of a right which is illusory.

165. The Court regarded such a construction in ***Suresh Koushal***'s case as inappropriate of the privacy based claims of the LGBT population, for their rights are not at all "so-called" but are real rights founded on sound constitutional doctrine. The Court went on to observe that the rights of the LGBT community inhere in the right to life, dwell in privacy and dignity and they constitute the essence of liberty and freedom. Further, the Court observed that sexual orientation being an essential component of identity, equal protection demands equal protection of the identity of every individual without discrimination.

166. Speaking in the same tone and tenor, Kaul, J., while concurring with the view of Chandrachud, J., observed that the right to privacy cannot be denied even if there is a minuscule fraction of the population which is affected. He was of the view that the majoritarian

concept does not apply to constitutional rights and the Courts are often called upon to take what may be categorized as a non-majoritarian view.

167. Kaul, J. went on to opine that one's sexual orientation is undoubtedly an attribute of privacy and in support of this view, he referred to the observations made in ***Mosley*** (supra) which read thus:-

> "130... It is not simply a matter of personal privacy v. the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.
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> 131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say. because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug- taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76). would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to

> be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.""

168. After the nine-Judge bench decision in ***Puttaswamy*** (supra), the challenge to the *vires* of Section 377 IPC has been stronger than ever. It needs to be underscored that in the said decision, the nine-Judge Bench has held that sexual orientation is also a facet of a person's privacy and that the right to privacy is a fundamental right under the Constitution of India.

169. The observation made in ***Suresh Koushal*** (supra) that gays, lesbians, bisexuals and transgenders constitute a very minuscule part of the population is perverse due to the very reason that such an approach would be violative of the equality principle enshrined under Article 14 of the Constitution. The mere fact that the percentage of population whose fundamental right to privacy is being abridged by the existence of Section 377 in its present form is low does not impose a limitation upon this Court from protecting the fundamental rights of those who are so affected by the present Section 377 IPC.

170. The constitutional framers could have never intended that the protection of fundamental rights was only for the majority population.

If such had been the intention, then all provisions in Part III of the Constitution would have contained qualifying words such as 'majority persons' or 'majority citizens'. Instead, the provisions have employed the words 'any person' and 'any citizen' making it manifest that the constitutional courts are under an obligation to protect the fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get violated.

171. Such a view is well supported on two counts, namely, one that the constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures. In the case at hand, whatever be the percentage of gays, lesbians, bisexuals and transgenders, this Court is not concerned with the number of persons belonging to the LGBT community. What matters is whether this community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book. If the answer to both these questions is in the affirmative, then the

constitutional courts must not display an iota of doubt and must not hesitate in striking down such provision of law on the account of it being violative of the fundamental rights of certain citizens, however minuscule their percentage may be.

172. A second count on which the view in ***Suresh Koushal*** (supra) becomes highly unsustainable is that the language of both Articles 32 and 226 of the Constitution is not reflective of such an intention. A cursory reading of both the Articles divulges that the right to move the Supreme Court and the High Courts under Articles 32 and 226 respectively is not limited to a situation when there is violation of the fundamental rights of a large chunk of populace.

173. Such a view is also fortified by several landmark judgments of the Supreme Court such as ***D.K. Basu v. State of W.B.***[71] wherein the Court was concerned with the fundamental rights of only those persons who were put under arrest and which again formed a minuscule fraction of the total populace. Another recent case wherein the Supreme Court while discharging its constitutional duty did not hesitate to protect the fundamental right to die with dignity is ***Common Cause (A Regd. Society)*** (supra) wherein the Supreme

[71](1997) 1 SCC 416

Court stepped in to protect the said fundamental right of those who may have slipped into permanent vegetative state, who again form a very minuscule part of the society.

174. Such an approach reflects the idea as also mooted by Martin Luther King Jr. who said, "Injustice anywhere is a threat to justice everywhere". While propounding this view, we are absolutely conscious of the concept of reasonable classification and the fact that even single person legislation could be valid as held in ***Chiranjit Lal Chowdhury v. Union of India***[72], which regarded the classification to be reasonable from both procedural and substantive points of view.

175. We are aware that the legislature is fully competent to enact laws which are applicable only to a particular class or group. But, for the classification to be valid, it must be founded on an intelligible differentia and the differentia must have a rational nexus with the object sought to be achieved by a particular provision of law.

176. That apart, since it is alleged that Section 377 IPC in its present form violates a fundamental right protected by Article 21 of the Constitution, that is, the right to personal liberty, it has to not only stand the test of Article 21 but it must also stand the test of Article 19

[72] [1950] 1 SCR 869

which is to say that the restriction imposed by it has to be reasonable and also that of Article 14 which is to say that Section 377 must not be arbitrary.

177. Whether Section 377 stands the trinity test of Articles 14, 19 and 21 as propounded in the case of ***Maneka Gandhi*** (supra) will be ascertained and determined at a later stage of this judgment when we get into the interpretative dissection of Section 377 IPC.

**M. <u>Doctrine of progressive realization of rights</u>**

178. When we talk about the rights guaranteed under the Constitution and the protection of these rights, we observe and comprehend a manifest ascendance and triumphant march of such rights which, in turn, paves the way for the doctrine of progressive realization of the rights under the Constitution. This doctrine invariably reminds us about the living and dynamic nature of a Constitution. Edmund Burke, delineating upon the progressive and the perpetual growing nature of a Constitution, had said that a Constitution is ever-growing and it is perpetually continuous as it embodies the spirit of a nation. It is enriched at the present by the past experiences and influences and makes the future richer than the present.

179. In ***N.M. Thomas*** (supra), Krishna Iyer, J., in his concurring opinion, observed thus:-

> "Law, including constitutional law, can no longer go it alone' but must be illumined in the interpretative process by sociology and allied fields of knowledge. Indeed, the term 'constitutional law' symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think. So much so, a wider perspective is needed to resolve issues of constitutional law."
>
> And again:-
>
> “An overview of the decided cases suggests the need to re-interpret the dynamic import of the 'equality clauses' and, to stress again, beyond reasonable doubt, that the paramount law. which is organic and regulates our nation's growing life, must take in its sweep ethics, economics, politics and sociology'.”

The learned Judge, expanding the horizon of his concern, reproduced the lament of Friedman:-

> "It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society."

The main assumptions which Friedman makes are:

> "first, the law is, in Holmes' phrase, not a brooding omnipotence in the sky', but a flexible instrument of social order, dependent on the political values of the society which it purports to regulate...."

> Naturally surges the interrogation, what are the challenges of changing values to which the guarantee of equality must respond and how?"

180. Further, Krishna Iyer, J. referred to the classic statement made by Chief Justice Marshall in ***McCulloch v. Maryland***[73] which was also followed by Justice Brennan in ***Kazenbach v. Morgan***[74]. The said observation reads thus:-

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

181. In ***Manoj Narula*** (supra), the Court recognized the dynamic nature of the Indian Constitution and observed that it is a living document with capabilities of enormous dynamism. It is a Constitution made for a progressive society and the working of such a Constitution depends upon the prevalent atmosphere and conditions.

182. In ***Government of NCT of Delhi*** (supra), the Court, while contemplating on what is it that makes a Constitution a dynamic and a living document, observed that it is the philosophy of 'constitutional culture' which, as a set of norms and practices, breathes life into the

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[73] (1816) 17 US 316
[74] (1966) 384 US 641

words of the great document and it constantly enables the words to keep stride with the rapid and swift changes occurring in the society and the responsibility of fostering a constitutional culture rests upon the shoulders of the State. Thereafter, the Court went on to observe:-

> "The Constitutional Courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution."

And again, it proceeded to reproduce the wise words of Justice Brennan:-

> "We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time."

183. We have discussed, in brief, the dynamic and progressive nature of the Constitution to accentuate that rights under the Constitution are also dynamic and progressive, for they evolve with

the evolution of a society and with the passage of time. The rationale behind the doctrine of progressive realization of rights is the dynamic and ever growing nature of the Constitution under which the rights have been conferred to the citizenry.

184. The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality so that they, with the aid of judicial creativity, are able to fulfill their foremost constitutional obligation, that is, to protect the rights bestowed upon the citizens of our country by the Constitution.

185. Here, it is also apposite to refer to the words of Lord Roskill in his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject 'Law Lords, Reactionaries or Reformers'[75] which read as follows:-

> "Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves:-

[75] Lord Roskill, "Law Lords, Reactionaries or Reformers", Current Legal Problems (1984)

> "this case requires a policy decision what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it. is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply."
>
> [Emphasis supplied]

186. What the words of Lord Roskill suggest is that it is not only the interpretation of the Constitution which needs to be pragmatic, due to the dynamic nature of a Constitution, but also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply.

187. This also gives birth to an equally important role of the State to implement the constitutional rights effectively. And of course, when we say State, it includes all the three organs, that is, the legislature,

the executive as well as the judiciary. The State has to show concerned commitment which would result in concrete action. The State has an obligation to take appropriate measures for the progressive realization of economic, social and cultural rights.

188. The doctrine of progressive realization of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.

189. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

190. The aforesaid two doctrines lead us to the irresistible conclusion that if we were to accept the law enunciated in ***Suresh Koushal's*** case, it would definitely tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights. It is because ***Suresh Koushal's*** view gets wrongly embedded with the minuscule facet and assumes criminality on the bedrock being guided by a sense of social

morality. It discusses about health which is no more a phobia and is further moved by the popular morality while totally ignoring the concepts of privacy, individual choice and the orientation. Orientation, in certain senses, does get the neuro-impulse to express while seeing the other gender. That apart, swayed by data, ***Suresh Koushal*** fails to appreciate that the sustenance of fundamental rights does not require majoritarian sanction. Thus, the ruling becomes sensitively susceptible.

**N. <u>International perspective</u>**

***(i) <u>United States</u>***

191. The Supreme Court of the United States in ***Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.***[76], highlighting the plight of homosexuals, observed that until the mid-20th century, same-sex intimacy had long been condemned as immoral by the State itself in most Western nations and a belief was often embodied in the criminal law and for this reason, homosexuals, among others, were not deemed to have dignity in their own distinct identity. The Court further noted that truthful declaration by same-sex couples of what was in their hearts had to remain unspoken and even when a

[76] 576 US (2015)

greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. The Court also observed that same-sex intimacy remained a crime in many States and that gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by the police and burdened in their rights to associate.

192. The Court further observed that what the statutes in question seek to control is a personal relationship, whether or not entitled to formal recognition in the law, that is within the liberty of persons to choose without being punished as criminals. Further, the Court acknowledged that adults may choose to enter upon a relationship in the confines of their homes and their own private lives and still retain their dignity as free persons and that when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The Court held that such liberty protected by the Constitution allows homosexual persons the right to make this choice.

193. In the case of ***Price Waterhouse v. Hopkins***[77], the Supreme Court of the United States, while evaluating the legal relevance of sex stereotyping, observed thus:-

> "...we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.""

194. In the case of ***Kimberly Hively v. Ivy Tech Community College of Indiana***[78], while holding that discrimination amongst employees based on their sexual orientation amounts to discrimination based on sex, the Court observed as under:-

> "We would be remiss not to consider the EEOC's recent decision in which it concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). The EEOC, the body charged with enforcing Title VII, came to this conclusion for three primary reasons. First, it concluded that "<u>sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex</u>." Id. at *5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the

[77] 490 U.S. 228 (1989)
[78] 830 F.3d 698 (7th Cir. 2016)

> same act). Second, it explained that "sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex," in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. Id. at *6-7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. Id. In coming to these conclusions, the EEOC noted critically that "courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the "borders [between the two classes] are imprecise." Id. at *8 (quoting Simonton, 232 F.3d at 35).
>
> [Underlining is ours]

195. In the case of ***Lawrence v. Texas***[79], while dealing with the issue of decriminalization of sexual conduct between homosexuals, the U.S. Supreme Court observed that the said issue neither involved minors nor persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused nor did it involve public conduct or prostitution nor the question whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The Court further observed that the issue related to two adults who, with full and mutual consent of each other, engaged in sexual practices common to a

[79] 539 U.S. 558 (2003)

homosexual lifestyle. The Court declared that the petitioners were entitled to respect for their private lives and that the State could not demean their existence or control their destiny by making their private sexual conduct a crime, for their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the State.

196. In ***Roberts v. United States Jaycees***[80], the Supreme Court of the United States observed:-

> "Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment ~ speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. The intrinsic and instrumental features of constitutionally protected association may, of course, coincide."
>
> [Emphasis added]

[80] 468 U.S. 609 (1984)

***(ii)*** ***<u>Canada</u>***

197. The Supreme Court of Canada, in ***Delwin Vriend and others v. Her Majesty the Queen in Right of Alberta and others***[81], while interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms, arrived at the conclusion that 'sex' includes sexual orientation. Section 15(1) of the Charter reads thus:-

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability."

198. In ***Delwin Vriend,*** the Supreme Court of Canada, relying on the reasoning adopted by it in ***Egan v. Canada*** (supra), applied its well-known test of grounds analogous to those specified textually. The ***Egan*** test is:-

> "In Egan, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131).

[81] [1998] 1 SCR 493

> A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (Egan, at para. 56, per L'Heureux - Dube J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (Miron, at para. 128, per McLachlin J.)
>
> In ***Egan,*** it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied."

199. Thereafter, the Court in ***Delwin Vriend*** (supra) observed that perhaps the most important outcome is the psychological harm which may ensue from the state of affairs as the fear of discrimination (by LGBT) would logically lead them to concealment of true identity and this is harmful to their personal confidence and self-esteem. The Court held that this is a clear example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and

lesbians are less worthy of protection as individuals in Canada's society and the potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.

***(iii)*** ***<u>South Africa</u>***

200. The Constitutional Court of South Africa in ***National Coalition for Gay & Lesbian Equality*** (supra) 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."

***(iv) United Kingdom***

201. In ***Euan Sutherland v. United Kingdom***[82]*,* the issue before the European Commission of Human Rights was whether the difference in age limit for consent for sexual activities for homosexuals and heterosexuals, the age limit being 16 years in the case of heterosexuals and 18 years in the case of homosexuals, is justified. While considering the same, the Commission observed that no objective and reasonable justification exists for the maintenance of a higher minimum age of consent in case of male homosexuals as compared to heterosexuals and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention. The Commission further observed that sexual orientation was usually established before the age of puberty in both boys and girls and referred to evidence that reducing the age of consent would unlikely affect the majority of men engaging in homosexual activity, either in general or within specific age groups. The Council of the British Medical Association (BMA) concluded in its Report that the age of consent

[82]2001 ECHR 234

for homosexual men should be set at 16 since the then existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men. An equal age of consent was also supported by the Royal College of Psychiatrists, the Health Education Authority and the National Association of Probation Officers as well as by other bodies and organizations concerned with health and social welfare. It is further noted that equality of treatment in respect of the age of consent is now recognized by the great majority of Member States of the Council of Europe.

***(v) <u>Other Courts/Jurisdictions</u>***

202. In ***Ang Ladlad LGBT Party v. Commission of Elections***[83]*,* the Supreme Court of the Republic of the Philippines observed:-

> "Freedom of expression constitutes one of the essential foundations of a democratic society, and this freedom applies not only to those that are favorably received but also to those that offend, shock, or disturb. Any restriction imposed in this sphere must be proportionate to the legitimate aim pursued. Absent any compelling state interest, it is not for the COMELEC or this Court to impose its views on the populace."
>
> Elaborating further, the Court held:-
>
> "It follows that both expressions concerning one's homosexuality and the activity of forming a political

[83] G. R. No.190582, Supreme Court of Philippines (2010)

> association that supports LGBT individuals are protected as well."

The Court navigated through European and United Nations Judicial decisions and held:-

> "In the area of freedom of expression, for instance, United States courts have ruled that existing free speech doctrines protect gay and lesbian rights to expressive conduct. In order to justify the prohibition of a particular expression of opinion, public institutions must show that their actions were caused by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

203. Further, in ***Toonen***'s case, the Human Rights Committee made the following relevant observations:-

> "I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.
>
> Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus

> violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence."

204. In ***Dudgeon*** (supra), the European Court of Human Rights made the following observations with respect to homosexuality:-

> "It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."
>
> [Emphasis supplied]

## O. Comparative analysis of Section 375 and Section 377 IPC

205. Let us, in the obtaining situation, conduct a comparative analysis of the offence of rape and unnatural offences as defined under Section 375 and Section 377 of the IPC respectively. Section 375 IPC defines the offence of rape and reads as under:-

**Section 375. Rape**-A man is said to commit "rape" if he —
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions: —

First. —Against her will.

Secondly. —Without her consent.

Thirdly. —With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. —With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. —With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome

substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. —With or without her consent, when she is under eighteen years of age.

Seventhly. —When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2. —Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'.

206. A cursory reading of Section 375 IPC divulges that it is a gender specific provision for the protection of women as only a man can commit the offence of rape. The Section has been divided into two parts. The former part, comprising of Clauses (a) to (d), simply

describes what acts committed by a man with a woman would amount to rape provided that the said acts are committed in the circumstances falling under any of the seven descriptions as stipulated by the latter part of the Section.

207. It is in this way that the latter part of Section 375 IPC becomes important as it lays down the circumstances, either of which must be present, for an act committed by a man with a woman to come within the sweep of the offence of rape. To put it differently, for completing the offence of rape, any of the circumstances described in the latter part of Section 375 must be present. Let us now dissect each of the seven descriptions appended to Section 375 IPC which specify the absence of a willful and informed consent for constituting the offence of rape.

208. The first description provides that any of the acts described in the former part of Section 375 IPC would amount to rape if such acts are committed against the will of the woman. The second description stipulates that the acts described in the former part would amount to rape if such acts are committed without the consent of the woman. As per the third description, the acts would amount to rape even if the woman has given her consent but the said consent has been

obtained by putting her or any person in whom she is interested, in fear of death or of hurt. As per the fourth description, the acts would amount to rape when the woman has given her consent but the same was given by her under the belief that she is or believes herself to be lawfully married to the man committing the acts stated in the former part of the Section. The fifth description provides that the acts described in the former part would amount to rape if the woman gives her consent but at the time of giving such consent, she is unable to understand the nature and consequences of the acts to which she consents due to the reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance either by the man who commits the acts or through another third person. The sixth description is plain and simple as it stipulates that the acts described in the former part of the Section would amount to rape, irrespective of the fact whether the woman has given her consent or not, if, at the time when the acts were committed, the woman was below the age of eighteen years. Coming to the seventh and the last description, it provides that the acts prescribed in the former part would amount to rape if the woman is unable to communicate her consent.

209. Explanation 2 to Section 375 IPC gives the definition of consent for the purpose of Section 375 to the effect that consent means an unequivocal voluntary agreement by the woman through words, gestures or any form of verbal or non-verbal communication whereby she communicates her willingness to participate in any of the sexual acts described in the former part of Section 375 IPC.

210. We have scrutinized the anatomy of the seven descriptions contained in the latter part of Section 375 IPC along with Explanation 2 to Section 375 IPC to emphasize and accentuate that the element of absence of consent is firmly ingrained in all the descriptions contained in the latter part of Section 375 IPC and the absence of a willful and informed consent is *sine qua non* to designate the acts contained in the former part of Section 375 IPC as rape.

211. Presently, we proceed to scan the anatomy of Section 377 of IPC and x-ray the provision to study its real nature and content. It reads thus:-

> "**Section 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."

212. Section 377 IPC, unlike Section 375, is a gender-neutral provision as it uses the word 'whoever'. The word 'carnal', as per the Black's Law Dictionary[84], means of the body, relating to the body, fleshy or sexual. 'Sexual intercourse' has been defined in Black's Law Dictionary as a contact between a male and a female's organ.

213. Another expression which has been employed in Section 377 is 'against the order of nature'. The phrase 'against the order of nature' has neither been defined in Section 377 IPC nor in any other provision of the IPC. The foundation on which Section 377 IPC makes carnal intercourse an offence is the precept that such carnal intercourse is against the order of nature. This brings us to the important question as to what is 'against the order of nature'?

214. In ***Khanu*** (supra), where the question before the Court was whether *coitus per os* (mouth contact with the male genitals) amounts to carnal intercourse against the order of nature, the Court ruled in the affirmative observing that the natural object of intercourse is that there should be the possibility of conception of human beings which

[84] Black's Law Dictionary, 2nd edn.

in the case of *coitus per os* is impossible. Thus, the most common argument against homosexuality and criminalization of carnal intercourse even between consenting adults of opposite sex is that traditionally, the essential purpose of sex is to procreate.

215. With the passage of time and evolution of the society, procreation is not the only reason for which people choose to come together, have live-in relationships, perform coitus or even marry. They do so for a whole lot of reasons including emotional companionship. Homer Clark writes:-

> "But the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is the refuge from the coldness and impersonality of contemporary existence."

216. In the contemporary world where even marriage is now not equated to procreation of children, the question that would arise is whether homosexuality and carnal intercourse between consenting adults of opposite sex can be tagged as 'against the order of nature'. It is the freedom of choice of two consenting adults to perform sex for procreation or otherwise and if their choice is that of the latter, it cannot be said to be against the order of nature. Therefore, sex, if performed differently, as per the choice of the consenting adults,

does not *per se* make it against the order of nature.

217. Section 377 criminalises even voluntary carnal intercourse not only between homosexuals but also between heterosexuals. The major difference between the language of Section 377 and Section 375 is that of the element of absence consent which has been elaborately incorporated in the seven descriptions contained in the latter part of Section 375 IPC. It is the absence of willful and informed consent embodied in the seven descriptions to Section 375 which makes the offence of rape criminal.

218. On the other hand, Section 377 IPC contains no such descriptions/exceptions embodying the absence of willful and informed consent and criminalises even voluntary carnal intercourse both between homosexuals as well as between heterosexuals. While saying so, we gain strength and support from the fact that the legislature, in its wisdom, while enacting Section 375 IPC in its amended form after the Criminal Law (Amendment) Act, 2013, has not employed the words “subject to any other provision of the IPC”. The implication of the absence of these words simply indicates that Section 375 IPC which does not criminalize consensual carnal intercourse between heterosexuals is not subject to Section 377 IPC.

219. Section 377, so far as it criminalises carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 IPC clearly stipulates that carnal intercourse between a man and a woman with the willful and informed consent of the woman does not amount to rape and is not penal.

220. Despite the Criminal Law (Amendment) Act, 2013 coming into force, by virtue of which Section 375 was amended, whereby the words 'sexual intercourse' in Section 375 were replaced by four elaborate clauses from (a) to (d) giving a wide definition to the offence of rape, Section 377 IPC still remains in the statute book in the same form. Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the willful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC.

221. Drawing an analogy, if consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under Section

377 IPC. If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces.

222. There is another aspect which needs to be discussed, which is whether criminalisation of carnal intercourse under Section 377 serves any useful purpose under the prevalent criminal law. Delineating on this aspect, the European Commission of Human Rights in ***Dudgeon*** (supra) opined thus:-

> "The 1967 Act, which was introduced into Parliament as a Private Member's Bill, was passed to give effect to the recommendations concerning homosexuality made in 1957 in the report of the Departmental Committee on Homosexual Offences and Prostitution established under the chairman ship of Sir John Wolfenden (the "Wolfenden Committee" and "Wolfenden report"). The Wolfenden Committee regarded the function of the criminal law in this field as:
>
> > "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence",

but not

> "to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined".

> The Wolfenden Committee concluded that homosexual behaviour between consenting adults in private was part of the "realm of private morality and immorality which is, in brief and crude terms, not the law's business" and should no longer be criminal"
>
> [Underlining is ours]

223. At the very least, it can be said that criminalisation of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate public purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception.

**P. The litmus test for survival of Section 377 IPC**

224. Having discussed the various principles and concepts and bearing in mind the sacrosanctity of the fundamental rights which

guides the constitutional courts, we shall now proceed to deal with the constitutionality of Section 377 IPC on the bedrock of the principles enunciated in Articles 14, 19 and 21 of the Constitution.

225. It is axiomatic that the expression 'life or personal liberty' in Article 21 embodies within itself a variety of rights. In ***Maneka Gandhi*** (supra), Bhagwati, J. (as he then was) observed:-

> "The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19..."

226. In ***Anuj Garg*** (supra), while dealing with the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman", the Court, holding it *ultra vires*, ruled thus:-

> "31. … It is their life; subject to constitutional, statutory and social interdicts—a citizen of India should be allowed to live her life on her own terms."
>
> And again:-
>
> "35. Privacy rights prescribe autonomy to choose profession whereas *security concerns* texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong

> that the essence of the guarantee is lost. State protection must not translate into censorship."

227. In ***Common Cause (A Regd. Society)*** (supra), the Court, in the context of right to dignity, observed:-

> "Right to life and liberty as envisaged under Article 21 is meaningless unless it encompasses within its sphere individual dignity and right to dignity includes the right to carry such functions and activities as would constitute the meaningful expression of the human self."

228. In ***Puttaswamy*** (supra), the right to privacy has been declared to be a fundamental right by this Court as being a facet of life and personal liberty protected under Article 21 of the Constitution.

229. In view of the above authorities, we have no hesitation to say that Section 377 IPC, in its present form, abridges both human dignity as well as the fundamental right to privacy and choice of the citizenry, howsoever small. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep the right of every individual including that of the LGBT to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution.

230. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual

liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.

231. While saying so, we are absolutely conscious of the fact that the citizenry may be deprived of their right to life and personal liberty if the conditions laid down in Article 21 are fulfilled and if, at the same time, the procedure established by law as laid down in ***Maneka Gandhi*** (supra) is satisfied. Article 21 requires that for depriving a person of his right to life and personal liberty, there has to be a law and the said law must prescribe a fair procedure. The seminal point is to see whether Section 377 withstands the sanctity of dignity of an individual, expression of choice, paramount concept of life and whether it allows an individual to lead to a life that one's natural orientation commands. That apart, more importantly, the question is whether such a gender-neutral offence, with the efflux of time, should

be allowed to remain in the statute book especially when there is consent and such consent elevates the status of bodily autonomy. Hence, the provision has to be tested on the principles evolved under Articles 14, 19 and 21 of the Constitution.

232. In ***Sunil Batra v. Delhi Administration and others***[85]*,* Krishna Iyer, J. opined that what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.

233. We, first, must test the validity of Section 377 IPC on the anvil of Article 14 of the Constitution. What Article 14 propounds is that 'all like should be treated alike'. In other words, it implies equal treatment for all equals. Though the legislature is fully empowered to enact laws applicable to a particular class, as in the case at hand in which Section 377 applies to citizens who indulge in carnal intercourse, yet the classification, including the one made under Section 377 IPC, has to satisfy the twin conditions to the effect that the classification must be founded on an intelligible differentia and the said differentia must

[85]AIR 1978 SC 1675 : (1978) 4 SCC 494

have a rational nexus with the object sought to be achieved by the provision, that is, Section 377 IPC.

234. In ***M. Nagaraj and others v. Union of India and others***[86], it has been held:-

> "The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances."

235. In ***E.P. Royappa v. State of Tamil Nadu and another***[87]*,* this Court observed that equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. It was further held that equality is antithetic to arbitrariness, for equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.

236. In ***Budhan Choudhry v. The State of Bihar***[88], while delineating on the concept of reasonable classification, the Court observed thus:-

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[86]AIR 2007 SC 71 : (2006) 8 SCC 212
[87]AIR 1974 SC 555 : (1974) 4 SCC 3
[88] AIR 1955 SC 191

> "It is now well-established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

237. A perusal of Section 377 IPC reveals that it classifies and penalizes persons who indulge in carnal intercourse with the object to protect women and children from being subjected to carnal intercourse. That being so, now it is to be ascertained whether this classification has a reasonable nexus with the object sought to be achieved. The answer is in the negative as the non-consensual acts which have been criminalized by virtue of Section 377 IPC have already been designated as penal offences under Section 375 IPC and under the POCSO Act. Per contra, the presence of this Section in its present form has resulted in a distasteful and objectionable

collateral effect whereby even 'consensual acts', which are neither harmful to children nor women and are performed by a certain class of people (LGBTs) owning to some inherent characteristics defined by their identity and individuality, have been woefully targeted. This discrimination and unequal treatment meted out to the LGBT community as a separate class of citizens is unconstitutional for being violative of Article 14 of the Constitution.

238. In ***Shayara Bano*** (supra), the Court observed that manifest arbitrariness of a provision of law can also be a ground for declaring a law as unconstitutional. Opining so, the Court observed thus:-

> "The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

239. In view of the law laid down in ***Shayara Bano*** (supra) and given the fact that Section 377 criminalises even consensual sexual acts between adults, it fails to make a distinction between consensual and non-consensual sexual acts between competent

adults. Further, Section 377 IPC fails to take into account that consensual sexual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction. Needless to say, the Section also interferes with consensual acts of competent adults in private space. Sexual acts cannot be viewed from the lens of social morality or that of traditional precepts wherein sexual acts were considered only for the purpose of procreation. This being the case, Section 377 IPC, so long as it criminalises consensual sexual acts of whatever nature between competent adults, is manifestly arbitrary.

240. The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a

liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.

241. In the adverting situation, we must also examine whether Section 377, in its present form, stands the test of Article 19 of the Constitution in the sense of whether it is unreasonable and, therefore, violative of Article 19. In ***Chintaman Rao v. State of Madhya Pradesh***[89], this Court, in the context of reasonable restrictions under Article 19, opined thus:-

> "The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by

[89] AIR 1951 SC 118

> clause (6) of article 19, it must be held to be wanting in that quality."

242. In ***S. Rangarajan v. P. Jagjivan Ram and others***[90], the Court observed, though in a different context, thus:-

> " ... Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression."

243. In ***S. Khushboo*** (supra), this Court, while observing that 'morality and decency' on the basis of which reasonable restrictions can be imposed on the rights guaranteed under Article 19 should not be amplified beyond a rational and logical limit, ruled that even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as `decency and morality' among others, yet it is necessary to tolerate unpopular views in the socio-cultural space.

244. In the case of ***Shreya Singhal v. Union of India***[91]*,* this Court, while striking down Section 66A of the Information Technology Act, 2000, had observed that when a provision is vague and overboard in

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[90](1989) 2 SCC 574
[91](2015) 5 SCC 1

the sense that it criminalises protected speech and speech of innocent nature, resultantly, it has a chilling effect and is liable to be struck down. The Court opined:-

> "We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

245. In the obtaining situation, we need to check whether public order, decency and morality as grounds to limit the fundamental right of expression including choice can be accepted as reasonable restrictions to uphold the validity of Section 377 IPC. We are of the conscious view that Section 377 IPC takes within its fold private acts of adults including the LGBT community which are not only consensual but are also innocent, as such acts neither cause disturbance to the public order nor are they injurious to public decency or morality. The law is *et domus sua cuique est tutissimum refugium* – A man's house is his castle. Sir Edward Coke[92] said:-

> "The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose."

[92]Semayne's Case, 77 Eng. Rep. 194, 195; 5 Co. Rep. 91, 195 (K.B. 1604)

246. That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception. Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice.

247. In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved.

248. Bigoted and homophobic attitudes dehumanize the

transgenders by denying them their dignity, personhood and above all, their basic human rights. It is important to realize that identity and sexual orientation cannot be silenced by oppression. Liberty, as the linchpin of our constitutional values, enables individuals to define and express their identity and individual identity has to be acknowledged and respected.

249. The very existence of Section 377 IPC criminalising transgenders casts a great stigma on an already oppressed and discriminated class of people. This stigma, oppression and prejudice has to be eradicated and the transgenders have to progress from their narrow claustrophobic spaces of mere survival in hiding with their isolation and fears to enjoying the richness of living out of the shadows with full realization of their potential and equal opportunities in all walks of life. The ideals and objectives enshrined in our benevolent Constitution can be achieved only when each and every individual is empowered and enabled to participate in the social mainstream and in the journey towards achieving equality in all spheres, equality of opportunities in all walks of life, equal freedoms and rights and, above all, equitable justice. This can be achieved only by inclusion of all and exclusion of none from the mainstream.

250. We must realize that different hues and colours together make the painting of humanity beautiful and this beauty is the essence of humanity. We need to respect the strength of our diversity so as to sustain our unity as a cohesive unit of free citizens by fostering tolerance and respect for each others' rights thereby progressing towards harmonious and peaceful co-existence in the supreme bond of humanity. Attitudes and mentality have to change to accept the distinct identity of individuals and respect them for who they are rather than compelling them to 'become' who they are not. All human beings possess the equal right to be themselves instead of transitioning or conditioning themselves as per the perceived dogmatic notions of a group of people. To change the societal bias and root out the weed, it is the foremost duty of each one of us to "stand up and speak up" against the slightest form of discrimination against transgenders that we come across. Let us move from darkness to light, from bigotry to tolerance and from the winter of mere survival to the spring of life — as the herald of a New India — to a more inclusive society.

251. It is through times of grave disappointment, denunciation, adversity, grief, injustice and despair that the transgenders have

stood firm with their formidable spirit, inspired commitment, strong determination and infinite hope and belief that has made them look for the rainbow in every cloud and lead the way to a future that would be the harbinger of liberation and emancipation from a certain bondage indescribable in words – towards the basic recognition of dignity and humanity of all and towards leading a life without pretence eschewing duality and ambivalence. It is their momentous "walk to freedom" and journey to a constitutional ethos of dignity, equality and liberty and this freedom can only be fulfilled in its truest sense when each of us realize that the LGBT community possess equal rights as any other citizen in the country under the magnificent charter of rights – our Constitution.

252. Thus analysed, Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 IPC is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered

under Section 377 IPC done between the individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

**Q. <u>Conclusions</u>**

253. In view of the aforesaid analysis, we record our conclusions in seriatim:-

(i) The eminence of identity which has been luculently stated in the ***NALSA*** case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, "constitutionally permissible".

(ii) In ***Suresh Koushal*** (supra), this Court overturned the decision of the Delhi High Court in ***Naz Foundation*** (supra)

thereby upholding the constitutionality of Section 377 IPC and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the *vires* of the Section. Such a view is constitutionally impermissible.

(iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

(iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the

sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

(v) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and

freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

(vi) The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual

including the right to express and choose without any impediments so as to enable an individual to fully realize his/her fundamental right to live with dignity.

(vii) Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) After the privacy judgment in ***Puttaswamy*** (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in ***Suresh Koushal*** (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in ***Suresh Koushal*** (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall

be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

(ix) There is a manifest ascendance of rights under the Constitution which paves the way for the doctrine of progressive realization of rights as such rights evolve with the evolution of the society. This doctrine, as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. In the light of the same, if we were to accept the view in ***Suresh Koushal*** (supra), it would tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.

(x) Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.

(xi) A cursory reading of both Sections 375 IPC and 377 IPC reveals that although the former Section gives due recognition to the absence of 'wilful and informed consent' for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of 'wilful and informed consent' to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words

'subject to any other provision of the IPC'. This indicates that Section 375 IPC is not subject to Section 377 IPC.

(xii) The expression 'against the order of nature' has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not *per se* make it 'against the order of nature'.

(xiii) Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in ***Maneka Gandhi*** (supra) and other later authorities.

(xiv) An examination of Section 377 IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 IPC in its present form

has resulted in an unwanted collateral effect whereby even 'consensual sexual acts', which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

(xv) Section 377 IPC, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society. Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in ***Shayara Bano*** (supra), Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

(xvi) An examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.

(xvii) Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under

Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

(xviii) The decision in ***Suresh Koushal*** (supra), not being in consonance with what we have stated hereinabove, is overruled.

254. The Writ Petitions are, accordingly, disposed of. There shall be no order as to costs.

…….CJI
(Dipak Misra)

……..J.
(A.M. Khanwilkar)

New Delhi;
September 6, 2018

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CRIMINAL/CIVIL ORIGINAL JURISDICTION**

**WRIT PETITION (CRIMINAL) NO. 76 OF 2016**

NAVTEJ SINGH JOHAR & ORS. …PETITIONERS

VERSUS

UNION OF INDIA …RESPONDENT

**WITH**

**WRIT PETITION (CIVIL) NO.572 OF 2016**

**WITH**

**WRIT PETITION (CRIMINAL) NO.88 OF 2018**

**WITH**

**WRIT PETITION (CRIMINAL) NO.100 OF 2018**

**WITH**

**WRIT PETITION (CRIMINAL) NO.101 OF 2018**

**WITH**

**WRIT PETITION (CRIMINAL) NO.121 OF 2018**

## J U D G M E N T

**R.F. Nariman, J.**

1. *"The love that dare not speak its name"* is how the love that exists between same-sex couples was described by Lord Alfred Douglas, the lover of Oscar Wilde, in his poem *Two Loves* published in 1894 in Victorian England.

2. The word "homosexual" is not derived from "homo" meaning man, but from "homo" meaning same.[1] The word "lesbian" is derived from the name of the Greek island of Lesbos, where it was rumored that female same-sex couples proliferated. What we have before us is a relook at the constitutional validity of Section 377 of the Indian Penal Code which was enacted in the year 1860 (over 150 years ago) insofar as it criminalises consensual sex between adult same-sex couples.

3. These cases have had a chequered history. Writ petitions were filed before the Delhi High Court challenging the

[1] *Homo* in Greek means 'same' – the Nicene creed that was accepted by the Catholic Church after the Council at Nicaea, held by Emperor Constantine in 325 AD, was formulated with the word *'homo'* at the forefront. When coupled with *'sios'* it means same substance, meaning thereby that Jesus Christ was divine as he was of the same substance as God.

constitutional validity of Section 377 of the Penal Code insofar as it criminalizes consensual sex between adult same-sex couples within the confines of their homes or other private places. A Division Bench of the Delhi High Court in **Naz Foundation v. Government of NCT of Delhi ("Naz Foundation"),** 111 DRJ 1 (2009), after considering wide-ranging arguments on both sides, finally upheld the plea of the petitioners in the following words:

> "**132.** We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.
> We allow the writ petition in the above terms."

4. Despite the fact that no appeal was filed by the Union of India, in appeals filed by private individuals and groups, the

Supreme Court in **Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors. ("Suresh Kumar Koushal")**, (2014) 1 SCC 1, reversed the judgment of the High Court. Reviews that were filed against the aforesaid judgment, including by the Union of India, were dismissed by this Court.

5. Meanwhile, the Supreme Court delivered an important judgment reported as **National Legal Services Authority v. Union of India ("NALSA")**, (2014) 5 SCC 438, which construed Articles 15 and 21 of the Constitution of India as including the right to gender identity and sexual orientation, and held that just like men and women, transgenders could enjoy all the fundamental rights that other citizens of India could enjoy. Thereafter, in **Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. ("Puttaswamy")**, (2017) 10 SCC 1, a nine-Judge Bench of this Court unanimously declared that there is a fundamental right of privacy which enured in favour of all persons, the concomitant of which was that the right to make choices that were fundamental to a person's way of living could not be interfered with by the State without compelling necessity and/or harm caused to other individuals.

6. The impetus of this decision is what led to a three-Judge Bench order of 08.01.2018, which referred to the judgment of **Puttaswamy** (supra) and other arguments made by Shri Datar, to refer the correctness of **Suresh Kumar Koushal's** case (supra) to a larger Bench. This is how the matter has come to us.

**History of Section 377**

7. In the western world, given the fact that both Judaism and Christianity outlawed sexual intercourse by same-sex couples, offences relating thereto were decided by ecclesiastical courts. It is only as a result of Henry VIII of England breaking with the Roman Catholic Church that legislation in his reign, namely the Buggery Act of 1533, prohibited "the detestable and abominable offence" of buggery committed with mankind or beast.

8. Between 1806, when reliable figures begin, and 1900, 8,921 men were indicted for sodomy, gross indecency or other 'unnatural misdemeanours' in England and Wales. Ninety men per year were, on average, indicted for homosexual offences in

this period. About a third as many were arrested and their case considered by magistrates. Most of the men convicted were imprisoned, but between 1806 and 1861, when the death penalty for sodomy was finally abolished, 404 men were sentenced to death. Fifty-six were executed, and the remainder were either imprisoned or transported to Australia for life. Two such men, James Pratt and John Smith, were the last to be executed in Britain for sodomy on 27 November, 1835.

9. During the reign of the East India Company in India, Parliament established what was called the Indian Law Commission. In 1833, Thomas Babington Macaulay was appointed to chair the Commission.[2]

10. The Indian Law Commission, with Macaulay as its head, submitted the Draft Penal Code to the Government of India on 14.10.1837. This draft consisted of 488 clauses. After the First Report submitted on 23.07.1846, the Second Report of Her Majesty's Commissioners for revising and consolidating the law was submitted by C.H. Cameron and D. Eliott on 24.06.1847.

[2] Thomas Babington Macaulay was a Whig liberal who was a precocious genius. Apart from having a photographic memory with which he astounded persons around him, one incident which took place when Macaulay was only 5 years old told the world what was in store for it when Macaulay would reach adulthood. A lady dropped some hot coffee on the five-year old child and expressed great sorrow for doing so. The child riposted, after letting out a scream, "Madam, the agony has abated".

These Commissioners concluded that the Draft Penal Code was sufficiently complete, and, with slight modifications, fit to be acted upon. The revised edition of the Penal Code was then forwarded to the Judges of the Supreme Court at Calcutta on 30.05.1851, and also to the Judges of the Sudder Court at Calcutta.

11. The revised edition of the Penal Code as prepared by Mr. Bethune, the Legislative member of the Legislative Council of India, together with the views of the Chief Justice and Mr. Justice Buller of the Supreme Court at Calcutta, as well as those of Mr. Justice Colvile were sent to the Company in London. The Court of Directors in London were anxious to see the Penal Code enacted as early as possible. They, therefore, constituted a Council in which Sir Barnes Peacock was made the fourth member.

12. This Council or Committee prepared a revised Penal Code which was then referred to a Select Committee in 1857. Given the Indian Mutiny of 1857, the Code was passed soon thereafter in October, 1860 and brought into force on 01.01.1862. Sir James Fitzjames Stephen proclaimed that:

> "The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made. It is to the French Penal Code and, I may add, to the North Germany Code of 1871, what a finished picture is to a sketch. It is far simpler, and much better expressed, than Livingston's Code for Louisiana; and its practical success has been complete".

13. He further described the Penal Code as:-

> "the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few), to suit circumstances of British India."

14. According to Lord Macaulay, a good Code should have the qualities of precision and comprehensibility. In a letter to Lord Auckland, the Governor General of India in Council, which accompanied his draft Penal Code, he stated:

> "There are two things which a legislator should always have in view while he is framing laws: the one is that they should be as far as possible precise; the other that they should be easily understood. That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the Courts of Justice."

15. Stung to the quick, when criticized as to the delay in bringing out the Code, he observed in a Minute to Lord Auckland as follows:

> "…when I remember the slow progress of law reforms at home and when I consider that our Code decides hundreds of questions… every one of which if stirred in England would give occasion to voluminous controversy and to many animated debates, I must acknowledge that I am inclined to fear that we have been guilty rather of precipitation than of delay."

16. Earlier, he had described the core objective of his project in his 04.06.1835 Minute to the Council which could be paraphrased as follows:-

> It should be more than a mere digest of existing laws, covering all contingencies, and 'nothing that is not in the Code ought to be law'.
>
> It should suppress crime with the least infliction of suffering and allow for the ascertaining of the truth at the smallest possible cost of time and money.
>
> Its language should be clear, unequivocal and concise. Every criminal act should be separately defined, its language followed precisely in indictment and conduct found to fall clearly within the definition.
>
> Uniformity was to be the chief end and special definitions, procedures or other exceptions to account for different races or sects should not be included without clear and strong reasons.

17. It is interesting to note that Lord Macaulay's Draft was substantially different from what was enacted as Section 377. Macaulay's original draft read:-

> "**361.** Whoever, intending to gratify unnatural lust, touches for that purpose any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall be liable to fine.
>
> **362.** Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

18. What is remarkable for the time in which he lived is the fact that Lord Macaulay would punish touching another person for the purpose of gratifying "unnatural lust" without their "free and intelligent consent" with a term of imprisonment extendable to life (but not less than seven years) while the penalty for the same offence, when consensual, would be imprisonment for a maximum term of fourteen years (but not less than two years). Even in this most prudish of all periods of English history, Lord

Macaulay recognized a lesser sentence for the crime of "unnatural lust", if performed with consent. Living in the era in which he lived, he clearly eschewed public discussion on this subject, stating:-

> "Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave, without comment, to the judgment of his Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."

19. At what stage of the proceedings before the various persons and committees after 1837, Section 377 finally took shape, is not clear. What is clear is that it is the Committee of Sir Barnes Peacock which finally sent the draft equivalent of Section 377 for enactment.

20. The Indian Penal Code, given its long life of over 150 years, has had surprisingly few amendments made to it. The 42nd Law Commission Report, early in this country's history, did not recommend the amendment or deletion of Section 377. But

B. P. Jeevan Reddy, J.'s Law Commission Report of the year 2000 (the 172nd Report) recommended its deletion consequent to changes made in the preceding sections, which made it clear that anal sex between consenting adults, whether same-sex or otherwise, would not be penalized.

**Law in the United Kingdom**

21. As has been mentioned earlier in this judgment, the first enactment prohibiting same-sex intercourse was passed in the year 1533 in the reign of Henry VIII. The death penalty was prescribed even for consenting adults who indulged in this "abomination". The trial of persons such as Oscar Wilde is what led to law reform in the U.K., albeit 60 years later.

22. The Marquess of Queensberry's son, Lord Alfred Douglas, was having an affair with Oscar Wilde, which the Marquess discovered. At Oscar Wilde's club, the Marquess left a note describing Oscar Wilde as a "somdomite" which led to one of the most celebrated defamation actions in England. In the course of his cross-examination of Oscar Wilde, Sir Edward Carson was able to draw from his famous witness the fact that

boys could be plain or ugly, which would have led to the truth of establishing the charge against Oscar Wilde. Rather than go on with the trial, Oscar Wilde hastily withdrew his action for defamation. But that was not the end. A prosecution under the Criminal Law Amendment Act of 1885 followed, in which Oscar Wilde was convicted and sent to jail for a period of two years. He never quite recovered, for after his jail sentence was served out, he died a broken and impoverished man in Paris at the early age of 46.[3]

23. The winds of change slowly blew over the British Isles and finally, post the Second World War, what is known as the Wolfenden Committee was appointed on 24.08.1954, *inter alia* to consider the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts. The Committee Report, even though it is of a vintage of September 1957, makes interesting reading. In paragraphs 31 and 32 of the Report, the Committee opined:-

[3] Much more could have come from the pen of this genius. In fact, when crossing the U.S. Customs and being asked whether he had anything to declare, his famous answer was said to have been, "I have nothing to declare except my genius." But even unjust jail sentences can produce remarkable things – *The Ballad of Reading Gaol* is a masterpiece of English poetry which the world would never have received had he not been incarcerated in Reading Gaol.

"*31.* Even if it could be established that homosexuality were a disease, it is clear that many individuals, however their state is reached, present social rather than medical problems and must be dealt with by social, including penological, methods. This is especially relevant when the claim that homosexuality is an illness is taken to imply that its treatment should be a medical responsibility. Much more important than the academic question whether homosexuality is a disease is the practical question whether a doctor should carry out any part or all of the treatment. Psychiatrists deal regularly with problems of personality which are not regarded as diseases, and conversely the treatment of cases of recognized psychiatric illness may not be strictly medical but may best be carried out by non-medical supervision or environmental change. Examples would be certain cases of senile dementia or chronic schizophrenia which can best be managed at home. In fact, the treatment of behavior disorders, even when medically supervised, is rarely confined to psychotherapy or to treatment of a strictly medical kind. This is not to deny that expert advice should be sought in very many homosexual cases. We shall have something more to say on these matters in connection with the treatment of offenders.

*32.* The claim that homosexuality is an illness carries the further implication that the sufferer cannot help it and therefore carries a diminished responsibility for his actions. Even if it were accepted that homosexuality could properly be described as a "disease", we should not accept this corollary. There are no *prima facie* grounds for supposing that because a particular person's sexual propensity happens to lie in the direction of persons of his or her own sex it is any less controllable than that of those whose propensity is for persons of the opposite sex. We are informed that patients in mental hospitals, with few exceptions, show clearly

> by their behavior that they can and do exercise a high degree of responsibility and self-control; for example, only a small minority need to be kept in locked wards. The existence of varying degrees of self-control is a matter of daily experience - the extent to which coughing can be controlled is an example - and the capacity for self-control can vary with the personality structure or with temporary physical or emotional conditions. The question which is important for us here is whether the individual suffers from a condition which causes diminished responsibility. This is a different question from the question whether he was responsible in the past for the causes or origins of his present condition. That is an interesting enquiry and may be of relevance in other connections; but our concern is with the behavior which flows from the individual's present condition and with the extent to which he is responsible for that behavior, whatever may have been the causes of the condition from which it springs. Just as expert opinion can give valuable assistance in deciding on the appropriate ways of dealing with a convicted person, so can it help in assessing the additional factors that may affect his present responsibility?"

24. It then went on to note in paragraph 36 that the evidence before them showed that homosexuality existed in all levels of society and was prevalent in all trades and professions. In paragraph 53, the main arguments for retention of the existing law were set out. Insofar as societal health was concerned, the Committee rejected this for lack of evidence. It went on to state:-

"*54.* As regards the first of these arguments, it is held that conduct of this kind is a cause of the demoralization and decay of civilisations, and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped, by every possible means. We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. <u>But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind</u>. It is held also that if such men are employed in certain professions or certain branches of the public service their private habits may render them liable to threats of blackmail or to other pressures which may make them "bad security risks." If this is true, it is true also of some other categories of persons: for example, drunkards, gamblers and those who become involved in compromising situations of a heterosexual kind; and while it may be a valid ground for excluding from certain forms of employment men who indulge in homosexual behaviour, it does not, in our view, constitute a sufficient reason for making their private sexual behaviour an offence in itself."

(Emphasis supplied)

25. Insofar as the damaging effects on family life were concerned, this was rejected by stating:-

> "*55.* The second contention, that homosexual behaviour between males has a damaging effect on family life, may well be true. Indeed, we have had evidence, that it often is; cases in which homosexual behaviour on the part of the husband has broken up a marriage are by no means rare, and there are also cases in which a man in whom the homosexual component is relatively weak nevertheless derives such satisfaction from homosexual outlets that he does not enter upon a marriage which might have been successfully and happily consummated. We deplore this damage to what we regard as the basic unit of society; but cases are also frequently encountered in which a marriage has been broken up by homosexual behaviour on the part of the wife, and no doubt some women, too, derive sufficient satisfaction from homosexual outlets to prevent their marrying. We have had no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offence. This argument is not to be taken as saying that society should condone or approve male homosexual behaviour. But where adultery, fornication and lesbian behaviour are not criminal offences there seems to us to be no valid ground, on the basis of damage to the family, for so regarding homosexual behaviour between men. Moreover, it has to be recognized that the mere existence of the condition of homosexuality in one of the partners can result in an unsatisfactory marriage, so that for a

homosexual to marry simply for the sake of conformity with the accepted structure of society or in the hope of curing his condition may result in disaster."

26. And in rejecting the allegation that men indulging in such practices with other men may turn their attention to boys, the Committee said:-

> "*56.* We have given anxious consideration to the third argument, that an adult male who has sought as his partner another adult male may turn from such a relationship and seek as his partner a boy or succession of boys. We should certainly not wish to countenance any proposal which might tend to increase offences against minors. Indeed, if we thought that any recommendation for a change in the law would increase the danger to minors, we should not make it. But in this matter, we have been much influenced by our expert witnesses. They are in no doubt that whatever may be the origins of the homosexual condition, there are two recognisably different categories among adult male homosexuals. There are those who seek as partners other adult males, and there are paedophiliacs, that is to say men who seek as partners boys who have not reached puberty.
> 57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and *vice-versa,* though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen."

27. Finally, the Committee stated:

> "*60.* We recognise that a proposal to change a law which has operated for many years so as to make

legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated *de novo,* any provision making these acts illegal. To reverse a long-standing tradition is a serious matter and not to be suggested lightly. But the task entrusted to us, as we conceive it, is to state what we regard as a just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure.

*61.* Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.

*62.* We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offence."

28. Change came slowly. It was only in 1967 that the Wolfenden Committee Report was acted upon by the British Parliament by enacting the Sexual Offences Act, 1967, which abolished penal offences involving consenting same-sex adults.

29. In 2017, the United Kingdom passed the Policing and Crimes Act which served as an amnesty law to pardon persons who were cautioned or convicted under legislations that outlawed homosexual acts.[4]

**The Law in the United States**

30. At the time that the United States achieved independence in 1776, the law in all the States insofar as same-sex offences were concerned, was the English law. This state of affairs continued until challenges were made in the last century to state statutes which criminalized sodomy. One such case, namely, **Bowers v. Hardwick ("Bowers")**, 92 L. Ed. 2d 140 (1986), reached the United States Supreme Court in the year 1986. By a 5:4 decision, the United States Supreme Court upheld a Georgia statute criminalizing sodomy and its

[4] The impetus for this law was the prosecution of Alan Turing in 1952. Alan Turing was instrumental in cracking intercepted code messages that enabled the Allies to defeat Germany in many crucial engagements in the War. Turing accepted chemical castration treatment as an alternative to prison upon conviction, but committed suicide just before his 42nd birthday in 1954.

applicability to the commission of that act with another adult male in the bedroom of the respondent's home. Justice White, who spoke for the majority of the Court, did this on several grounds.

31. First and foremost, he stated that there was no right to privacy that extended to homosexual sodomy. No connection between family, marriage, or procreation and homosexuality had been demonstrated to the court. The next ground for upholding such law was that proscriptions against such conduct had ancient roots. **Stanley v. Georgia ("Stanley"),** 22 L. Ed. 2d 542 (1969), where the Court held that the First Amendment prohibits conviction for possessing and reading obscene material in the privacy of one's home, was brushed aside stating that **Stanley** itself recognized that its holding offered no protection for possession of drugs, firearms or stolen goods in the home. Therefore, such a claimed fundamental right could not possibly exist when adultery, incest and other sexual crimes are punished, even though they may be committed in the home. Another important rationale was that the Georgia law was based on a notion of morality, which is a choice that could

legitimately be exercised by a State Legislature. Chief Justice Burger, concurring, again relied heavily on 'ancient roots', stating that throughout the history of western civilization, homosexual sodomy was outlawed in the Judeo-Christian tradition, which the Georgia legislature could well follow. Justice Powell, concurring with the majority, found that to imprison a person upto 20 years for a single, private, consensual act of sodomy within the home would be a cruel and unusual punishment within the meaning of the Eighth Amendment. However, since no trial had taken place on the facts, and since the respondent did not raise any such Eighth Amendment issue, Justice Powell concurred with the majority.

32. The dissenting opinion of four Justices makes interesting reading. Justice Blackmun, who spoke for four dissenters, began with the classical definition of the old privacy right which is the "right to be let alone", and quoted from Justice Holmes' article *The Path of the Law,* stating:-

> "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since,

> and the rule simply persists from blind imitation of the past."

33. So much, then, for history and its "ancient roots". Justice Blackmun's dissent then went on to consider the famous judgment in **Wisconsin v. Yoder***,* 32 L. Ed. 2d 15 (1972), in which the Court had upheld the fundamental right of the Amish community not to send their children to schools, stating that a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different. Referring to Judeo-Christian values, the Court said that the fact that certain religious groups condemn the behavior of sodomy gives the State no licence to impose their moral judgment on the entire citizenry of the United States. Ending with a John Stuart Mill type of analysis, the dissent stated:-

> "**44.** This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. Diamond v. Charles, 476 U.S. 54, 65-66, 106 S. Ct. 1697, 1705, 90 L.Ed.2d 48 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."

34. Justice Stevens, also in a powerfully worded dissent, specifically stated that the protection of privacy extends to intimate choices made by unmarried as well as married persons.

35. It took the United States 17 years to set aside this view of the law and to accept the dissenting judgments in **Bowers** (supra).

36. In **Lawrence v. Texas**, 539 U.S. 558 (2003), by a majority of 6:3, Justice Anthony Kennedy, speaking for the majority, set aside the judgment in **Bowers** (supra), accepting that the dissenting judgments in that case were correct. In a tilt at the history analysis of the majority judgment in **Bowers** (supra), the Court found that earlier sodomy laws were not directed at homosexuals at large, but instead sought to prohibit non-procreative sexual activity more generally, and were not enforced against consenting adults acting in private. After citing from **Planned Parenthood of Southeastern Pa. v. Casey ("Casey")**, 505 U.S. 833 (1992), the majority held – "our obligation is to define the liberty of all, not to mandate our own moral code." The majority judgment then referred to a Model

Penal Code that the American Law Institute took out in 1955, making it clear that it did not provide for criminal penalties for consensual same-sex relationships conducted in private. The judgment then went on to refer to the Wolfenden Committee Report and the Sexual Offences Act,1967 in the United Kingdom and referred to the European Court's decision in **Dudgeon v. United Kingdom,** 45 Eur. Ct. H. R. (1981). It then referred to **Romer v. Evans ("Romer")**, 517 U.S. 620 (1996), where the Court struck down a class-based legislation which deprived homosexuals of State anti-discrimination laws as a violation of the Equal Protection Clause. The majority then found that the 1986 decision of **Bowers** (supra), had "sustained serious erosion" through their recent decisions in **Casey** (supra) and **Romer** (supra)**,** and had, therefore, to be revisited.[5] Justice

[5] The majority's decision echoes what had happened earlier in what is referred to as the celebrated flag salute case, namely, **West Virginia State Board of Education v. Barnette**, 319 U.S. 624 (1943). The U.S. Supreme Court had overruled its recent judgment in **Minersville School District v. Gobitis**, 310 U.S. 586 (1940). Justice Jackson speaking for the majority of the Court found:-

> *"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly."*

The learned Judge then went on to find:

> *"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and*

O'Connor concurred in the judgment but side-stepped rather than overruled **Bowers** (supra). Justice Scalia, with whom the Chief Justice and Justice Thomas joined, found no reason to undo the **Bowers** (supra) verdict stating that *stare decisis* should carry the day. An interesting passage in Justice Scalia's judgment reads as follows:-

> "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once

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*assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."*

And finally, it was held:-

*"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."*

> thought necessary and proper in fact serve only to oppress," [ante, at 579]; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best."

37. Before coming to our own judgments, we may quickly survey some of the judgments of the courts of other democratic nations. The European Community decisions, beginning with **Dudgeon v. United Kingdom** (supra) and continuing with **Norris v. Ireland,** Application no. 10581/83**,** and **Modinos v. Cyprus,** 16 EHRR 485 (1993), have all found provisions similar to Section 377 to be violative of Article 8 of the European Human Rights Convention, 1948 in which everyone has the right to respect for his private and family life, his home and his correspondence, and no interference can be made with these rights unless the law is necessary in a democratic society *inter alia* for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

38. In **El-Al Israel Airlines Ltd. v. Jonathan Danielwitz,** H.C.J. 721/94, the Supreme Court of Israel, speaking through

Barak, J., recognized a same-sex relationship so that a male companion could be treated as being a companion for the receipt of a free or discounted aeroplane ticket. The Court held:-

> "**14.**….The principle of equality demands that the existence of a rule that treats people differently is justified by the nature and substance of the issue. The principle of equality therefore presumes the existence of objective reasons that justify a difference (a distinction, dissimilarity). Discrimination — which is the opposite of equality — exists therefore in those situations where a different law for people who are (de facto) different from one another is based on reasons that are insufficient to justify a distinction between them in a free and democratic society. In Justice Or's words, discrimination is 'different treatment without an objective justification' (Hoppert v. 'Yad VaShem' Holocaust Martyrs and Heroes Memorial Authority [12], at p. 360). President Agranat discussed this and pointed out:
>
>> 'The principle of equality, which is merely the opposite of discrimination and which, for reasons of justice and fairness, the law of every democratic country aspires to achieve, means that people must be treated equally for a particular purpose, when no real differences that are relevant to this purpose exist between them. If they are not treated equally, we have a case of discrimination. However, if the difference or differences between different people are relevant for the purpose under discussion, it is a permitted distinction to treat them differently for that purpose, provided that

> those differences justify this. In this context, the concept of "equality" therefore means "relevant equality", and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in this state. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 Boronovski v. Chief Rabbis [16], at p. 35).

Therefore, a particular law will create discrimination when two individuals, who are different from one another (factual inequality), are treated differently by the law, even though the factual difference between them does not justify different treatment in the circumstances. Discrimination is therefore based on the factors of arbitrariness, injustice and unreasonableness.

XXX

**17.** We have seen, therefore, that giving a benefit to a (permanent) employee for a spouse or recognized companion of the opposite sex and not giving the same benefit for a same-sex companion amounts to a violation of equality. What is the nature of this discrimination? Indeed, all discrimination is prohibited, but among the different kinds of discrimination, there are varying degrees. The severity of the discrimination is determined by the severity of the violation of the principle of equality. Thus, for example, we consider discrimination on the basis of race, religion, nationality, language, ethnic group and age to be particularly serious. In

> this framework, the Israeli legal system attaches great importance to the need to guarantee equality between the sexes and to prevent discrimination on the basis of sex (see HCJ 153/87 Shakdiel v. Minister of Religious Affairs [19]; Poraz v. Mayor of Tel Aviv-Jaffa [6]).”
>
> (Emphasis supplied)

39. An instructive recent judgment from Trinidad and Tobago in **Jason Jones v. Attorney General of Trinidad and Tobago,** Claim No. CV 2017-00720, followed our judgment in **Puttaswamy** (supra) in order to strike down Section 13 of the Sexual Offences Act, 1986 on the ground that the State cannot criminalise sexual relations of the same sex between consenting adults. The court concluded:-

> “**168.** Having regard to the evidence and submissions before this court on all sides, there is no cogent evidence that the legislative objective is sufficiently important to justify limiting the claimant’s rights. Mr. Hosein’s stated objectives of:
>
> **168.1.** Maintaining traditional family and values that represent society;
>
> **168.2.** Preserving the legislation as it is and clarifying the law; and
>
> **168.3.** Extending the offence in section 16 to women and reduce it to serious indecency from gross indecency;
>
> do not counterbalance the claimant’s limit of his fundamental right of which he has given evidence.

> Instead, the court accepts the claimant's position that the law as it stands is not sufficiently important to justify limiting his fundamental rights and that he has proven it on a balance of probabilities."

40. To similar effect is the judgment of the High Court of Fiji in **Dhirendra Nadan v. State**, Case No. HAA0085 of 2005, where a Section similar to Section 377 was held to be inconsistent with the constitutional right of privacy and invalid to the extent that the law criminalises acts constituting private consensual sexual conduct "against the course of nature" between adults.

41. The South African Supreme Court, by a decision of 1999 in **The National Coalition for Gay and Lesbian Equality v. The Minister of Home Affairs**, Case CCT 10/99, after referring to various judgments of other courts, also found a similar section to be inconsistent with the fundamental rights under its Constitution.

42. Another important decision is that of the United Nations Human Rights Committee in **Toonen v. Australia,** Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)**,** dated 31.03.1994. The Committee was called upon to determine whether Mr. Nicholas

Toonen, who resided in the state of Tasmania, had been the victim of arbitrary interference with his privacy, and whether he had been discriminated against on the basis of his sexual orientation of being a homosexual. The Committee found:-

> "**8.2** Inasmuch as Article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that Sections 122 (a), (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.
>
> **8.3** The prohibition against private homosexual behaviour is provided for by law, namely, Sections 122 and 123 of the Tasmanian Criminal Code. As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16 on article 17, the "introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances".(4) The

Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

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**8.5** As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes “by driving underground many of the people at the risk of infection”. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

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**8.7** The State party has sought the Committee's guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

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**10.** Under article 2(3)(a) of the Covenant, the author, victim of a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant, is entitled to a remedy. In the opinion of the Committee, an

effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Criminal Code."

43. As a result of these findings, the Australian Parliament, on 19.12.1994, passed the Human Rights (Sexual Conduct) Act, 1994, Section 4 of which reads as under:-

> "***4. Arbitrary interferences with privacy***
>
> (1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.
>
> (2) For the purposes of this section, an adult is a person who is 18 years old or more."

**Recent Judgments of this Court**

44. **Anuj Garg and Ors. v. Hotel Association of India and Ors.**, (2008) 3 SCC 1, is an important decision of this Court, which dealt with the constitutional validity of another pre-constitution enactment, namely, Section 30 of the Punjab Excise Act of 1914, which prohibited employment of any woman in any part of premises in which liquor is consumed by the public. Sinha, J. adverted to the fact that when the original

Act was enacted, the concept of equality between the two sexes was unknown. The Constitution changed all that when it enacted Articles 14 and 15. What is of importance is that when discrimination is made between two sets of persons, the classification must be founded on some rational criteria having regard to the societal conditions as they exist presently, and not as they existed in the early 20th century or even earlier. This was felicitously stated by the learned Judge as follows:-

> "**7.** The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid.
>
> **8.** In *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611, this Court, while referring to an amendment made in UK in relation to a provision which was in pari materia with Section 118 of Indian Succession Act, observed (SCC p. 624, para 28):
>
>> "*28*…The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time."

Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, it was held (*John Vallamattom case,* SCC p. 625, para 33):

> "*33.* It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation."
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**26.** When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They

are now widely accepted both in police as also army services."

45. The Court went on to hold that "proportionality" should be a standard capable of being called reasonable in a modern democratic society (*See* paragraph 36).

In a significant paragraph, the learned Judge held:-

> "**43.** Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other *policy inference* (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the *privacy rights*."

46. The learned Judge then went on to further hold that the standard of judicial scrutiny of legislations, which on their face effect discrimination, is as follows:-

> "**46.** It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. <u>Legislation should not be only</u>

assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

**47.** No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. Heightened level of scrutiny is the normative threshold for judicial review in such cases."

47. Finally, the Court held:-

"**50.** The test to review such a protective discrimination statute would entail a two-pronged scrutiny:

(*a*) the legislative interference (induced by sex discriminatory legislation in the instant case) should be justified in principle,

(*b*) the same should be proportionate in measure.

**51.** The Court's task is to determine whether the measures furthered by the State in the form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy, et al. The bottomline in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.

> In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued."

48. The Section which had been struck down by the High Court was held to be arbitrary and unreasonable by this Court as well.

49. Close on the heels of this Court's judgment in **Suresh Kumar Koushal** (supra) is this Court's judgment in **NALSA** (supra). In this case, the Court had to grapple with the trauma, agony and pain of the members of the transgender community. The Court referred to Section 377 in the following words:

> "**19.** Section 377 IPC found a place in the Penal Code, 1860, prior to the enactment of the Criminal Tribes Act that criminalised all penile non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the proscribed sexual practices. Reference may be made to the judgment of the Allahabad High Court in *Queen Empress* v. *Khairati*, ILR (1884) 6 All 204, wherein a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a "habitual sodomite" and was later acquitted on appeal. In that case, while acquitting him, the Sessions Judge stated as follows: (ILR pp. 204-05)
>
> > "… 'This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a

> eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of a trumpet—and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.'"

> Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including *hijras* and was used as an instrument of harassment and physical abuse against *hijras* and transgender persons."

50. The Court went on to explain the concepts of gender identity and sexual orientation, and relied heavily upon *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.* The Court then went on to hold:

> "**60.** The principles discussed hereinbefore on TGs and the international conventions, including *Yogyakarta Principles*, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, which has sufficient legal and historical justification in our country."

51. Insofar as Articles 15 and 16 of the Constitution were concerned, the Court held:

> "**66.** Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female."

52. Insofar as Article 19(1)(a) of the Constitution and transgenders were concerned, the Court held:

> "**72.** Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(*a*) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or

interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(*a*) of the Constitution of India and the State is bound to protect and recognise those rights."

53. In a significant paragraph relating to the personal autonomy of an individual, this Court held:

> "**75.** Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg* v. *Hotel Assn. of India* [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."

54. The conclusion therefore was:-

> "**83.** 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 TG community."

55. Dr. A.K. Sikri, J., in a separate concurring judgment, spoke of the fundamental and universal principle of the right of choice given to every individual, which is an inseparable part of human rights. He then went on to hold:-

> "**116.1.** Though in the past TGs in India were treated with great respect, that does not remain the scenario any longer. Attrition in their status was triggered with the passing of the Criminal Tribes Act, 1871 which deemed the entire community of hijra persons as innately "criminal" and "adapted to the systematic commission of non-bailable offences". This dogmatism and indoctrination of the Indian people with aforesaid presumption, was totally capricious and nefarious. There could not have been more harm caused to this community with the passing of the aforesaid brutal legislation during the British Regime with the vicious and savage mind-set. To add insult to the irreparable injury caused, Section 377 of the Penal Code was misused and abused as there was a tendency, in the British period, to arrest and prosecute TG persons under Section 377 merely on suspicion. To undergo this sordid historical harm caused to TGs of India, there is a need for incessant efforts with effervescence."

56. And in paragraphs 125 and 129, he outlined the role of our Court as follows:-

"**125.** The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, the law has to play more predominant role. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights. It is the denial of social justice which in turn has the effect of denying political and economic justice.

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**129.** As we have pointed out above, our Constitution inheres liberal and substantive democracy with the rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. The rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights."

57. In an unusual final order, the Court declared:-

"**135.** We, therefore, declare:

**135.1.** Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

**135.2.** Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

**135.3.** We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

**135.4.** The Centre and State Governments are directed to operate separate HIV serosurveillance centres since hijras/transgenders face several sexual health issues.

**135.5.** The Centre and State Governments should seriously address the problems being faced by hijras/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

**135.6.** The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

**135.7.** The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

**135.8.** The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

**135.9.** The Centre and the State Governments should also take measures to regain their respect

> and place in the society which once they enjoyed in our cultural and social life."

58. **Puttaswamy** (supra) is the next important nail in the coffin of section 377 insofar as it pertains to consensual sex between same-sex adults. In this judgment, Chandrachud, J. referred approvingly to the **NALSA** (supra) judgment in paragraph 96 and went on to hold that privacy is intrinsic to freedom and liberty. In referring to **Suresh Kumar Koushal** (supra), Chandrachud, J. referred to the judgment as "another discordant note" which directly bears upon the evolution of constitutional jurisprudence on the right to privacy. Chandrachud, J. went on to castigate the judgment in **Suresh Kumar Koushal** (supra), and held:-

> "**144.** Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of

popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream". Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

**145.** The view in *Koushal* [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy-based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

**146.** The decision in *Koushal* [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the *Koushal* [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which *Koushal* [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] has dealt with the privacy-dignity based claims of LGBT persons on this aspect.

147. Since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding."

59. In an important paragraph, the learned Judge finally held:

> "**323.** Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being."

60. Nariman, J., in his judgment, which was concurred in by three other learned Judges, recognized the privacy of choice which protects an individual's autonomy over fundamental personal choices as follows:-

> "**521.** In the Indian context, a fundamental right to privacy would cover at least the following three aspects:
>
> • Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;
>
> • Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have

control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and

• The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(*d*) and (*e*) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(*a*) to (*c*), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us."

61. Kaul, J., in a separate judgment, also joined Chandrachud, J. in castigating **Suresh Kumar Koushal's** judgment as follows:

"**647.** There are two aspects of the opinion of Dr D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of constitutional jurisprudence on the right to privacy he has referred to the judgment in *Suresh Kumar Koushal* v. *Naz Foundation* [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1]. In the challenge laid to Section 377 of the Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, *inter alia*, observed [Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94] that the right to live with dignity and the right to privacy both are recognised as dimensions of Article 21 of

the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the section ultra vires of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr D.Y. Chandrachud, J., who in paras 144 to 146 of his judgment, states that the right to privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to constitutional rights and the courts are often called up on to take what may be categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. The observations made in *Mosley* v. *News Group Papers Ltd.* [Mosley v. News Group Papers Ltd., 2008 EWHC 1777 (QB)], in a broader concept may be usefully referred to:

> "*130.* … It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well-recognised criteria.
>
> *131*. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and

> personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg Court in *Von Hannover* [Von Hannover v. Germany, (2004) 40 EHRR 1] at pp. 60 and 76, would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."

62. Close upon the heels of these three judgments are three other important recent decisions. In **Common Cause v. Union of India**, 2018 5 SCC 1, a case dealing with euthanasia, Dipak Misra, C.J., states as under:-

"**166.** The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognise such dynamism. The Constitution Bench in *Gian Kaur* [Gian Kaur v. State of Punjab, (1996) 2 SCC 648 : 1996 SCC (Cri) 374], as stated earlier, distinguishes attempt to suicide and abetment of suicide from acceleration of the process of natural death which has commenced. The authorities, we have noted from other jurisdictions, have observed the distinctions between the administration of lethal injection or certain medicines to cause painless death and non-administration of certain treatment which can prolong the life in cases where the process of dying that has commenced is not reversible or withdrawal of the treatment that has been given to the patient because of the absolute absence of possibility of saving the life. To explicate, the first part relates to an overt act whereas the second one would come within the sphere of informed consent and authorised omission. The omission of such a nature will not invite any criminal liability if such action is guided by certain safeguards. The concept is based on non-prolongation of life where there is no cure for the state the patient is in and he, under no circumstances, would have liked to have such a degrading state. The words "no cure" have to be understood to convey that the patient remains in the same state of pain and suffering or the dying process is delayed by means of taking recourse to

modern medical technology. It is a state where the treating physicians and the family members know fully well that the treatment is administered only to procrastinate the continuum of breath of the individual and the patient is not even aware that he is breathing. Life is measured by artificial heartbeats and the patient has to go through this undignified state which is imposed on him. The dignity of life is denied to him as there is no other choice but to suffer an avoidable protracted treatment thereby thus indubitably casting a cloud and creating a dent in his right to live with dignity and face death with dignity, which is a preserved concept of bodily autonomy and right to privacy. In such a stage, he has no old memories or any future hopes but he is in a state of misery which nobody ever desires to have. Some may also silently think that death, the inevitable factum of life, cannot be invited. To meet such situations, the Court has a duty to interpret Article 21 in a further dynamic manner and it has to be stated without any trace of doubt that the right to life with dignity has to include the smoothening of the process of dying when the person is in a vegetative state or is living exclusively by the administration of artificial aid that prolongs the life by arresting the dignified and inevitable process of dying. Here, the issue of choice also comes in. Thus analysed, we are disposed to think that such a right would come within the ambit of Article 21 of the Constitution.

**L. *Right of self-determination and individual autonomy***

**167.** Having dealt with the right to acceleration of the process of dying a natural death which is arrested with the aid of modern innovative technology as a part of Article 21 of the Constitution, it is necessary to address the issues of right of self-determination and individual autonomy.

**168.** John Rawls says that the liberal concept of autonomy focuses on choice and likewise, self-determination is understood as exercised through the process of choosing [Rawls, John, *Political Liberalism*, 32, 33 (New York: Columbia University Press, 1993)]. The respect for an individual human being and in particular for his right to choose how he should live his own life is individual autonomy or the right of self-determination. It is the right against non-interference by others, which gives a competent person who has come of age the right to make decisions concerning his or her own life and body without any control or interference of others. Lord Hoffman, in *Reeves* v. *Commr. of Police of the Metropolis* [Reeves v. Commr. of Police of the Metropolis, (2000) 1 AC 360 : (1993) 3 WLR 363 (HL)] has stated: (AC p. 369 B)

> "… Autonomy means that every individual is sovereign over himself and cannot be denied the right to certain kinds of behaviour, even if intended to cause his own death."

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**202.8.** An inquiry into Common Law jurisdictions reveals that all adults with capacity to consent have the right of self-determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The "Emergency Principle" or the "Principle of Necessity" has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid Advance Directive which is free from reasonable doubt and specifying

that he/she does not wish to be treated, then such directive has to be given effect to."

63. In the same case, Chandrachud J. went on to hold:

"**437.** Under our Constitution, the inherent value which sanctifies life is the dignity of existence. Recognising human dignity is intrinsic to preserving the sanctity of life. Life is truly sanctified when it is lived with dignity. There exists a close relationship between dignity and the quality of life. For, it is only when life can be lived with a true sense of quality that the dignity of human existence is fully realised. Hence, there should be no antagonism between the sanctity of human life on the one hand and the dignity and quality of life on the other hand. Quality of life ensures dignity of living and dignity is but a process in realising the sanctity of life.

**438.** Human dignity is an essential element of a meaningful existence. A life of dignity comprehends all stages of living including the final stage which leads to the end of life. Liberty and autonomy are essential attributes of a life of substance. It is liberty which enables an individual to decide upon those matters which are central to the pursuit of a meaningful existence. The expectation that the individual should not be deprived of his or her dignity in the final stage of life gives expression to the central expectation of a fading life: control over pain and suffering and the ability to determine the treatment which the individual should receive. When society assures to each individual a protection against being subjected to degrading treatment in the process of dying, it seeks to assure basic human dignity. Dignity ensures the sanctity of life. The recognition afforded to the autonomy of the individual in matters relating to end-of-life decisions

is ultimately a step towards ensuring that life does not despair of dignity as it ebbs away.

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**441.** The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle. [Richard Delgado, "Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy", Arizona Law Review (1975), Vol. 17, at p. 474.] It protects the most personal and intimate decisions of individuals that affect their life and development. [Ibid.] Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life of individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy. The right to privacy resides in the right to liberty and in the respect of autonomy. [T.L. Beauchamp, "The Right to Privacy and the Right to Die", *Social Philosophy and Policy* (2000), Vol. 17, at p. 276.] The right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity. Few moments could be of as much importance as the intimate and private decisions that we are faced regarding death. [Ibid.] Continuing treatment against the wishes of a patient is not only a violation of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a facet of privacy by this Court."

64. Similarly, in **Shafin Jahan v. Asokan K.M.**, 2018 SCC Online 343, this Court was concerned with the right of an adult

citizen to make her own marital choice. The learned Chief Justice referred to Articles 19 and 21 of the Constitution of India as follows:-

> "**28.** Thus, the pivotal purpose of the said writ is to see that no one is deprived of his/her liberty without sanction of law. It is the primary duty of the State to see that the said right is not sullied in any manner whatsoever and its sanctity is not affected by any kind of subterfuge. The role of the Court is to see that the detenue is produced before it, find out about his/her independent choice and see to it that the person is released from illegal restraint. The issue will be a different one when the detention is not illegal. What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have to come to an end.
>
> XXX
>
> **54.** It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to

his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition."

65. In another recent judgment of a three-Judge Bench, in **Shakti Vahini v. Union of India,** 2018 SCC Online SC 275, which dealt with honour killings, this Court held:-

"**44.** Honour killing guillotines individual liberty, freedom of choice and one's own perception of choice. It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy.

**45.** The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of

an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

**46.** The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the

> notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law."

**Mental Healthcare Act, 2017**

66. Parliament is also alive to privacy interests and the fact that persons of the same-sex who cohabit with each other are entitled to equal treatment.

67. A recent enactment, namely the Mental Healthcare Act, 2017, throws a great deal of light on recent parliamentary legislative understanding and acceptance of constitutional values as reflected by this Court's judgments. Section 2(s) of the Act defines mental illness, which reads as under:

> "***2(s)*** **"mental illness"** means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;"

68. This definition throws to the winds all earlier misconceptions of mental illness including the fact that same-sex couples who indulge in anal sex are persons with mental illness. At one point of time, the thinking in Victorian England and early on in America was that homosexuality was to be considered as a mental disorder. The *amicus curiae* brief of the American Psychiatric Association in support of the petitioners in **Lawrence v. Texas** (supra) has put paid to this notion. This brief set out the research that has been done in this area as follows:

> ***"D. The Recognition That Homosexuality Is Not A "Mental Disorder"***
>
> The American mental health professions concluded more than a quarter-century ago that homosexuality is not a mental disorder. That conclusion was reached after decades of study of homosexuality by independent researchers, as well as numerous attempts by practitioners in the mental-health professions to effectuate a change in individuals' sexual orientation. During the first half of the 20th century, many mental health professionals regarded homosexuality as a pathological condition, but that perspective reflected untested assumptions supported largely by clinical impressions of patients seeking therapy and individuals whose conduct brought them into the criminal justice system. See J.C. Gonsiorek, The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality: Research Implications for Public

Policy 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991). Those assumptions were not subjected to rigorous scientific scrutiny with nonclinical, nonincarcerated samples until the latter half of the century. Once the notion that homosexuality is linked to mental illness was empirically tested, it proved to be based on untenable assumptions and value judgments.

In one of the first rigorous examinations of the mental health status of homosexuality, Dr. Evelyn Hooker administered a battery of standard psychological tests to homosexual and heterosexual men who were matched for age, IQ, and education. See Evelyn Hooker, The Adjustment of the Male Overt Homosexual, 21 J. Projective Techniques 17-31 (1957). None of the men was in therapy at the time of the study. Based on the ratings of expert judges who were kept unaware of the men's sexual orientation, Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of the psychological testing, and that a similar majority of the two groups appeared to be free of psychopathology. She concluded from her data that homosexuality is not inherently associated with psychopathology and that "homosexuality as a clinical entity does not exist." Id. at 18-19. Hooker's findings were followed over the next two decades by numerous studies, using a variety of research techniques, which similarly concluded that homosexuality is not related to psychopathology or social maladjustment.

In 1973, in recognition that scientific data do not indicate that a homosexual orientation is inherently associated with psychopathology, amicus American Psychiatric Association's Board of Trustees voted to remove homosexuality from the Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. That resolution stated that "homosexuality per se implies no impairment in

judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, Position Statement on Homosexuality and Civil Rights (Dec. 15, 1973), printed in 131 Am. J. Psychiatry 497 (1974). That decision was upheld by a vote of the Psychiatric Association's membership the following year. After a thorough review of the scientific evidence, amicus American Psychological Association adopted the same position in 1975, and urged all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation. See Am. Psychol. Ass'n, Minutes of the Annual Meeting of the Council of Representatives, 30 Am. Psychologist 620, 633 (1975). Amicus National Association of Social Workers (NASW) has adopted a similar policy. See NASW, Policy Statement on Lesbian and Gay Issues (Aug. 1993) (approved by NASW Delegate Assembly), reprinted in NASW, Social Work Speaks: NASW Policy Statements 162 (3d ed. 1994).

Of course, as is the case for heterosexuals, some homosexuals have mental illnesses, psychological disturbances, or poor social adjustment. Gay men, lesbians, and bisexuals also may be at somewhat greater risk for some kinds of psychological problems because of stresses associated with the experiences of social stigma and prejudice (see pp. 23-27, infra). But research conducted over four decades has established that "homosexuality in and of itself bears no necessary relationship to psychological adjustment." The efforts to "cure" homosexuality that were prevalent in earlier generations—which included hypnosis, administration of hormones, aversive conditioning with electric shock or nausea-inducing drugs, lobotomy, electroshock, and castration—are now regarded by the mental-health professions as regrettable."

69. It also outlined the prejudice, discrimination and violence that has been encountered by gay people, as follows:

> "***A. Discrimination, Prejudice, And Violence Encountered By Gay People***
>
> Lesbians and gay men in the United States encounter extensive prejudice, discrimination, and violence because of their sexual orientation. Intense prejudice against gay men and lesbians was widespread throughout much of the 20th century; public opinion studies routinely showed that, among large segments of the public, gay people were the target of strong antipathy. Although a shift in public opinion concerning homosexuality occurred in the 1990s, hostility toward gay men and lesbians remains common in contemporary American society. Prejudice against bisexuals appears to exist at comparable levels. Discrimination against gay people in employment and housing also appears to remain widespread.
>
> The severity of this anti-gay prejudice is reflected in the consistently high rate of anti-gay harassment and violence in American society. Numerous surveys indicate that verbal harassment and abuse are nearly universal experiences of gay people. Although physical violence is less common, substantial numbers of gay people report having experienced crimes against their person or property because of their sexual orientation. In 2001, the most recent year for which FBI statistics are available, there were 1,375 reported bias motivated incidents against gay men, lesbians, and bisexuals. That figure likely represents only a fraction of such crimes, because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics differs widely

> among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack confidence that the assailants will be caught.
>
> Although homosexuality is not a mental disorder, this societal prejudice against gay men and lesbians can cause them real and substantial psychological harm. Research indicates that experiencing rejection, discrimination, and violence is associated with heightened psychological distress among gay men and lesbians. These problems are exacerbated by the fact that, because of anti-gay stigma, gay men and lesbians have less access to social support and other resources that assist heterosexuals in coping with stress. Although many gay men and lesbians learn to cope with the social stigma against homosexuality, efforts to avoid that social stigma through attempts to conceal or dissimulate sexual orientation can be seriously damaging to the psychological well-being of gay people. Lesbians and gay men have been found to manifest better mental health to the extent that they feel positively about their sexual orientation and have integrated it into their lives through "coming out" and participating in the gay community. Being able to disclose one's sexual orientation to others also increases the availability of social support, which is crucial to mental health."

70. Expressing its approval of the position taken by the American Psychiatric Association, the Indian Psychiatric Society in its recent Position Statement on Homosexuality dated 02.07.2018 has stated:-

> "In the opinion of the Indian Psychiatric Society (IPS) homosexuality is not a psychiatric disorder.
>
> This is in line with the position of American Psychiatric Association and The International Classification of Diseases of the World health Organization which removed homosexuality from the list of psychiatric disorders in 1973 and 1992 respectively.
>
> The I.P.S recognizes same-sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. 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.
>
> The Indian Psychiatric Society further supports de-criminalization of homosexual behavior."

71. The US Supreme Court, in its decision in **Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.,** 576 US (2015), also took note of the enormous sufferings of homosexual persons in the time gap between **Bowers** (supra) and **Lawrence v. Texas** (supra)**,** in the following words:-

> "This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers*, a bare majority upheld a law criminalizing same-sex intimacy. See 478 U.S., at 186, 190–195. That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action

> that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the *Bowers* Court. See *id.*, at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); *id.*, at 214 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting). That is why *Lawrence* held *Bowers* was "not correct when it was decided." 539 U.S., at 578. Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen."

72. The present definition of mental illness in the 2017 Parliamentary statute makes it clear that homosexuality is not considered to be a mental illness. This is a major advance in our law which has been recognized by the Parliament itself. Further, this is buttressed by Section 3 of the Act which reads as follows:-

> *"**3. Determination of Mental Illness.*** (1) Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government.
>
> (2) No person or authority shall classify a person as a person with mental illness, except for purposes

directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force.

(3) Mental illness of a person shall not be determined on the basis of—

(a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person;

(b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community.

(4) Past treatment or hospitalisation in a mental health establishment though relevant, shall not by itself justify any present or future determination of the person's mental illness.

(5) The determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent court."

73. Mental illness in our statute has to keep pace with international notions and accepted medical standards including the latest edition of the International Classification of Diseases of the World Health Organization under Section 3(1) of the Act. Under Section 3(3), mental illness shall not be determined on the basis of social status or membership of a cultural group or for any other reason not directly relevant to the mental health of

the person. More importantly, mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community. It is thus clear that Parliament has unequivocally declared that the earlier stigma attached to same-sex couples, as persons who are regarded as mentally ill, has gone for good. This is another very important step forward taken by the legislature itself which has undermined one of the basic underpinnings of the judgment in **Suresh Kumar Koushal** (supra).

Section 21(1)(a) is important and set out hereinbelow:

> "***21. Right to equality and non-discrimination.*** (1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:–
>
> (a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;"

74. This Section is parliamentary recognition of the fact that gay persons together with other persons are liable to be affected with mental illness, and shall be treated as equal to the

other persons with such illness as there is to be no discrimination on the basis of sexual orientation. Section 30 is extremely important and reads as under:

> "***30. Creating awareness about mental health and illness and reducing stigma associated with mental illness.***
> The appropriate Government shall take all measures to ensure that,—
> (a) the provisions of this Act are given wide publicity through public media, including television, radio, print and online media at regular intervals;
> (b) the programmes to reduce stigma associated with mental illness are planned, designed, funded and implemented in an effective manner;
> (c) the appropriate Government officials including police officers and other officers of the appropriate Government are given periodic sensitisation and awareness training on the issues under this Act."

75. Section 115 largely does away with one other outmoded Section of the Indian Penal Code, namely, Section 309. This Section reads as follows.

> "***115. Presumption of severe stress in case of attempt to commit suicide.*** (1) Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.
>
> (2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to

> commit suicide, to reduce the risk of recurrence of attempt to commit suicide."

76. Instead of the inhumane Section 309 which has remained on the statute book for over 150 years, Section 115 makes it clear that Section 309 is rendered largely ineffective, and on the contrary, instead of committing a criminal offence, any person who attempts to commit suicide shall be presumed to have severe stress and shall not be tried and punished under Section 309 of the Indian Penal Code. More importantly, the Government has an affirmative duty to provide care, treatment and rehabilitation to such a person to reduce the risk of recurrence of that person's attempt to commit suicide. This parliamentary declaration under Section 115 again is in keeping with the present constitutional values, making it clear that humane measures are to be taken by the Government in respect of a person who attempts to commit suicide instead of prosecuting him for the offence of attempt to commit suicide.

77. And finally, Section 120 of the Act reads as under:-

> "***120. Act to have overriding effect.*** The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith

> contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

78. The Latin maxim *cessant ratione legis, cessat ipsa lex,* meaning when the reason for a law ceases, the law itself ceases, is a rule of law which has been recognized by this Court in **H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Dept,** 1979 4 SCC 642 at paragraph 29, and **State of Punjab v. Devans Modern Breweries Ltd.,** (2004) 11 SCC 26 at paragraph 335. It must not be forgotten that Section 377 was the product of the Victorian era, with its attendant puritanical moral values. Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with

- as Justice Holmes said in the lines quoted above in this judgment - a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.

79. Given our judgment in **Puttaswamy** (supra), in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons.

80. The Union of India, seeing the writing on the wall, has filed an affidavit in which it has not opposed the Petitioners but left the matter to be considered by the wisdom of this Court. Some of the intervenors have argued in favour of the retention of Section 377 *qua* consenting adults on the grounds that homosexual acts are not by themselves proscribed by Section 377. Unless there is penetration in the manner pointed out by the explanation to the Section, no offence takes place. They

have also added that the Section needs to be retained given the fact that it is only a parliamentary reflection of the prevailing social mores of today in large segments of society. According to them, this furthers a compelling state interest to reinforce morals in public life which is not disproportionate in nature. We are afraid that, given the march of events in constitutional law by this Court, and parliamentary recognition of the plight of such persons in certain provisions of the Mental Healthcare Act, 2017, it will not be open for a constitutional court to substitute societal morality with constitutional morality, as has been stated by us hereinabove. Further, as stated in **S. Khushboo v. Kanniammal and Anr.**, (2010) 5 SCC 600, at paragraphs 46 and 50, this Court made it clear that notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive - sin is not punishable on earth by Courts set up by the State but elsewhere; crime alone is punishable on earth. To confuse the one with the other is what causes the death knell of Section 377, insofar as it applies to consenting homosexual adults.

81. Another argument raised on behalf of the intervenors is that change in society, if any, can be reflected by amending laws by the elected representatives of the people. Thus, it would be open to the Parliament to carve out an exception from Section 377, but this Court should not indulge in taking upon itself the guardianship of changing societal mores. Such an argument must be emphatically rejected. The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.[6] One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism

[6] This phrase occurs in one of the most celebrated footnotes in the US Supreme Court's constitutional history – namely, Footnote 4 of **United States v. Carolene Products Co.**, 304 U.S. 144 (1938).

in India.[7] Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.

82. Insofar as Article 14 is concerned, this Court in **Shayara Bano v. Union of India,** (2017) 9 SCC 1, has stated, in paragraph 101, that a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle, as also if it is excessive or disproportionate. We find that Section 377, in penalizing consensual gay sex, is manifestly arbitrary. Given modern psychiatric studies and legislation which recognizes that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized, the Section must be held to be a provision which is capricious and irrational. Also, roping in such persons with sentences going upto life imprisonment is clearly excessive and disproportionate, as a result of which, when applied to such persons, Articles 14 and 21 of the Constitution

[7] In William Shakespeare's *Julius Caesar* (Act III, Scene 1), Caesar tells Cassius-

*"I could be well moved, if I were as you;*
*If I could pray to move, prayers would move me:*
*But I am constant as the Northern Star,*
*Of whose true-fixed and resting quality*
*There is no fellow in the firmament."*

would clearly be violated. The object sought to be achieved by the provision, namely to enforce Victorian mores upon the citizenry of India, would be out of tune with the march of constitutional events that has since taken place, rendering the said object itself discriminatory when it seeks to single out same-sex couples and transgenders for punishment.

83. As has been stated in the judgment of Nariman, J. in **Shreya Singhal v. Union of India**, (2015) 5 SCC 1, the chilling effect caused by such a provision would also violate a privacy right under Article 19(1)(a), which can by no stretch of imagination be said to be a reasonable restriction in the interest of decency or morality (*See* paragraphs 87 to 94).

84. We may hasten to add, that the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* discussed below, which were also referred to by Radhakrishnan, J. in **NALSA** (supra), conform to our constitutional view of the fundamental rights of the citizens of India and persons who come to this Court.

85. The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, had undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

86. A distinguished group of human rights experts drafted, developed, discussed and refined these Principles. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6th to 9th November, 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.

87. A few relevant extracts from the Yogyakarta Principles and its Preamble are as follows:-

"***Preamble***

WE, THE INTERNATIONAL PANEL OF EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW AND ON SEXUAL ORIENTATION AND GENDER IDENTITY,

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UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

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FOLLOWING AN EXPERTS' MEETING HELD IN YOGYAKARTA, INDONESIA FROM 6 TO 9 NOVEMBER 2006, HEREBY ADOPT THESE PRINCIPLES:

**1.** ***The right to the universal enjoyment of human rights***.—All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

***States shall***:

(*a*) embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

(*b*) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

(*c*) undertake programmes of education and awareness to promote and enhance the full

enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

(*d*) integrate within State policy and decision making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

**2. *The rights to equality and non-discrimination***.—Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

***States shall***:

(*a*) embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and

interpretation, and ensure the effective realisation of these principles;

(*b*) repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(*c*) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(*d*) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

(*e*) in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

(*f*) take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

**3.** ***The right to recognition before the law***.— Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery,

sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

***States shall***:

(*a*) ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

(*b*) take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

(*c*) take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person's profound self-defined gender identity;

(*d*) ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

(*e*) ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

(*f*) undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

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**4.** ***The right to life***.—Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

***States shall***:

(*a*) repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same-sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

(*b*) remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

(*c*) cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

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**6.** ***The right to privacy***.—Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and

reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

***States shall***:

(*a*) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

(*b*) repeal all laws that criminalise consensual sexual activity among persons of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(*c*) ensure that criminal and other legal provisions of general application are not applied de facto to criminalise consensual sexual activity among persons of the same-sex who are over the age of consent;

(*d*) repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

(*e*) release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

(*f*) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from

arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

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**18.** ***Protection from medical abuses***.—No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

***States shall***:

(*a*) take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

(*b*) take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

(*c*) establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

(*d*) ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

(*e*) review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

(*f*) ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

**19.** ***The right to freedom of opinion and expression***.— Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

***States shall***:

(*a*) take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

(*b*) ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of

> such organisations are non-discriminatory on the basis of sexual orientation or gender identity;
>
> (*c*) take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;
>
> (*d*) ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;
>
> (*e*) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;
>
> (*f*) ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate."
>
> (Emphasis supplied)

88. These principles give further content to the fundamental rights contained in Articles 14, 15, 19 and 21, and viewed in the light of these principles also, Section 377 will have to be declared to be unconstitutional.

89. Given the aforesaid, it has now to be decided as to whether the judgment in **Suresh Kumar Koushal** (supra) is correct. **Suresh Kumar Koushal's** judgment (supra) first begins with the presumption of constitutionality attaching to pre-

constitutional laws, such as the Indian Penal Code. The judgment goes on to state that pre-constitutional laws, which have been adopted by Parliament and used with or without amendment, being manifestations of the will of the people of India through Parliament, are presumed to be constitutional. We are afraid that we cannot agree.

90. Article 372 of the Constitution of India continues laws in force in the territory of India immediately before the commencement of the Constitution. That the Indian Penal Code is a law in force in the territory of India immediately before the commencement of this Constitution is beyond cavil. Under Article 372(2), the President may, by order, make such adaptations and modifications of an existing law as may be necessary or expedient to bring such law in accord with the provisions of the Constitution. The fact that the President has not made any adaptation or modification as mentioned in Article 372(2) does not take the matter very much further. The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is

aware of its limitations in enacting laws – it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code. In fact, in the majority judgment of B.P. Jeevan Reddy, J. in **New Delhi Municipal Council v. State of Punjab and Ors.**, (1997) 7 SCC 339, the Punjab Municipal Act of 1911 was deemed to be a post-constitutional law inasmuch as it was extended to Delhi only in 1950, as a result of which the presumption of constitutionality was raised. Ahmadi, C.J.'s dissenting opinion correctly states that if a pre-constitutional law is challenged, the presumption of constitutional validity would not obtain. The relevant paragraph is extracted below:-

> "**119.** Reddy, J. has taken the view that the Doctrine of Presumption of Constitutionality of Legislations requires the saving of the taxes which these Acts impose upon the commercial activities of State

> Governments. The Act is a pre-constitutional enactment. The basis of this doctrine is the assumed intention of the legislators not to transgress constitutional boundaries. It is difficult to appreciate how that intention can be assumed when, at the time that the law was passed, there was no such barrier and the limitation was brought in by a Constitution long after the enactment of the law. (This Court has in a Constitution Bench decision, *Gulabbhai Vallabbhai Desai* v. *Union of India* [AIR 1967 SC 1110 : (1967) 1 SCR 602] , (AIR at p. 1117 raised doubts along similar lines). The Framers obviously wanted the law under Article 289(2) to be of a very high standard. Can these laws, which are silent on the most important aspect required by Article 289(2), i.e., the specification of the trading activities of State Governments which would be liable to Union taxation, be said to meet with that standard?"

91. It is a little difficult to subscribe to the view of the Division Bench that the presumption of constitutionality of Section 377 would therefore attach.

92. The fact that the legislature has chosen not to amend the law, despite the 172nd Law Commission Report specifically recommending deletion of Section 377, may indicate that Parliament has not thought it proper to delete the aforesaid provision, is one more reason for not invalidating Section 377, according to **Suresh Kumar Koushal** (supra). This is a little difficult to appreciate when the Union of India admittedly did not

challenge the Delhi High Court judgment striking down the provision in part. Secondly, the fact that Parliament may or may not have chosen to follow a Law Commission Report does not guide the Court's understanding of its character, scope, ambit and import as has been stated in **Suresh Kumar Koushal** (supra). It is a neutral fact which need not be taken into account at all. All that the Court has to see is whether constitutional provisions have been transgressed and if so, as a natural corollary, the death knell of the challenged provision must follow.

93. It is a little difficult to appreciate the Court stating that the ambit of Section 377 IPC is only determined with reference to the sexual act itself and the circumstances in which it is executed. It is also a little difficult to appreciate that Section 377 regulates sexual conduct regardless of gender identity and orientation.

94. After 2013, when Section 375 was amended so as to include anal and certain other kinds of sexual intercourse between a man and a woman, which would not be criminalized as rape if it was between consenting adults, it is clear that if

Section 377 continues to penalize such sexual intercourse, an anomalous position would result. A man indulging in such sexual intercourse would not be liable to be prosecuted for rape but would be liable to be prosecuted under Section 377. Further, a woman who could, at no point of time, have been prosecuted for rape would, despite her consent, be prosecuted for indulging in anal or such other sexual intercourse with a man in private under Section 377. This would render Section 377, as applied to such consenting adults, as manifestly arbitrary as it would be wholly excessive and disproportionate to prosecute such persons under Section 377 when the legislature has amended one portion of the law in 2013, making it clear that consensual sex, as described in the amended provision, between two consenting adults, one a man and one a woman, would not be liable for prosecution. If, by having regard to what has been said above, Section 377 has to be read down as not applying to anal and such other sex by a male-female couple, then the Section will continue to apply only to homosexual sex. If this be the case, the Section will offend Article 14 as it will discriminate between heterosexual and

homosexual adults which is a distinction which has no rational relation to the object sought to be achieved by the Section - namely, the criminalization of all carnal sex between homosexual and/or heterosexual adults as being against the order of nature.[8] Viewed either way, the Section falls foul of Article 14.

95. The fact that only a minuscule fraction of the country's population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others, on an application of the recent judgments delivered by this Court after **Suresh Kumar Koushal** (supra), it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision.

[8] An argument was made by the Petitioners that Section 377, being vague and unintelligible, should be struck down on this ground as it is not clear as to what is meant by "against the order of nature". Since Section 377 applies down the line to carnal sex between human beings and animals as well, which is not the subject matter of challenge here, it is unnecessary to go into this ground as the Petitioners have succeeded on other grounds raised by them.

96. For all these reasons therefore, we are of the view that, **Suresh Kumar Koushal** (supra) needs to be, and is hereby, overruled.

97. We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments (*See* (1) *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547 at paragraphs 16, 25 and 52; and (2) *Subramaniam Swamy v. Union of India* (2016) 7 SCC 221 at paragraphs 153 to 156). We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

98. We are also of the view that the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to

reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment.

**……..J.**
**(R.F. Nariman)**

**New Delhi;**
**September 06, 2018.**

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CRIMINAL/CIVIL ORIGINAL JURISDICTION**

**WRIT PETITION (CRIMINAL) NO 76 OF 2016**

**NAVTEJ SINGH JOHAR & ORS. ...Petitioner**

**VERSUS**

**UNION OF INDIA, THR. SECRETARY,**
**MINISTRY OF LAW AND JUSTICE …Respondent**

**WITH**

**WRIT PETITION (CIVIL) NO 572 OF 2016**

**AKKAI PADMASHALI ...Petitioner**

**VERSUS**

**UNION OF INDIA, THR.SECRETARY,**
**MINISTRY OF LAW AND JUSTICE ...Respondent**

**WITH**

**WRIT PETITION (CRIMINAL) NO 88 OF 2018**

**KESHAV SURI ...Petitioner**

**VERSUS**

**UNION OF INDIA ...Respondent**

**WITH**

**WRIT PETITION (CRIMINAL) NO 100 OF 2018**

**ARIF JAFAR ...Petitioner**

**VERSUS**

**UNION OF INDIA AND ORS. ...Respondents**

**WITH**

**WRIT PETITION (CRIMINAL) NO 101 OF 2018**

**ASHOK ROW KAVI AND ORS. ...Petitioners**

**VERSUS**

**UNION OF INDIA AND ORS. ...Respondents**

**AND**

**WITH**

**WRIT PETITION (CRIMINAL) NO 121 OF 2018**

**ANWESH POKKULURI AND ORS. ...Petitioners**

**VERSUS**

**UNION OF INDIA ...Respondent**

**J U D G M E N T**

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## Dr Dhananjaya Y Chandrachud, J

## A From denial to freedom

> "What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization, or worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter."[1]

1 The lethargy of the law is manifest yet again.

2 A hundred and fifty eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. The human instinct to love was caged by constraining the physical manifestation of their sexuality. Gays and lesbians[2] were made subordinate to the authority of a coercive state. A charter of morality made their relationships hateful. The criminal law became a willing instrument of repression. To engage in 'carnal intercourse' against 'the order of nature' risked being tucked away for ten years in a jail. The offence would

[1] Justice Leila Seth, "A mother and a judge speaks out on Section 377", The Times of India, 26 January, 2014.

[2] These terms as well as terms such as "LGBT" and "LGBTIQ" used in the judgement are to be construed in an inclusive sense to include members of all gender and sexual minorities, whose sexual activity is criminalized by the application of Section 377 of the Indian Penal Code, 1860.

be investigated by searching the most intimate of spaces to find tell-tale signs of intercourse. Civilisation has been brutal.

3 Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulay's legacy - the offence under Section 377 of the Penal Code - has continued to exist for nearly sixty eight years after we gave ourselves a liberal Constitution. Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them. The shadows of a receding past confront their quest for fulfillment.

4 Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity. We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society. Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which

define their identities? If there is only one answer to this question, as I believe there is, the tragedy and anguish which Section 377 inflicts must be remedied.

5 The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.

Section 377 provides for rule by the law instead of the rule of law. The rule of law requires a just law which facilitates equality, liberty and dignity in all its facets. Rule by the law provides legitimacy to arbitrary state behaviour.

6 Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of

the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.

7 It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognised and protected by the Constitution. Section 377 of the Penal Code is unconstitutional in so far as it penalises a consensual relationship between adults of the same gender. The constitutional values of liberty and dignity can accept nothing less.

## B "To the wisdom of the Court"

### Union Government before the Court

8 After the hearing commenced, the Additional Solicitor General tendered an affidavit. The Union government states that it leaves a decision on the

validity of Section 377 'to the wisdom of this Court'. Implicit in this is that the government has no view of its own on the subject and rests content to abide by the decision of this Court. During the parleys in Court, the ASG however submitted that the court should confine itself to the reference by ruling upon the correctness of **Suresh Kumar Koushal** v. **Naz Foundation**[3] ("Koushal").

9 We would have appreciated a categorical statement of position by the government, setting out its views on the validity of Section 377 and on the correctness of **Koushal**. The ambivalence of the government does not obviate the necessity for a judgment on the issues raised. The challenge to the constitutional validity of Section 377 must squarely be addressed in this proceeding. That is plainly the duty of the Court. Constitutional issues are not decided on concession. The statement of the Union government does not concede to the contention of the petitioners that the statutory provision is invalid. Even if a concession were to be made, that would not conclude the matter for this Court. All that the stand of the government indicates is that it is to the 'wisdom' of this Court that the matter is left. In reflecting upon this appeal to our wisdom, it is just as well that we as judges remind ourselves of a truth which can unwittingly be forgotten: flattery is a graveyard for the gullible.

[3] (2014) 1 SCC 1

10 Bereft of a submission on behalf of the Union government on a matter of constitutional principle these proceedings must be dealt with in the only manner known to the constitutional court: through an adjudication which fulfills constitutional values and principles.

11 The ASG made a fair submission when he urged that the court should deal with the matter in reference. The submission, to its credit, would have the court follow a path of prudence. Prudence requires, after all, that the Court should address itself to the controversy in the reference without pursuing an uncharted course beyond it. While accepting the wisdom of the approach suggested by the ASG, it is nonetheless necessary to make some prefatory observations on the scope of the reference.

12 The correctness of the decision in **Koushal** is in question. **Koushal** [as indeed the decision of the Delhi High Court in **Naz Foundation** v. **Government of NCT of Delhi**[4] ("**Naz**")] dealt with the validity of Section 377 which criminalizes even a consensual relationship between adults of the same gender who engage in sexual conduct ('carnal intercourse against the order of nature'). In dealing with the validity of the provision, it is necessary to understand the nature of the constitutional right which LGBT individuals claim.

[4](2010) Cri LJ 94

According to them, the right to be in a relationship with a consenting adult of the same gender emanates from the right to life, as a protected value under the Constitution. They ground their right on the basis of an identity resting in their sexual orientation. According to them, their liberty and dignity require both an acknowledgement as well as a protection under the law, of their sexual orientation. Representing their identity, based on sexual orientation, to the world at large and asserting it in their relationship with the community and the state is stated to be intrinsic to the free exercise of speech and expression guaranteed by the Constitution. Sexual orientation is claimed to be intrinsic to the guarantee against discrimination on the ground of sex. The statutory provision, it has been asserted, also violates the fundamental guarantee against arbitrariness because it unequally targets gay men whose sexual expression falls in the area prohibited by Section 377.

13 In answering the dispute in regard to the validity of Section 377, the court must of necessity understand and explain in a constitutional perspective, the nature of the right which is claimed. The challenge to Section 377 has to be understood from the perspective of a rights discourse. While doing so, it becomes necessary to understand the constitutional source from which the claim emerges. When a right is claimed to be constitutionally protected, it is but necessary for the court to analyze the basis of that assertion. Hence, in

answering the reference, it is crucial for the court to place the entitlement of the LGBT population in a constitutional framework. We have approached the matter thus far from the perspective of constitutional analysis. But there is a more simple line of reasoning as well, grounded as we believe, in common-sense. Sexual acts between consenting adults of the same gender constitute one facet – albeit an important aspect – of the right asserted by gay men to lead fulfilling lives. Gay and lesbian relationships are sustained and nurtured in every aspect which makes for a meaningful life. In understanding the true nature of those relationships and the protection which the Constitution affords to them, it is necessary to adopt a perspective which leads to their acceptance as equal members of a humane and compassionate society. Forming a holistic perspective requires the court to dwell on, but not confine itself, to sexuality. Sexual orientation creates an identity on which there is a constitutional claim to the entitlement of a dignified life. It is from that broad perspective that the constitutional right needs to be adjudicated.

## C From "The Ashes of the Gay"

"Democracy
It's coming through a hole in the air,
…
It's coming from the feel
that this ain't exactly real,
or it's real, but it ain't exactly there.
From the wars against disorder,
from the sirens night and day,

from the fires of the homeless,
from the ashes of the gay:
Democracy is coming…"[5]

14 Section 377 of the Indian Penal Code, 1860 ("IPC") has made 'carnal intercourse against the order of nature' an offence. This provision, understood as prohibiting non-peno vaginal intercourse, reflects the imposition of a particular set of morals by a colonial power at a particular point in history. A supposedly alien law,[6] Section 377 has managed to survive for over 158 years, impervious to both the anticolonial struggle as well as the formation of a democratic India, which guarantees fundamental rights to all its citizens. An inquiry into the colonial origins of Section 377 and its postulations about sexuality is useful in assessing the relevance of the provision in contemporary times.[7]

15 Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India and principal architect of the IPC, cited two main sources from which he drew in drafting the Code: the French (Napoleonic) Penal Code, 1810 and Edward Livingston's Louisiana Code.[8] Lord Macaulay also

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[5] Lyrics from Leonard Cohen's song "Democracy" (1992).

[6] See Same-Sex Love in India: A Literary History (Ruth Vanita and Saleem Kidwai, eds.), Penguin India (2008) for writings spanning over more than 2,000 years of Indian literature which demonstrate that same-sex love has flourished, evolved and been embraced in various forms since ancient times.

[7] Law like Love: Queer Perspectives on Law (Arvind Narrain and Alok Gupta, eds.), Yoda Press (2011).

[8] K. N. Chandrasekharan Pillai and Shabistan Aquil, "Historical Introduction to the Indian Penal Code", in Essays on the Indian Penal Code, New Delhi, Indian Law Institute (2005); Siyuan Chen, "Codification, Macaulay and the Indian Penal Code [Book Review], Singapore Journal of Legal Studies, National University of Singapore, Faculty of Law (2011), at pages 581-584.

drew inspiration from the English common law and the British Royal Commission's 1843 Draft Code.[9] Tracing that origin, English jurist Fitzjames Stephen observes:

> "The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India."[10]

In order to understand the colonial origins of Section 377, it is necessary to go further back to modern English law's conception of anal and oral intercourse, which was firmly rooted in Judeo-Christian morality and condemned non-procreative sex.[11] Though Jesus himself does not reference homosexuality or homosexual sex,[12] the "Holiness Code"[13] found in Leviticus provides thus:

> "You shall not lie with a male as with a woman. It is an abomination. [18:22]
>
> If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. [19:13]
>
> If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them. [20:13]"

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[9] Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia", Asian Journal of Comparative Law, Vol. 4 (2009), at page 11 ("Douglas"); David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century", Modern Asian Studies, Vol. 32 (1998), at pages 513-557.

[10] Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", Carleton University (2011).

[11] Michael Kirby, "The Sodomy Offence: England's Least Lovely Law Export?" Journal of Commonwealth Criminal Law, Inaugural Issue (2011).

[12] Douglas, supra note 9, at page 4.

[13] Ibid at page 2.

Another Judeo-Christian religious interpretation refers to "sodomy", a term used for anal intercourse that is derived from an interpretation of Genesis 18:20 of the Old Testament,[14] known as the story of Sodom and Gomorrah. Briefly, when two angels took refuge in the home of Lot, the men of the town of Sodom surrounded the house and demanded that the angels be sent out so that the men may "know" them (in this interpretation, with sexual connotations). When Lot offered them his two virgin daughters instead, the men of Sodom responded by threatening Lot. The angels then blinded the "Sodomites."[15] The use of the term "sodomites" to describe those who engaged in anal intercourse emerged in the 13th Century, and the term "sodomy" was used as a euphemism for a number of sexual 'sins' two centuries earlier.[16]

16 The preservation of the Judeo-Christian condemnation of homosexuality is also attributed to the Jewish theologian, Philo of Alexandria, who is regarded as the father of the Church Fathers and who reviled homosexuals and called for their execution.[17] The condemnation of homosexuality can also be traced to Roman law. Emperor Justinian's Code of 529, for instance, stated

[14] Douglas, supra note 9, at page 4.
[15] Jessica Cecil, "The Destruction of Sodom and Gomorrah", British Broadcasting Company, 11 February 2017.
[16] Douglas, supra note 9, at page 4; KSN Murthy's Criminal Law: Indian Penal Code (KVS Sarma ed), Lexis Nexis (2016).
[17] Philo, translated by F.H. Colson and G.H. Whitaker, 10 Volumes, (Cambridge: Harvard University Press, 1929-1962).

that persons who engaged in homosexual sex were to be executed.[18] From Rome, the condemnation of homosexuality spread across Europe, where it manifested itself in ecclesiastical law.[19] During the Protestant Reformation, these laws shifted from the ecclesiastical to the criminal domain, beginning with Germany in 1532.[20]

While ecclesiastical laws against homosexual intercourse were well established in England by the 1500s,[21] England's first criminal (non-ecclesiastical) law was the Buggery Act of 1533, which condemned "the detestable and abominable vice of buggeri committed with mankind or beest."[22] "Buggery" is derived from the old French word for heretic, "bougre", and was taken to mean anal intercourse.[23]

17 The Buggery Act, 1533, which was enacted by Henry VIII, made the offence of buggery punishable by death, and continued to exist for nearly 300 years before it was repealed and replaced by the Offences against the Person Act, 1828. Buggery, however, remained a capital offence in England until 1861, one year after the enactment of the IPC. The language of Section 377

[18] David F. Greenberg and Marcia H. Bystryn, "Christian Intolerance of Homosexuality", American Journal of Sociology, Vol. 88 (1982), at pages 515-548.
[19] Douglas, supra note 9, at pages 5 and 8.
[20] Ibid at page 5.
[21] Ibid at page 2.
[22] The Buggery Act, 1533.
[23] Douglas, supra note 9, at page 2.

has antecedents in the definition of buggery found in Sir Edward Coke's late 17th Century compilation of English law:[24]

> "...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."[25]

18 The Criminal Law Amendment Act, 1885 made "gross indecency" a crime in the United Kingdom, and was used to prosecute homosexuals where sodomy could not be proven. In 1895, Oscar Wilde was arrested under the Act for 'committing acts of gross indecency with male persons'.[26] During Wilde's trial, the Prosecutor, referring to homosexual love, asked him, "What is 'the love that dare not speak its name'?" Wilde responded:

> "The love that dare not speak its name" in this century is such a great affection of an elder for a younger man as there was between David and Jonathan, such as Plato made the very basis of his philosophy, and such as you find in the sonnets of Michelangelo and Shakespeare. It is that deep spiritual affection that is as pure as it is perfect. It dictates and pervades great works of art, like those of Shakespeare and Michelangelo, and those two letters of mine, such as they are. It is in this century misunderstood, so much misunderstood that it may be described as "the love that dare not speak its name," and on that account of it I am placed where I am now. It is beautiful, it is fine, it is the noblest form of affection. There is nothing unnatural about it. It is intellectual, and it repeatedly exists between an older and a younger man, when the older man has intellect, and the younger man has all the joy, hope and glamour of life before him. That it should be so, the world

[24] Ibid at 7.
[25] Human Rights Watch. This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (2008).
[26] Douglas, supra note 9, at page 15.

> does not understand. The world mocks at it, and sometimes puts one in the pillory for it."[27]

Wilde was held guilty and was sentenced to two years' hard labour and subsequently incarcerated.

Following World War II, arrests and prosecutions of homosexuals increased. Alan Turing, the renowned mathematician and cryptographer who was responsible for breaking the Nazi Enigma code during World War II, was convicted of 'gross indecency' in 1952. In order to avoid a prison sentence, Turing was forced to agree to chemical castration. He was injected with synthetic female hormones. Less than two years after he began the hormone treatment, Turing committed suicide. The Amendment Act (also known as the Labouchere Amendment) remained in English law until 1967. Turing was posthumously pardoned in 2013, and in 2017, the UK introduced the Policing and Crime Bill, also called the "Turing Law," posthumously pardoning 50,000 homosexual men and providing pardons for the living.

In the wake of several court cases in which homosexuality had been featured, the British Parliament in 1954 set up the Wolfenden Committee, headed by

[27] H. Montgomery Hyde, John O'Connor, and Merlin Holland, The Trials of Oscar Wilde (2014), at page 201.

John Wolfenden, to "consider…the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts", as well as the laws relevant to prostitution and solicitation. The Wolfenden Report of 1957, which was supported by the Church of England,[28] proposed that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' and recommended that homosexual acts between two consenting adults should no longer be a criminal offence.[29]

19 The success of the report led England and Wales to enact The Sexual Offences Act, 1967, which decriminalized private homosexual sex between two men over the age of twenty-one. Britain continued to introduce and amend laws governing same-sex intercourse to make them more equal, including the lowering of the age of consent for gay/bisexual men to sixteen in 2001.[30] In May 2007, in a statement to the UN Human Rights Council, the UK, which imposed criminal prohibitions against same-sex intercourse in its former colonies across the world, committed itself to the cause of worldwide decriminalization of homosexuality.[31] Today, India continues to enforce a law

[28] Ibid at 25.
[29] Report of the Departmental Committee on Homosexual Offences and Prostitution (1957) ("Wolfenden Report").
[30] Sexual Offences (Amendment) Act 2000, Parliament of the United Kingdom.
[31] Douglas, supra note 9, at page 29.

imposed by an erstwhile colonial government, a law that has been long done away with by the same government in its own jurisdiction.

## C.I "Arc of the moral universe"

20 Lord Macaulay was greatly influenced by English philosopher and jurist Jeremy Bentham, who coined the term codification and argued for replacing existing laws with clear, concise, and understandable provisions that could be universally applied across the Empire.[32] Ironically, in a 1785 essay, Bentham himself wrote one of the earliest known defences of homosexuality in the English language, arguing against the criminalization of homosexuality. However, this essay was only discovered 200 years after his death.[33]

21 The Law Commission's 1837 draft of the Penal Code (prepared by Lord Macaulay) contained two sections (Clauses 361 and 362), which are considered the immediate precursors to Section 377:

> "OF UNNATURAL OFFENCES
>
> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and

[32] Douglas, supra note 9, at page 9.
[33] Ibid.

> must not be less than two years, and shall also be liable to fine.
>
> 362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

Both the draft clauses are vague in their description of the acts they seek to criminalize. Lord Macaulay also omitted an explanation to the Clauses. In a note presented with the 1837 draft, Lord Macaulay elaborated:

> "Clauses 361 and 362 relate to an odious class of offences respecting which **it is desirable that as little as possible be said.** We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. **We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community** by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."[34] (Emphasis supplied)

So abominable did Macaulay consider these offences that he banished the thought of providing a rationale for their being made culpable. The prospect of a public discussion was revolting.

[34] Enze Han, Joseph O'Mahoney, "British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire", Routledge (2018).

After twenty-five years of revision, the IPC entered into force on 1 January 1862, two years after Lord Macaulay's death. The IPC was the first codified criminal code in the British Empire. Section 377 of the revised code read as follows:

> "Of Unnatural Offences
>
> 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][35], 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."

22 The Explanation is unique in that it requires proof of penetration – something that British Law did not. The two clauses in the Draft Code fell somewhere in between, requiring proof of "touch".[36]

By the time India gained independence in 1947, Britain had introduced Penal Codes similar to the IPC in other former colonies, including Zanzibar (Tanzania) in 1867, Singapore, Malaysia, and Brunei in 1871, Ceylon (Sri Lanka) in 1885, Burma (Myanmar) in 1886,[37] East Africa Protectorate (Kenya)

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[35] Changed from "transportation for life" by Act 26 of 1955.
[36] Douglas, supra note 9, at page 16.
[37] Nang Yin Kham, "An Introduction to the Law and Judicial System of Myanmar", Centre for Asia Legal Studies Faculty of Law, National University of Singapore, Working Paper 14/02, (2014).

in 1897, Sudan in 1889, Uganda in 1902, and Tanganyika (Tanzania) in 1920.[38] Under Article 372(1) of the Indian Constitution, which provides that all laws in force prior to the commencement of the Constitution shall continue to be in force until altered or repealed, the IPC and many other pre-Independence laws were "saved" and allowed to operate in Independent India.

23 While Section 377 has been used to prosecute non-consensual sexual acts, it has also been used to prosecute consensual sexual acts. In **(Meharban) Nowshirwan Irani** v. **Emperor**[39], for instance, a police officer observed Nowshirwan, a young shopkeeper, engaged in homosexual acts with a young man, Ratansi, through a keyhole in Nowshirwan's house. The Prosecution argued that the acts were non-consensual, but could not prove coercion.[40] The High Court of Sindh ultimately set aside the conviction based on insufficient evidence. Nevertheless, what should have been an intimate act between two consenting parties in their bedroom became a public scandal and the subject of judicial scrutiny.[41]

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[38] Supra note 34.
[39] AIR 1934 Sind. 206.
[40] Arvind Narrain, "'That Despicable Specimen of Humanity': Policing of Homosexuality in India", in Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India (Kalpana Kannabiran and Ranbir Singh eds.), Sage (2008).
[41] Arvind Narrain, "A New Language of Morality: From the Trial of Nowshirwan to the Judgement in Naz Foundation", The Indian Journal of Constitutional Law, Vol. 4 (2010).

In **D P Minwalla** v. **Emperor**[42], Minawalla and Tajmahomed, were seen having anal intercourse in a lorry and were arrested, charged, and found guilty under Section 377. Tajmahomed was sentenced to four months rigorous imprisonment, and Minawalla, who was charged with abetment, was sentenced to a fine of Rs 100 and imprisonment until the rising of the Bench. Minawalla appealed the decision on the grounds that he was not a consenting partner, and submitted himself to a medical exam. The judge was unconvinced, however, and Minawalla's original sentence was upheld. The Court, convinced that the acts were consensual, found the men guilty under Section 377.[43]

In **Ratan Mia** v. **State of Assam**[44], the Court convicted two men (one aged fifteen and a half, the other twenty) under Section 377 and treated them as equally culpable, as he was unable to cast one of them as the perpetrator and the other as the victim or abettor. Both men were originally sentenced to imprisonment for six months and a fine of Rs 100. After Nur had spent six years in prison and appealed three times,[45] both men's sentences were

[42] AIR 1935 Sind. 78.
[43] Supra note 40.
[44] (1988) Cr.L.J. 980.
[45] Suparna Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code" in Queering India: Same-Sex Love and Eroticism in Indian Culture and Society (Ruth Vanita ed.), Routledge (2002).

reduced to seven days rigorous imprisonment, in view of the fact that they were first time offenders under the age of twenty-one.[46]

Even though the government is not proactively enforcing a law that governs private activities, the psychological impact for homosexuals who are, for all practical purposes, felons in waiting, is damaging in its own right:

> "...The true impact of Section 377 on queer lives is felt outside the courtroom and must not be measured in terms of legal cases. Numerous studies, including both documented and anecdotal evidence, tell us that Section 377 is the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the state. There are innumerable stories that can be cited – from the everyday violence faced by hijras [a distinct transgender category] and kothis [effeminate males] on the streets of Indian cities to the refusal of the National Human Rights Commission to hear the case of a young man who had been given electro-shock therapy for nearly two years. A recent report by the People's Union for Civil Liberties (Karnataka), showed that Section 377 was used by the police to justify practices such as illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families."[47]

Before the end of the 19th century, gay rights movements were few and far between. Indeed, when Alfred Douglas, Oscar Wilde's lover, wrote in his 1890s poem entitled "Two Loves" of "the love that dare not speak its name", he was alluding to society's moral disapprobation of homosexuality.[48] The 20th

[46] Ibid.
[47] Douglas, supra note 9, at page 21; "Introduction" to Because I Have a Voice: Queer Politics in India, (Gautam Bhan and Arvind Narrain eds), Yoda Press (2005) at pages 7, 8.
[48] Melba Cuddy-Keane, Adam Hammond and Alexandra Peat, "Q" in Modernism: Keywords, Wiley-Blackwell (2014).

century, however, saw the LGBTIQ community emerge from the shadows worldwide, poised to agitate and demand equal civil rights. LGBTIQ movements focused on issues of intersectionality, the interplay of oppressions arising from being both queer and lower class, coloured, disabled, and so on. Despite the movement making numerous strides forward in the fight for equal rights, incidents of homosexual arrests were nevertheless extant at the turn of the 21st century.

In many cases of unfulfilled civil rights, there is a tendency to operate under the philosophy articulated by Dr. Martin Luther King, that "the arc of the moral universe is long, but it bends towards justice." It is likely that those who subscribe to this philosophy believe that homosexuals should practice the virtue of patience, and wait for society to understand and accept their way of life. What those who purport this philosophy fail to recognize is that Dr King himself argued against the doctrine of "wait":

> "For years now I have heard the word "wait." It rings in the ear of every Negro with a piercing familiarity. This "wait" has almost always meant "never." It has been a tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration. We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied." We have waited for more than three hundred and forty years for our God-given and constitutional rights . . . when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never knowing what to expect next, and plagued with inner fears and outer resentments;

> when you are forever fighting a degenerating sense of "nobodyness" -- then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope, sirs, you can understand our legitimate and unavoidable impatience." (Letter from a Birmingham Jail)[49]

24 Indian citizens belonging to sexual minorities have waited. They have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial-era law – forcing them to live in hiding, in fear, and as second-class citizens. In seeking an adjudication of the validity of Section 377, these citizens urge that the acts which the provision makes culpable should be decriminalised. But this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens.

[49] Martin Luther King Jr., "Letter from a Birmingham Jail" (1963).

## D An equal love

**"Through Love's Great Power**

Through love's great power to be made whole
In mind and body, heart and soul –
Through freedom to find joy, or be
By dint of joy itself set free
In love and in companionhood:
This is the true and natural good.
To undo justice, and to seek
To quash the rights that guard the weak -
To sneer at love, and wrench apart
The bonds of body, mind and heart
With specious reason and no rhyme:
This is the true unnatural crime."[50]

Article 14 is our fundamental charter of equality:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." (Emphasis supplied)

25 In **Naz**, the Delhi High Court held that Section 377 violates Article 14 of the Constitution since the classification on which it is based does not bear any nexus to the object which the provision seeks to achieve.[51] In **Koushal**, this Court rejected the **Naz** formulation on the ground that "those who indulge in carnal intercourse in the ordinary course and those who ... [do so] against the order of nature constitute different classes."[52] **Koushal** held on that logic that

[50] Vikram Seth wrote this poem the morning after the Supreme Court refused to review its decision in Koushal.
[51] Naz Foundation, at para 91.
[52] Koushal, at para 65.

Section 377 does not suffer from arbitrariness or from an irrational classification.

26 A litany of our decisions – to refer to them individually would be a parade of the familiar – indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation.[53] There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.[54]

27 Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism

[53] State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75.
[54] Deepak Sibal v. Punjab University, (1989) 2 SCC 145.

buries the life-giving forces of the Constitution under a mere *mantra*. What it ignores is that Article 14 contains a powerful statement of values – of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in state action. As our constitutional jurisprudence has evolved towards recognizing the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that *avatar,* it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavor and in every facet of human existence.

In **E P Royappa** v. **State of Tamil Nadu**[55], the validity of state action was made subject to the test of arbitrariness:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14…"

[55] (1974) 4 SCC 3

Four decades later, the test has been refined in **Shayara Bano** v. **Union of India**[56]:

> "The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

28 The wording of Section 377 does not precisely map on to a distinction between homosexuals and heterosexuals but a precise interpretation would mean that it penalizes some forms of sexual expression among heterosexuals while necessarily criminalizing every form of sexual expression and intimacy between homosexuals.[57] For Section 377 to withstand the scrutiny of Article 14, it was necessary for the Court in **Koushal** to establish the difference between 'ordinary intercourse' and 'intercourse against the order of nature', the legitimate objective being pursued and the rational nexus between the goal and the classification. However, the **Koushal** approach has been criticised on the ground that while dealing with Article 14, it fell "short of the minimum standards of judicial reasoning that may be expected from the Supreme Court."[58] On a review of the prosecutions under Section 377, **Koushal** conceded that "no uniform test [could] be culled out to classify acts

[56] (2017) 9 SCC 1

[57] Gautam Bhatia, "Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution", Indian Law Review, Vol. 1 (2017), at pages 115-144.

[58] Shubhankar Dam, "Suresh Kumar Koushal and Another v. NAZ Foundation and Others (Civil Appeal No. 10972 of 2013)" Public Law, International Survey Section (2014).

as 'carnal intercourse against the order of nature.'"[59] Yet **Koushal** upheld the classification of sexual acts in Section 377 without explaining the difference between the classes, or the justification for treating the classes differently.

This lack of reasoning and analysis by the Court has been critiqued in scholarly research on the subject. The following extract sums up the criticism with telling effect:

> "The Court says – without an iota of evidence – that there are two classes of persons – those who engage in sexual intercourse in the "ordinary course", and those who don't. What is ordinary course? Presumably, heterosexuality. Why is this ordinary course? Perhaps because there are more heterosexuals than homosexuals around, although the Court gives no evidence for that. Well, there are also more black-haired people in India than brown-haired people. Is sex with a brown-haired person against the order of nature because it happens less often?... *Where is the rational nexus? What is the legitimate governmental objective?* Even if we accept that there is an intelligible differentia here, *on what basis do you criminalize – and thus deny equal protection of laws – to one class of persons?* The Court gives no answer. Alternatively, "ordinary sex" is penal-vaginal, and every other kind of sex is "against the ordinary course of nature". Again, no evidence to back *that* claim up apart from the say-so of the judge."[60]

At the very outset, we must understand the problem with the usage of the term 'order of nature'. What is 'natural' and what is 'unnatural'? And who decides the categorization into these two ostensibly distinct and water-tight compartments? Do we allow the state to draw the boundaries between

[59] Koushal, at para 60.
[60] Gautam Bhatia, "The Unbearable Wrongness of Koushal vs Naz Foundation", Indian Constitutional Law and Philosophy (2013).

permissible and impermissible intimacies between consenting adults? Homosexuality has been documented in almost 1500 species, who "unfortunately are not blessed with rational capabilities (and the propensity to 'nurture' same sex thoughts) as are found in mankind."[61] An interesting article in this regard notes that, "no species has been found in which homosexual behaviour has not been shown to exist, with the exception of species that never have sex at all, such as sea urchins and aphis."[62]

29 In an incisive article,[63] Ambrosino discusses the shift from reproductive instinct to erotic desire and how crucial this shift is to understanding modern notions of sexuality. He analyses how the lines between homosexuality and heterosexuality are blurred, and perhaps even an outdated myth or invention when we understand the fluidity of sexual identities today:[64]

> ""No one knows exactly why heterosexuals and homosexuals ought to be different," wrote Wendell Ricketts, author of the 1984 study Biological Research on Homosexuality. The best answer we've got is something of a tautology: "heterosexuals and homosexuals are considered different because they can be divided into two groups on the basis of the belief that they can be divided into two groups."
>
> Though the hetero/homo divide seems like an eternal, indestructible fact of nature, it simply isn't. It's merely one recent grammar humans have invented to talk about what sex means to us."

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[61] Shamnad Basheer, Sroyon Mukherjee and Karthy Nair, "Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law", NUJS Law Review, Vol, 2 (2009).

[62] Bruce Bagemihl, Biological Exuberance: Animal Homosexuality and Natural Diversity, Stonewall Inn Editions (2000).

[63] Brandon Ambrosino, "The Invention of Heterosexuality", British Broadcasting Company, 26 March, 2017.

[64] Ibid.

He questions the elevated status of 'normalcy' in the following words:

> "Normal" is a loaded word, of course, and it has been misused throughout history. Hierarchical ordering leading to slavery was at one time accepted as normal, as was a geocentric cosmology. It was only by questioning the foundations of the consensus view that "normal" phenomena were dethroned from their privileged positions."

There are obvious shortcomings of the human element in the judgment of natural and unnatural:

> "Why judge what is natural and ethical to a human being by his or her animal nature? Many of the things human beings value, such as medicine and art, are egregiously unnatural. At the same time, humans detest many things that actually are eminently natural, like disease and death. If we consider some naturally occurring phenomena ethical and others unethical, that means our minds (the things looking) are determining what to make of nature (the things being looked at). Nature doesn't exist somewhere "out there," independently of us – we're always already interpreting it from the inside."

It has been argued that "the 'naturalness' and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, regulation and deployment of sexuality across time and space."[65] It is thus this "closeting of history" that produces the "hegemonic heterosexual" - the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal.[66] Heterosexuality becomes the site where the male sexed masculine man's desire for the female sexed feminine woman is privileged over all other forms

[65] Zaid Al Baset, "Section 377 and the Myth of Heterosexuality", Jindal Global Law Review, Vol. 4 (2012).
[66] Ibid.

of sexual desire and becomes a pervasive norm that structures all societal structures.[67]

The expression 'carnal' is susceptible to a wide range of meanings. Among them are:
"sexual, sensual, erotic, lustful, lascivious, libidinous, lecherous, licentious, lewd, prurient, salacious, coarse, gross, lubricious, venereal."

That's not all. The word incorporates meanings such as: "physical, bodily, corporeal and of the flesh." The late Middle English origin of 'carnal' derives from Christian Latin 'carnalis', from caro, carn – 'flesh'. At one end of the spectrum 'carnal' embodies something which relates to the physical feelings and desires of the body. In another sense, the word implies 'a relation to the body or flesh as the state of basic physical appetites'. In a pejorative sense, it conveys grossness or lewdness. The simple question which we need to ask ourselves is whether liberty and equality can be made to depend on such vagueness of expression and indeterminacy of content. Section 377 is based on a moral notion that intercourse which is **lustful** is to be frowned upon. It finds the sole purpose of intercourse in procreation. In doing so, it imposes criminal sanctions upon basic human urges, by targeting

[67] Ibid.

some of them as against the order of nature. It does so, on the basis of a social hypocrisy which the law embraces as its own. It would have human beings lead sanitized lives, in which physical relationships are conditioned by a moral notion of what nature does or does not ordain. It would have human beings accept a way of life in which sexual contact without procreation is an aberration and worse still, penal. It would ask of a section of our citizens that while love, they may, the physical manifestation of their love is criminal. This is manifest arbitrariness writ large.

If it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid.

In addition to the problem regarding the indeterminacy of the terms, there is a logical fallacy in ascribing legality or illegality to the ostensibly universal meanings of 'natural' and 'unnatural' as is pointed out in a scholarly article.[68] Basheer, *et al* make this point effectively:

> "From the fact that something occurs naturally, it does not necessarily follow that it is socially desirable. Similarly, acts that are commonly perceived to be 'unnatural' may not necessarily deserve legal sanction. Illustratively, consider a

[68] Supra note 61.

> person who walks on his hands all the time. Although this may be unnatural, it is certainly not deserving of legal censure.
>
> …In fact, several activities that might be seen to contravene the order of nature (heart transplants, for example) are beneficial and desirable. Even if an unnatural act is harmful to the extent that it justifies criminal sanctions being imposed against it, the reason for proscribing such an act would be that the act is harmful, and not that it is unnatural."

Indeed, there is no cogent reasoning to support the idea that behaviour that may be uncommon on the basis of mere statistical probability is necessarily abnormal and must be deemed ethically or morally wrong.[69] Even behaviour that may be considered wrong or unnatural cannot be criminalised without sufficient justification given the penal consequences that follow. Section 377 becomes a blanket offence that covers supposedly all types of non-procreative 'natural' sexual activity without any consideration given to the notions of consent and harm.

30 The meaning of 'natural' as understood in cases such as **Khanu** v. **Emperor**[70], which interpreted natural sex to mean only sex that would lead to procreation, would lead to absurd consequences. Some of the consequences have been pointed out thus:

> "The position of the court was thus that 'natural' sexual intercourse is restricted not only to heterosexual coitus, but further only to acts that might possibly result in conception.

[69] Sex, Morality and the Law, (Lori Gruen and George Panichas eds.), Routledge (1996).
[70] AIR (1925) Sind. 286

> Such a formulation of the concept of 'natural' sex excludes not only the use of contraception, which is likely to have fallen outside the hegemonic view of normative sexuality at the time, but also heterosexual coitus where one or both partners are infertile, or during the 'safe' period of a woman's menstrual cycle. It is perhaps unnecessary to state that the formulation also excludes oral sex between heterosexual partners and any homosexual act whatsoever."[71]

The indeterminacy and vagueness of the terms 'carnal intercourse' and 'order of nature' renders Section 377 constitutionally infirm as violating the equality clause in Article 14.

While it is evident that the classification is invalid, it is useful to understand its purported goal by looking at the legislative history of Section 377. In Macaulay's first draft of the Penal Code, the predecessor to present day Section 377 was Clause 361[72] which provided a severe punishment for touching another for the purpose of 'unnatural' lust. Macaulay abhorred the idea of any debate or discussion on this 'heinous crime'. India's anti-sodomy law was conceived, legislated and enforced by the British without any kind of public discussion.[73] So abhorrent was homosexuality to the moral notions which he espoused, that Macaulay believed that the idea of a discussion was

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[71] Andrew Davis, "The Framing of Sex: Evaluating Judicial Discourse on the 'Unnatural Offences'", Alternative Law Journal, Vol. 5 (2006).

[72] Clause 361 stated "Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine."

[73] Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals" The Economic and Political Weekly, Vol. 41 (2006).

repulsive. Section 377 reveals only the hatred, revulsion and disgust of the draftsmen towards certain intimate choices of fellow human beings. The criminalization of acts in Section 377 is not based on a legally valid distinction, "but on broad moral proclamations that certain kinds of people, singled out by their private choices, are less than citizens – or less than human."[74]

31 The **Naz** judgement has been criticised on the ground that even though it removed private acts between consenting adults from the purview of Section 377, it still retained the section along with its problematic terminology regarding the 'order of nature':[75]

> "…even though the acts would not be criminal, they would still be categorized as "unnatural" in the law. This is not an idle terminological issue. As Durkheim noted over a hundred years ago, the law also works as a tool that *expresses* social relations.[76] Hence, this expression itself is problematic from a dignitarian standpoint, otherwise so eloquently referred to by the judgement."

At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile–vaginal penetrative

[74] Supra note 25.
[75] John Sebastian, "The opposite of unnatural intercourse: understanding Section 377 through Section 375, Indian Law Review, Vol. 1 (2018).
[76] Emile Durkheim, The Division of Labour in Society, Macmillan (1984).

intercourse.[77] It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment.[78] Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand

[77] 375. A man is said to commit "rape" if he- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.—Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent. Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora. Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.—A medical procedure or intervention shall not constitute rape. Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

[78] Supra note 75, at pages 232-249.

excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14.

Nivedita Menon opposes the idea that 'normal' sexuality springs from nature and argues that this idea of 'normal' sexuality is a cultural and social construct:[79]

> "Consider the possibility that rules of sexual conduct are as arbitrary as traffic rules, created by human societies to maintain a certain sort of order, and which could differ from place to place -- for example, you drive on the left in India and on the right in the USA. Further, let us say you question the sort of social order that traffic rules keep in place. Say you believe that traffic rules in Delhi are the product of a model of urban planning that privileges the rich and penalizes the poor, that this order encourages petrol-consuming private vehicles and discourages forms of transport that are energy-saving -- cycles, public transport, pedestrians. You would then question that model of the city that forces large numbers of inhabitants to travel long distances every day simply to get to school andwork. You could debate the merits of traffic rules and urban planning on the grounds of convenience, equity and sustainability of natural resources -- at least, nobody could seriously argue that any set of traffic rules is natural."

32 The struggle of citizens belonging to sexual minorities is located within the larger history of the struggles against various forms of social subordination

[79] Nivedita Menon, "How Natural is Normal? Feminism and Compulsory Heterosexuality", In Because I have a Voice, Queer Politics in India, (Narrain and Bhan eds.) Yoda Press (2005).

in India. The order of nature that Section 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds "disturbing".[80] This includes various forms of transgression such as inter-caste and inter-community relationships which are sought to be curbed by society. What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority.[81] Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all.[82]

## E Beyond physicality: sex, identity and stereotypes

> "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."[83]

[80] Supra note 7.
[81] Ibid.
[82] Supra note 7.
[83] The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6 (CC), Sachs J., concurring.

33 The Petitioners contend that (i) Section 377 discriminates on the basis of sex and violates Articles 15 and 16; and (ii) Discrimination on the ground of sexual orientation is in fact, discrimination on the ground of sex. The intervenors argue that (i) Section 377 criminalizes acts and not people; (ii) It is not discriminatory because the prohibition on anal and oral sex applies equally to both heterosexual and homosexual couples; and (iii) Article 15 prohibits discrimination on the ground of 'sex' which cannot be interpreted so broadly as to include 'sexual orientation'.

34 When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights.[84] This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while

[84] Re. the Kerala Education Bill, AIR 1958 SC 956 at para 26; Sakal Papers v Union of India, AIR 1962 SC 305 at para 42; R.C. Cooper v Union of India, (1970) 1 SCC 248 at paras 43, 49; Bennett Coleman v. Union of India, AIR (1972) 2 SCC 788 at para 39; Maneka Gandhi v Union of India, (1978) 1 SCC 248 at para 19.

assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.

Article 15 of the Constitution reads thus:

> "15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." (Emphasis supplied)

Article 15 prohibits the State from discriminating on grounds only of sex. Early judicial pronouncements adjudged whether discrimination aimed only at sex is covered by Article 15 or whether the guarantee is attracted even to a discrimination on the basis of sex and some other grounds ('Sex plus'). The argument was that since Article 15 prohibited discrimination on only specified grounds, discrimination resulting from a specified ground coupled with other considerations is not prohibited. The view was that if the discrimination is justified on the grounds of sex and another factor, it would not be covered by the prohibition in Article 15.

35 One of the earliest cases decided in 1951 was by the Calcutta High Court in **Sri Sri Mahadev Jiew** v. **Dr. B B Sen**[85]. Under Order XXV, R. 1 of the Code of Civil Procedure, men could be made liable for paying a security

[85] AIR (1951) Cal. 563.

cost if they did not possess sufficient movable property in India only if they were residing outside India. However, women were responsible for paying such security, regardless of whether or not they were residing in India. In other words, the law drew a distinction between resident males who did not have sufficient immovable property, and resident females who did not have sufficient immovable property. Upholding the provision, the Calcutta High Court held:

> "31. Article 15(1) of the Constitution pro-vides, inter alia, -- The State shall not discriminate against any citizen on grounds only of sex. The word 'only' in this Article is of great importance and significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. **If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution.**" (Emphasis supplied)

This interpretation was upheld by this Court in **Air India** v. **Nergesh Meerza** ("Nergesh Meerza").[86] Regulations 46 and 47 of the Air India Employees' Service Regulations were challenged for causing a disparity between the pay and promotional opportunities of men and women in-flight cabin crew. Under Regulation 46, while the retirement age for male Flight Pursers was fifty eight, Air Hostesses were required to retire at thirty five, or on marriage (if they married within four years of joining service), or on their first pregnancy, whichever occurred earlier. This period could be extended in the

[86] (1981) 4 SCC 335

absolute discretion of the Managing Director. Even though the two cadres were constituted on the grounds of sex, the Court upheld the Regulations in part and opined:

> "68. **Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations**." (Emphasis supplied)

36 This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex *and* height. Such

a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.

37 A divergent note was struck by this Court in **Anuj Garg** v. **Hotel Association of India**[87]. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of women (and men under 25 years) in premises where liquor or other intoxicating drugs were consumed by the public. Striking down the law as suffering from "incurable fixations of stereotype morality and conception of sexual role", the Court held:

> "42… **one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart**..."
>
> "43…It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow**. Any other policy inference (such as the one embodied under section 30) from societal conditions would be oppressive on the women and against the privacy rights**." (Emphasis supplied)

The Court recognized that traditional cultural norms stereotype gender roles. These stereotypes are premised on assumptions about socially ascribed roles of gender which discriminate against women. The Court held that "insofar as governmental policy is based on the aforesaid cultural norms, it is

[87](2008) 3 SCC 1

constitutionally invalid." In the same line, the Court also cited with approval, the judgments of the US Supreme Court in **Frontiero** v. **Richardson**[88], and **United States** v. **Virginia**[89], and **Justice Marshall's dissent in Dothard** v. **Rawlinson**[90], The Court grounded the anti-stereotyping principle as firmly rooted in the prohibition under Article 15.

In **National Legal Services Authority** v. **Union of India** ("NALSA")[91], while dealing with the rights of transgender persons under the Constitution, this Court opined:

> "66. **Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.** Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' Under

[88] 411 U.S. 677 (1973). The case concerned a statute that allowed service-members to claim additional benefits if their spouse was dependent on them. A male claimant would automatically be entitled to such benefits while a female claimant would have to prove that her spouse was dependent on her for more than half his support. The Court struck down this statute stating that the legislation violated the equal protection clause of the American Constitution.

[89] 518 U.S. 515 (1996). The case concerned the Virginia Military Institute (VMI), which had a stated objected of producing "citizen-soldiers." However, it did not admit women. The Court held that such a provision was unconstitutional and that there were no "*fixed notions concerning the roles and abilities of males and females.*"

[90] 433 U.S. 321 (1977).The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall's dissent held that prohibition of women in 'contact positions' violated the Title VII guarantee.

[91] (2014) 5 SCC 438

> Articles 15 and 16, therefore, includes discrimination on the ground of gender identity." (Emphasis supplied)

This approach, in my view, is correct.

In **Nergesh Meerza**, this Court held that where persons of a particular class, in view of the "special attributes, qualities" are treated differently in 'public interest', such a classification would not be discriminatory. The Court opined that since the modes of recruitment, promotional avenues and other matters were different for Air Hostesses, they constituted a class separate from male Flight Pursers. This, despite noting that "a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind."

38 The Court did not embark on the preliminary enquiry as to whether the initial classification between the two cadres, being grounded in sex, was violative of the constitutional guarantee against discrimination. Referring specifically to the three significant disabilities that the Regulations imposed on Air Hostesses, the Court held that "there can be no doubt that these peculiar conditions do form part of the Regulations governing Air Hostesses but once we have held that Air Hostesses form a separate category with different and

separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground."

39 The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The very constitution of the cadre was based on sex. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory.

The Court went a step ahead and opined:

> "80…Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. **Apart from improving the health of the employee, it helps a good in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan**." (Emphasis supplied)

40 A strong stereotype underlines the judgment. The Court did not recognize that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman. In dealing with the provision for termination of service on the first pregnancy, the Court opined that a substituted provision for termination on the third pregnancy would be in the "larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children." Here again, the Court's view rested on a stereotype. The patronizing attitude towards the role of women compounds the difficulty in accepting the logic of **Nergesh Meerza**. This approach, in my view, is patently incorrect.

41 A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish

a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

The approach adopted the Court in **Nergesh Meerza**, is incorrect.

A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.

## E.I Facial neutrality: through the looking glass

42 The moral belief which underlies Section 377 is that sexual activities which do not result in procreation are against the 'order of nature' and ought

to be criminalized under Section 377. The intervenors submit that Section 377, criminalizes anal and oral sex by heterosexual couples as well. Hence, it is urged that Section 377 applies equally to all conduct against the 'order of nature', irrespective of sexual orientation. This submission is incorrect. In **NALSA** this Court held that Section 377, though associated with specific sexual acts, highlights certain identities. In **Naz**, the Delhi High Court demonstrated effectively how Section 377 though facially neutral in its application to certain acts, targets specific communities in terms of its impact:

> "**Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class**. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. **They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on itself**."[92] (Emphasis supplied)

To this end, it chronicled the experiences of the victims of Section 377, relying on the extensive records and affidavits submitted by the Petitioners that brought to fore instances of custodial rape and torture, social boycott, degrading and inhuman treatment and incarceration. The court concluded that while Section 377 criminalized conduct, it created a systemic pattern of

[92] Naz, at para 94.

disadvantage, exclusion and indignity for the LGBT community, and for individuals who indulge in non-heterosexual conduct.

43 Jurisprudence across national frontiers supports the principle that facially neutral action by the State may have a disproportionate impact upon a particular class. In Europe, **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006** defines 'indirect discrimination' as: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

In **Griggs** v **Duke Power Co.**[93], the US Supreme Court, whilst recognizing that African-Americans received sub-standard education due to segregated schools, opined that the requirement of an aptitude/intelligence test disproportionately affected African-American candidates. The Court held that "The Civil Rights Act" proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

[93] 401 U.S. 424 (1971)

In **Bilka-Kaufhaus GmbH** v. **Karin Weber von Hartz**[94], the European Court of Justice held that denying pensions to part-time employees is more likely to affect women, as women were more likely to take up part-time jobs. The Court noted:

> "Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, **where that exclusion affects a far greater number of women than men**, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex." (Emphasis supplied)

The Canadian Supreme Court endorsed the notion of a disparate impact where an action has a disproportionate impact on a class of persons. In **Andrews** v. **Law Society of British Columbia**[95], the Court noted:

> "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. **Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination**, while those based on an individual's merits and capacities will rarely be so classed." (Emphasis supplied)

Thus, when an action has "the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which

[94] (1986) ECR 1607
[95] (1989) 1 SCR 143

withholds or limits access to opportunities, benefits, and advantages available to other members of society",[96] it would be suspect.

In **City Council of Pretoria** v. **Walker**[97], the Constitutional Court of South Africa observed:

> "**The concept of indirect discrimination, … was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.**
>
> **In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken**." (Emphasis supplied)

## E.2 Deconstructing the polarities of binary genders

44 Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles.

[96] Ibid.
[97] (1998) 3 BCLR 257

The notion that the nature of relationships is fixed and within the 'order of nature' is perpetuated by gender roles, thus excluding homosexuality from the narrative. The effect is described as follows:

> "Cultural homophobia thus discourages social behavior that appears to threaten the stability of heterosexual gender roles. These dual normative standards of social and sexual behavior construct the image of a gay man as abnormal because he deviates from the masculine gender role by subjecting himself in the sexual act to another man."[98]

If individuals as well as society hold strong beliefs about gender roles – that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are attracted to men – it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship. If such a denial is further grounded in a law, such as Article 377 the effect is to entrench the belief that homosexuality is an aberration that falls outside the 'normal way of life.'

45 An instructive article by Zachary A. Kramer,[99] notes that a heterosexist society both expects and requires men and women to engage in only opposite-sex sexual relationships. The existence of same-sex relationships is,

[98] Elvia R. Arriola, "Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory", Berkeley Women's Law Journal, Vol. 9 (1994), at pages 103-143.

[99] Zachary A. Kramer, "The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII", University of Illinois Law Review (2004), at page 490.

therefore, repugnant to heterosexist societal expectations. Kramer argues that:

> "Discrimination against gays and lesbians reinforces traditional sex roles. The primary thrust of such discrimination is the gender-based stigmatization of gays and lesbians, deriving from the idea that homosexuality departs from traditional gender roles and that "real" men and women should not be attracted to a member of the same sex. This portrayal relies heavily on what Bennett Capers calls the "binary gender system."[100]

46 Bennett Capers defines the binary gender system as based in "heterosexism," which he defines as the "institutionalized valorization of heterosexual activity." Capers, in fact suggests that:

> "The sanctioning of discrimination based on sexual orientation perpetuates the subordination not only of lesbians and gays but of women as well.
>
> Heterosexism, then, in its reliance on a bipolar system of sex and gender, reinforces sexism in two ways. First, by penalizing persons who do not conform to a bipolar gender system and rewarding men and women who do, the heterosexist hegemony perpetuates a schema that valorizes passive, dependent women, thus contributing to sexism. Second, heterosexism reinforces sexism because it subordinates the female sex through its hierarchical polarity. Because heterosexism perpetuates sexism, the extension of substantial rights to lesbians and gays, who by definition challenge heterosexism and the concept of a binary gender system, would result in a challenge to sexism and to male power." [101]

[100] Ibid.

[101] Bennett Capers, "Note, Sexual Orientation and Title VII", Columbia Law Review (1991), at pages 1159, 1160, 1163.

In other words, one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles. Taking this further, Andrew Koppelman argues that:

> "Similarly, sodomy laws discriminate on the basis of sex-for example, permitting men, but not women, to have sex with women-in order to impose traditional sex roles. The Court has deemed this purpose impermissible in other contexts because it perpetuates the subordination of women. The same concern applies with special force to the sodomy laws, because their function is to maintain the polarities of gender on which the subordination of women depends."[102]

Koppelman thus suggests that the taboo against homosexuals "polices the boundaries that separate the dominant from the dominated in a social hierarchy."[103] He expands on this idea, using the analogy of miscegenation, or the interbreeding of races:

> "Do statutes that outlaw homosexual sex impose traditional sex roles? One possible answer is that of *McLaughlin* [*McLaughlin v. Florida*]: The crime is by definition one of engaging in activity inappropriate to one's sex. But these statutes' inconsistency with the Constitution's command of equality is deeper. Like the miscegenation statutes, the sodomy statutes reflect and reinforce the morality of a hierarchy based on birth. Just as the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, so the prohibition of sodomy preserves the polarities of gender on which rests the subordination of women."[104]

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[102] Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination", Yale Law Journal, Vol. 98 (1988), at page 147.

[103] Andrew Koppelman, "Why Discrimination against Lesbians and Gay Men is Sex Discrimination", New York University Law Review, Vol. 69 (1994).

[104] Supra note 102, at page 148.

Statutes like Section 377 give people ammunition to say "this is what a man is" by giving them a law which says "this is what a man is not." Thus, laws that affect non-heterosexuals rest upon a normative stereotype: "the bald conviction that certain behavior-for example, sex with women-is appropriate for members of one sex, but not for members of the other sex."[105]

What this shows us is that LGBT individuals as well as those who do not conform to societal expectations of sexual behaviour defy gender stereotypes.

> "The construction of gender stereotypes ultimately rests on the assumption that there are two opposite and mutually exclusive biological sexes. The assumption of heterosexuality is central to this gender binary. In a patriarchal context, some of the most serious transgressors are thus: a woman who renounces a man sexual partner or an individual assigned female at birth who renounces womanhood, thereby rejecting the patriarchal system and all other forms of male supervision and control, and an individual assigned male at birth who embraces womanhood, thereby abandoning privilege in favor of that which is deemed subservient, femininity."[106]

Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The case for gay rights undoubtedly seeks justice for gays. But it goes well beyond the concern for the gay community. The effort to end

[105] Ibid.

[106] The Relationship between Homophobia, Transphobia, and Women's Access to Justice for the Forthcoming CEDAW General Recommendation on Women's Access to Justice. Submitted to the United Nations Committee for the Elimination of All Forms of Discrimination against Women (2013).

discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.

> "To be a lesbian is to be perceived (labelled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males. A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism."[107]

Commenting on its link with the essence of Article 15, Tarunabh Khaitan writes:

> "But the salience of a case on discrimination against a politically disempowered minority, based purely on the prejudices of a majority, goes beyond the issue of LGBTQ rights. Indian constitutional democracy is at a crossroads…Inclusiveness and pluralism lie at the heart of Article 15, which can be our surest vehicle for the Court to lend its institutional authority to the salience of these ideas in our constitutional identity."[108]

47 Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality. Relationships which question the divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and

[107] Suzanne Pharr, Homophobia: A weapon of Sexism, Chardon Press (1988), at page18.
[108] Tarunabh Khaitan, "Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are", Indian Constitutional Law and Philosophy (2018).

relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function. For members of the community, hostility and exclusion aimed at them, drive them into hiding, away from public expression and view. It is this discrimination faced by the members of the community, which results in silence, and consequently invisibility, creating barriers, systemic and deliberate, that effect their participation in the work force and thus undermines substantive equality. In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect white supremacy, the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex.

48 A report prepared by the International Commission of Jurists[109] has documented the persecution faced by the affected community due to the operation of Section 377. The report documents numerous violations inflicted on people under the authority of Section 377. According to the National Crime Records Bureau, 1279 persons in 2014 and 1491 in 2015 were arrested under Section 377.[110]

[109] International Commission of Jurists, "Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (2017).
[110] Ibid, at page 16.

The report documents instances of abuse from law enforcement agencies and how the possibility of persecution under Section 377 prevents redress.[111] Even though acts such as blackmail, assault, and bodily crimes are punishable under penal laws, such methods of seeking redressal are not accessed by those communities given the fear of retaliation or prosecution.

49 The petitioners in the present batch of cases have real life narrations of suffering discrimination, prejudice and hate. In **Anwesh Pokkuluri** v. **UOI**[112], with which this case is connected, the Petitioners are a group of persons belonging to the LGBTQ community, each of whom has excelled in their fields but suffer immensely due to the operation of Section 377. To cope with the growing isolation among the community, these Petitioners, all alumni of Indian Institutes of Technology across the country, created a closed group called "Pravritti". The group consists of persons from the LGBTQ community. They are faculty members, students, alumni and anyone who has ever stayed on the campus of any IIT in the country. The group was formed in 2012 to help members cope with loneliness and difficulties faced while accepting their identity along with holding open discussions on awareness.

[111] Ibid, at pages 16 – 18.
[112] Writ Petition (Criminal) No. 121 of 2018.

50 Out of twenty Petitioners, sixteen are gay, two are bisexual women and one is a bisexual man. One among the Petitioners is a transwoman. Three of the Petitioners explain that they suffered immense mental agony due to which they were on the verge of committing suicide. Another two stated that speaking about their sexual identity has been difficult, especially since they did not have the support of their families, who, upon learning of their sexual orientation, took them for psychiatric treatment to cure the so-called "disease." The families of three Petitioners ignored their sexual identity. One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality. Some of them have experienced depression; others faced problems focusing on their studies while growing up; one among them was forced to drop out of high school as she was residing in a girl's hostel where the authorities questioned her identity. The parents of one of them brushed his sexuality under the carpet and suggested that he marry a woman. Some doubted whether or not they should continue their relationships given the atmosphere created by Section 377. Several work in organisations that have policies protecting the LGBT community in place. Having faced so much pain in their personal lives, the Petitioners submit that with the continued operation of Section 377, such treatment will be unabated.

51 In **Navtej Johar** v. **Union of India**[113], with which this case is concerned, the Petitioners have set out multiple instances of discrimination and expulsion. The following is a realistic account:

> "While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police…Without the existence of this section, the social prejudice and shame that I have faced would have been considerably lessened…the fact that gay people, like me, are recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve.[114]

Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship. Referring to the effect of Foucault's panopticon in

[113] Writ Petition (Criminal) No. 76 of 2016.
[114] Written Submission on Behalf of the Voices Against 377, in W.P. (CRL.) No. 76/2016 at page 18.

inducing "a state of conscious and permanent visibility that assures the automatic functioning of power",[115] Ryan Goodman writes:

> "The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs a similar, yet dispersed, structure of observation and surveillance. **The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals, namely those who are certified with various levels of state authority, are more directly linked to the extension of law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself**."[116] (Emphasis supplied)

The effect of Section 377, thus, is not merely to criminalize an act, but to criminalize a specific set of identities. Though facially neutral, the effect of the provision is to efface specific identities. These identities are the soul of the LGBT community.

52 The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In **K S Puttaswamy** v. **Union of India**

[115] Michel Foucault, Discipline And Punish: the Birth of the Prison, Pantheon Books (1977) at page 201.
[116] Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics", California Law Review, Vol. 89 (2001), at page 688.

("Puttaswamy")[117], this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values.

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1)

[117](2017) 10 SCC 1

53 History has been witness to a systematic stigmatization and exclusion of those who do not conform to societal standards of what is expected of them. Section 377 rests on deep rooted gender stereotypes. In the quest to assert their liberties, people criminalized by the operation of the provision, challenge not only its existence, but also a gamut of beliefs that are strongly rooted in majoritarian standards of what is 'normal'. In this quest, the attack on the validity of Section 377 is a challenge to a long history of societal discrimination and persecution of people based on their identities. They have been subjugated to a culture of silence and into leading their lives in closeted invisibility. There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced, based on a majoritarian impulse of ascribed gender roles. That time is now.

## F Confronting the closet

54 The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are integral to the right to life under Article 21 of the Constitution. A meaningful life is a life of freedom and self-respect and nurtured in the ability to decide the course of living. In the nine judge Bench decision in **Puttaswamy**, this Court conceived of the right to privacy as natural and inalienable. The judgment delivered on behalf of four judges holds:

> "Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights…"[118]

Justice Bobde, in his exposition on the form of the 'right to privacy' held thus:

> "Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man."[119]

Justice Nariman has written about the inalienable nature of the right to privacy:

> "…Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments…"[120]

Justice Sapre, in his opinion, has also sanctified 'privacy' as a natural right:

> "In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth... It is indeed inseparable and inalienable…it is born with the human being…"[121]

[118] Puttaswamy, at para 42.
[119] Puttaswamy, at para 392.
[120] Puttaswamy, at para 490.
[121] Puttaswamy at para 557.

These opinions establish that the right to privacy is a natural right. The judgment of four judges in **Puttaswamy** held that the right to sexual orientation is an intrinsic part of the right to privacy. To define the scope of the right, it is useful to examine the discussion on the right to sexual orientation in judicial precedents of this Court.

55 Speaking for a two judge Bench in **NALSA**, Justice K S Radhakrishnan elucidated upon the term 'sexual orientation' as differentiable from an individual's 'gender identity', noting that:

> "Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bysexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom…"[122]

**Puttaswamy** rejected the "test of popular acceptance" employed by this Court in **Koushal** and affirmed that sexual orientation is a constitutionally guaranteed freedom:

> "…The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular

[122] NALSA, at para 22.

> minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life do not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."[123]

Rejecting the notion that the rights of the LGBT community can be construed as illusory, the court held that the right to privacy claimed by sexual minorities is a constitutionally entrenched right:

> "…The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination."[124]

Justice Kaul, concurring with the recognition of sexual orientation as an aspect of privacy, noted that:

> "…The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 144 to 146 of his judgment, states that the right of privacy

[123] Puttaswamy, at para 144.
[124] Puttaswamy, at para 145.

> cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy…"[125]

With these observations by five of the nine judges in **Puttaswamy**, the basis on which **Koushal** upheld the validity of Section 377 stands eroded and even disapproved.

56 We must now consider the impact of Section 377 on the exercise of the right to privacy by sexual minorities. Legislation does not exist in a vacuum. The social ramifications of Section 377 are enormous. While facially Section 377 only criminalizes certain "acts", and not relationships, it alters the prism through which a member of the LGBTQ is viewed. Conduct and identity are conflated.[126] The impact of criminalising non-conforming sexual relations is that individuals who fall outside the spectrum of heteronormative[127] sexual identity are perceived as criminals.[128]

57 World over, sexual minorities have struggled to find acceptance in the heteronormative structure that is imposed by society. In her book titled

[125] Puttaswamy, at para 647.
[126] Supra note 116, at page 689.
[127] The expression heteronormative is used to denote or relate to a world view that promotes heterosexuality as the normal or preferred sexual orientation.
[128] Supra note 116, at page 689.

'Epistemology of the Closet',[129] Eve Sedgwick states that "the closet is the defining structure for gay oppression in this century." The closet is symbolic of the exclusion faced by them:

> "Closets exist and they hide social information. They hide certain socially proscribed sexual desires, certain unnamable sexual acts deemed 'unnatural' by the cultural context and law, certain identities which dare not speak their name and certain forms of behaviour which can make an individual susceptible to stigma and oppression. The closet does not simply hide this susceptibility; it hides stigma and oppression itself. It marks the silencing of different voices, a silence which is achieved by a gross violation of lives that inhabit the closet, through both violence and pain inflicted by significant others both within and without the closet and instances of self-inflicted pain and violence. The closet also hides pleasure, myriad sexual expressions and furtive encounters that gratify the self. The closet also conceals the possibility of disease and death."[130]

The existing heteronormative framework – which recognises only sexual relations that conform to social norms – is legitimized by the taint of 'unnaturalness' that Section 377 lends to sexual relations outside this framework. The notion of 'unnatural acts', viewed in myopic terms of a "fixed procreational model of sexual functioning", is improperly applied to sexual relations between consenting adults.[131] Sexual activity between adults and based on consent must be viewed as a "natural expression" of human sexual competences and sensitivities.[132] The refusal to accept these acts amounts to

[129] Eve Kosofsky Sedgwick, Epistemology of the Closet, University of California Press (1990).
[130] Supra note 65, at page 102.
[131] David A. J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution", Hastings Law Journal, Vol. 30, at page 786.
[132] Ibid.

a denial of the distinctive human capacities for sensual experience outside of the realm of procreative sex.[133]

58 To deny the members of the LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution. The denial of the right to sexual orientation is also a denial of the right to privacy. The application of Section 377 causes a deprivation of the fundamental right to privacy which inheres in every citizen. This Court is entrusted with the duty to act as a safeguard against such violations of human rights. Justice Chelameswar, in his judgement in **Puttaswamy**, held that:

> "To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly..."[134]

59 The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the

[133] Ibid.
[134] Puttaswamy, at Para 350.

inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.

60 Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to 'confront the closet' and, as a necessary consequence, confront 'compulsory heterosexuality.'[135] Confronting the closet would entail "reclaiming markers of all desires, identities and acts which challenge it."[136] It would also entail ensuring that individuals belonging to sexual minorities, have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms.

61 In conceptualising a right to sexual privacy, it is important to consider how the delineation of 'public' and 'private' spaces affects the lives of the LGBTIQ community. Members of the community have argued that to base

[135] Supra note 65, at page 103.
[136] Ibid.

their claims on a right to privacy is of no utility to individuals who do not possess the privilege of a private space.[137] In fact, even for individuals who have access to private spaces the conflation of 'private' with home and family may be misplaced.[138] The home is often reduced to a public space as heteronormativity within the family can force the individual to remain inside the closet.[139] Thus, even the conception of a private space for certain individuals is utopian.[140]

62 Privacy creates "tiers of 'reputable' and 'disreputable' sex", only granting protection to acts behind closed doors.[141] Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance.[142] If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating 'homosexual' acts into the private sphere, would in effect reiterate the "ambient heterosexism of the public space."[143] It must be acknowledged that members belonging to sexual minorities are often subjected to

[137] Danish Sheikh, "Queer Rights and the Puttaswamy Judgement", Economic and Political Weekly, Vol. 52 (2017), at page 51.
[138] Supra note 65, at page 101.
[139] Ibid.
[140] Ibid.
[141] Supra note 137, at page 51.
[142] Saptarshi Mandal, "'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique", NUJS Law Review, Vol. 2 (2009), at page 533.
[143] Supra note 65, at page 100.

harassment in public spaces.[144] The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.

## F.I Sexual privacy and autonomy- deconstructing the heteronormative framework

63 In the absence of a protected zone of privacy, individuals are forced to conform to societal stereotypes. **Puttaswamy** has characterised the right to privacy as a shield against forced homogeneity and as an essential attribute to achieve personhood:

> "…Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her

[144] Supra note 137, at page 53.

> life. Privacy attaches to the person and not to the place where it is associated."[145]

This Court has recognized the right of an individual to break free from the demands of society and the need to foster a plural and inclusive culture. The judgment of four judges in **Puttaswamy**, for instance, held that:

> "Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture."[146]

64 In **Santosh Singh** v **Union of India**[147], a two-judge Bench of this Court dismissed a petition under Article 32 seeking a direction to the Central Board of Secondary Education to include moral science as a compulsory subject in the school syllabus in order to inculcate moral values. One of us (Chandrachud J) underscored the importance of accepting a plurality of ideas and tolerance of radically different views:

> "Morality is one and, however important it may sound to some, it still is only one element in the composition of values that a just society must pursue. There are other equally significant values which a democratic society may wish for education to impart to its young. Among those is the acceptance of a plurality and diversity of ideas, images and faiths which unfortunately faces global threats. Then again, equally important is the need to foster tolerance of those who hold radically differing views, empathy for those whom the economic and social milieu has cast away to the margins, a

[145] Puttaswamy, at para 297.
[146] Puttaswamy, at para 297.
[147] (2016) 8 SCC 253

> sense of compassion and a realisation of the innate humanity which dwells in each human being. Value based education must enable our young to be aware of the horrible consequences of prejudice, hate and discrimination that continue to threaten people and societies the world over…"[148]

The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them.[149] As noted by Richards, this moral right emerges from the autonomy to which the individual is entitled:

> "Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption that persons as such have a range of capacities that enables them to develop, and act upon plans of action that take as their object one's life and the way it is lived. The consequence of these capacities of autonomy is that humans can make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will define and pursue as needs and aspirations. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from birth, the central developmental task of becoming a person."[150]

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[148] Ibid at para 22.
[149] Supra note 131, at pages 1000-1001.
[150] Supra note 131, at pages 964-965; M. Mahler, "The Psychological Birth of The Human Infant: Symbiosis And Individuation" (1975); L. Kaplan, Oneness And Separateness: From Infant To Individual (1978).

65 In **Common Cause (A Registered Society)** v. **Union of India** ("**Common Cause**")[151], a Constitution Bench of this Court held that the right to die with dignity is integral to the right to life recognised by the Constitution and an individual possessing competent mental faculties is entitled to express his or her autonomy by the issuance of an advance medical directive:

> "The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle. It protects the most personal and intimate decisions of individuals that affect their life and development. Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy…"[152]

Autonomy and privacy are inextricably linked. Each requires the other for its full realization. Their interrelationship has been recognised in **Puttaswamy**:

> "…Privacy postulates the reservation of a private space for the individual, described as the right to be left alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy..."[153]

[151] (2018) 5 SCC 1
[152] Ibid, at para 441.
[153] Puttaswamy, at para 297.

In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance."[154] Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society.[155] The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be.[156] These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect.[157] Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy.[158] Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.[159]

66 An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self-

[154] Thomas M. Jr. Scanlon, Rawls' Theory of Justice, University of Pennsylvania Law Review (1973) at 1022.
[155] Ibid at 1023.
[156] Ibid at 1023.
[157] Ibid at 1023.
[158] Supra note 131, at page 971.
[159] Ibid at page 972.

determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual.[160] Such an interpretation of autonomy has implications for the widening application of human rights to sexuality.[161] Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex.[162] Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives.[163] Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.

## F.2 A right to intimacy- celebration of sexual agency

67 By criminalising consensual acts between individuals who wish to exercise their constitutionally-protected right to sexual orientation, the State is

[160] Supra note 131, at page 1003.
[161] Ibid.
[162] Ibid.
[163] Ibid.

denying its citizens the right to intimacy. The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.

In **Shakti Vahini** v. **Union of India**[164], a three judge Bench of this Court issued directives to prevent honour killings at the behest of Khap Panchayats and protect persons who enter into marriages that do not have the approval of the Panchayats. The Court recognised the right to choose a life partner as a fundamental right under Articles 19 and 21 of the Constitution. The learned Chief Justice held:

> "…when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy."[165]

In **Shafin Jahan** v. **Asokan**[166], this Court set aside a Kerala High Court judgement which annulled the marriage of a twenty-four year old woman with a man of her choice in a habeas corpus petition instituted by her father. The

[164] (2018) SCC OnLine SC 275
[165] Ibid, at para 44.
[166] (2018) SCC OnLine SC 343

Court upheld her right to choose of a life partner as well as her autonomy in the sphere of "intimate personal decisions." The Chief Justice held thus:

> "…expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. **The social values and morals have their space but they are not above the constitutionally guaranteed freedom** …"[167]
> (Emphasis supplied)

One of us (Chandrachud J) recognised the right to choose a partner as an important facet of autonomy:

> "…The choice of a partner whether **within or outside marriage** lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith...Social approval for intimate personal decisions is not the basis for recognising them..."[168] (Emphasis supplied)

The judgement in **Shafin Jahan** delineates a space where an individual enjoys the autonomy of making intimate personal decisions:

> "The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."[169]

In furtherance of the Rawlsian notion of self-respect as a primary good, individuals must not be denied the freedom to form relationships based on sexual intimacy. Consensual sexual relationships between adults, based on

[167] Ibid, at para 54.
[168] Ibid, at para 88.
[169] Ibid, at para 93.

the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect.[170] Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships.[171] The law provides the legitimacy for social institutions. In a democratic framework governed by the rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy. It cannot be allowed to become a yoke on the full expression of the human personality. By penalising sexual conduct between consenting adults, Section 377 imposes moral notions which are anachronistic to a constitutional order. While ostensibly penalising 'acts', it impacts upon the identity of the LGBT community and denies them the benefits of a full and equal citizenship. Section 377 is based on a stereotype about sex. Our Constitution which protects sexual orientation must

[170] David A. J. Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory", Fordham Law Review, Vol. 45 (1977), at pages 1130-1311.
[171] Ibid at 1311.

outlaw any law which lends the authority of the state to obstructing its fulfilment.

## G Section 377 and the right to health

> "Should medicine ever fulfil its great ends, it must enter into the larger political and social life of our time; it must indicate the barriers which obstruct the normal completion of the life cycle and remove them."
>
> - Virchow Rudolf

68 In the evolution of its jurisprudence on the constitutional right to life under Article 21, this Court has consistently held that the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right to health.[172] The right to health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right to emergency medical care and the right to the maintenance and improvement of public health.[173]

It would be useful to refer to judgments of this Court which have recognised the right to health.

[172] Dipika Jain and Kimberly Rhoten, "The Heteronormative State and the Right to Health in India", NUJS Law Review, Vol. 6 (2013).

[173] C.E.S.C. Limited v. Subhash Chandra Bose, (1992) 1 SCC 441; Consumer Education and Research Centre v. UOI, (1995) 3 SCC 42; Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37; Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1; Devika Biswas v. Union of India & Ors., (2016) 10 SCC 726; Common Cause v. Union of India & Ors., (2018) 5 SCC 1.

In **Bandhua Mukti Morcha** v. **Union of India**[174], a three-judge Bench identified the right to health within the right to life and dignity. In doing so, this Court drew on the Directive Principles of State Policy:

> "It is the fundamental right of every one in this country … to live with human dignity, free from exploitation. **This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.** These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials." (Emphasis supplied)

In **Consumer Education & Research Centre** v. **Union of India** ("CERC")[175], a Bench of three judges dealt with the right to health of workers in asbestos industries. While laying down mandatory guidelines to be followed for the well-being of workers, the Court held that:

> "The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood...**Therefore, it must be held that the right to health and medical care is a fundamental right under**

[174] (1984) 3 SCC 161
[175] (1995) 3 SCC 42

> **Article 21 read with Articles 39(c), 41 and 43 of the Constitution and makes the life of the workman meaningful and purposeful with dignity of person.** Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity." (Emphasis supplied)

In a dissenting judgment in **C.E.S.C. Limited** v. **Subhash Chandra Bose**[176], K Ramaswamy J observed that:

> "**Health is thus a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. In the light of Articles. 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our constitution, right to health is a fundamental human right to workmen.** The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors" (Emphasis supplied)

In **Kirloskar Brothers Ltd.** V. **Employees' State Insurance Corporation**[177], a three-judge Bench of this Court considered the applicability of the Employees' State Insurance Act, 1948 to the regional offices of the Appellant, observing that:

> "Health is thus a state of complete physical, mental and social well-being. Right to health, therefore, is a fundamental and human right to the workmen. The maintenance of health is the most imperative constitutional goal whose realisation requires interaction of many social and economic factors."

[176] (1992) 1 SCC 441
[177] (1996) 2 SCC 682

In **State of Punjab** v. **Ram Lubhaya Bagga**[178], a three-judge Bench of this Court considered a challenge to the State of Punjab's medical reimbursement policy. A.P. Mishra J, speaking for the Bench, observed that:

> "Pith and substance of life is the health, which is the nucleus of all activities of life including that of an employee or other viz. the physical, social, spiritual or any conceivable human activities. If this is denied, it is said everything crumbles.
>
> This Court has time and again emphasised to the Government and other authorities for focussing and giving priority and other authorities for focussing and giving priority to the health of its, citizen, which not only makes one's life meaningful, improves one's efficiency, but in turn gives optimum out put."

In **Smt M Vijaya** v. **The Chairman and Managing Director Singareni Collieries Co. Ltd.**[179], a five judge Bench of the Andhra Pradesh High Court considered a case where a girl was infected with HIV due to the negligence of hospital authorities. The Court observed that:

> "Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. By reason of numerous judgments of the Apex Court the horizons of Article 21 of the Constitution have been expanded recognising various rights of the citizens i.e...right to health...
>
> It is well settled that right to life guaranteed under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life."

[178] (1998) 4 SCC 117
[179] (2001) 5 ALD 522

In **Devika Biswas** v. **Union of India**[180], while hearing a public interest petition concerning several deaths that had taken place due to unsanitary conditions in sterilization camps across the country, a two judge Bench of this Court held that:

> "It is well established that the right to life under Article 21 of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right...That the right to health is an integral part of the right to life does not need any repetition."

In his concurring judgment in **Common Cause** v. **Union of India**, Sikri J, noted the inextricable link between the right to health and dignity:

> "There is a related, but interesting, aspect of this dignity which needs to be emphasised. **Right to health is a part of Article 21 of the Constitution.** At the same time, it is also a harsh reality that everybody is not able to enjoy that right because of poverty etc. The State is not in a position to translate into reality this right to health for all citizens. Thus, when citizens are not guaranteed the right to health, can they be denied right to die in dignity?" (Emphasis supplied)

In addition to the constitutional recognition granted to the right to health, the right to health is also recognised in international treaties, covenants, and agreements which India has ratified, including the International Covenant on Economic, Social and Cultural Rights, 1966 ("ICESCR") and the Universal

[180] (2016) 10 SCC 726

Declaration of Human Rights, 1948 ("UDHR"). Article 25 of the UDHR recognizes the right to health:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."

69 Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") recognizes the right of all persons to the enjoyment of the highest attainable standard of physical and mental health:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Article 12.2 requires States Parties to take specific steps to improve the health of their citizens, including creating conditions to ensure equal and timely access to medical services. In its General Comment No. 14,[181] the UN Economic and Social Council stated that States must take measures to respect, protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health-related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalized populations.

[181] UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2004 (2000).

Pursuant to General Comment No. 14, India is required to provide marginalized populations, including members of the LGBTIQ community, goods and services that are available (in sufficient quantity), accessible (physically, geographically, economically and in a non-discriminatory manner), acceptable (respectful of culture and medical ethics) and of quality (scientifically and medically appropriate and of good quality).

70 As early as 1948, the World Health Organization ("WHO") defined the term 'health' broadly to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[182] Even today, for a significant number of Indian citizens this standard of health remains an elusive aspiration. Of relevance to the present case, a particular class of citizens is denied the benefits of this constitutional enunciation of the right to health because of their most intimate sexual choices.

71 Sexuality is a natural and precious aspect of life, an essential and fundamental part of our humanity.[183] Sexual rights are entitlements related to sexuality and emanate from the rights to freedom, equality, privacy, autonomy, and dignity of all people.[184] For people to attain the highest

[182]Definition contained in the Preamble to the WHO Constitution (1948).
[183] Sexual Rights, International Planned Parenthood Federation (2008).
[184] Ibid.

standard of health, they must also have the right to exercise choice in their sexual lives and feel safe in expressing their sexual identity. However, for some citizens, discrimination, stigma, fear and violence prevent them from attaining basic sexual rights and health.

72 Individuals belonging to sexual and gender minorities experience discrimination, stigmatization, and, in some cases, denial of care on account of their sexual orientation and gender identity.[185] However, it is important to note that 'sexual and gender minorities' do not constitute a homogenous group, and experiences of social exclusion, marginalization, and discrimination, as well as specific health needs, vary considerably.[186] Nevertheless, these individuals are united by one factor - that their exclusion, discrimination and marginalization is rooted in societal heteronormativity and society's pervasive bias towards gender binary and opposite-gender relationships, which marginalizes and excludes all non-heteronormative sexual and gender identities.[187] This, in turn, has important implications for individuals' health-seeking behaviour, how health services are provided, and the extent to which sexual health can be achieved.[188]

[185] Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa", Health and Human Rights (2016) at pages 195–208.
[186] Institute of Medicine, "The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding", National Academies Press (2011).
[187] Supra note 185, at pages 195–208.
[188] Ibid.

73 The term 'sexual health' was first defined in a 1975 WHO Technical Report series as "the integration of the somatic, emotional, intellectual and social aspects of sexual being, in ways that are positively enriching and that enhance personality, communication and love."[189] The WHO's current working definition of sexual health is as follows:

> "…a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled."

The WHO further states that "sexual health cannot be defined, understood or made operational without a broad consideration of sexuality, which underlies important behaviours and outcomes related to sexual health." It defines sexuality thus:

> "…a central aspect of being human throughout life encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors."

[189] World Health Organization, "Gender and human rights: Defining sexual health", (2002).

74 A report entitled "Sexual Health, Human Rights and the Law",[190] published by the WHO in 2015 explores the relationship between these concepts. The report notes that "human sexuality includes many different forms of behaviour and expression, and that the recognition of the diversity of sexual behaviour and expression contributes to people's overall sense of health and well-being."[191] It emphasizes the importance of sexual health by stating that not only is it essential to the physical and emotional well-being of individuals, couples and families, but it is also fundamental to the social and economic development of communities and countries.[192] The ability of individuals to progress towards sexual health and well-being depends on various factors, including "access to comprehensive information about sexuality, knowledge about the risks they face and their vulnerability to the adverse consequences of sexual activity; access to good quality sexual health care, and an environment that affirms and promotes sexual health."

75 The International Women's Health Coalition has located the right to sexual health within 'sexual rights', defined as follows:[193]

> "Sexual rights embrace certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. They rest on the recognition that all individuals have the right—free of

[190] World Health Organisation, "Sexual Health, Human Rights and the Law" (2015).
[191] Ibid.
[192] Ibid.
[193] International Women's Health Coalition, "Sexual Rights are Human Rights" (2014).

> coercion, violence, and discrimination of any kind—to the highest attainable standard of sexual health; to pursue a satisfying, safe, and pleasurable sexual life; to have control over and decide freely, and with due regard for the rights of others, on matters related to their sexuality, reproduction, sexual orientation, bodily integrity, choice of partner, and gender identity; and to the services, education, and information, including comprehensive sexuality education, necessary to do so."

The discussion of 'sexual rights' (as they pertain to sexuality and sexual orientation) within the framework of the right to health is a relatively new phenomenon:[194]

> "..Before the 1993 World Conference on Human Rights in Vienna, and the subsequent 1994 International Conference on Population and Development in Cairo, sexuality, sexual rights, and sexual diversity had not formed part of the international health and human rights discourse. **These newly emerged "sexual rights" were founded on the principles of bodily integrity, personhood, equality, and diversity**."[195] (Emphasis supplied)

76 The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society.

[194] Supra note 185, at pages 195–208.
[195] Supra note 185, at pages 195–208.

77 The right to health is not simply the right not to be unwell, but rather the right to be well. It encompasses not just the absence of disease or infirmity, but "complete physical, mental and social well being",[196] and includes both freedoms such as the right to control one's health and body and to be free from interference (for instance, from non-consensual medical treatment and experimentation), and entitlements such as the right to a system of healthcare that gives everyone an equal opportunity to enjoy the highest attainable level of health.

78 The jurisprudence of this Court, in recognizing the right to health and access to medical care, demonstrates the crucial distinction between negative and positive obligations. Article 21 does not impose upon the State only negative obligations not to act in such a way as to interfere with the right to health. This Court also has the power to impose positive obligations upon the State to take measures to provide adequate resources or access to treatment facilities to secure effective enjoyment of the right to health.[197]

79 A study of sexuality and its relationship to the right to health in South Africa points to several other studies that suggest a negative correlation between sexual orientation-based discrimination and the right to health:

[196] Preamble to the Constitution of the World Health Organisation.
[197] Jayna Kothari, "Social Rights and the Indian Constitution", Law, Social Justice and Global Development Journal (2004).

> "For example, in a Canadian study, Brotman and colleagues found that being open about their sexual orientation in health care settings contributed to experiences of discrimination for lesbian, gay, and bisexual people."[198]
>
> "Lane and colleagues interviewed men who have sex with men in Soweto, and revealed that all men who disclosed their sexual orientation at public health facilities had experienced some form of discrimination. Such discrimination ['ranging from verbal abuse to denial of care'[199]], and also the anticipation thereof, leads to delays when seeking sexual health services such as HIV counseling and testing."[200]

80 Alexandra Muller describes the story of two individuals who experienced such discrimination. T, a gay man, broke both his arms while fleeing from a group of people that attacked him because of his sexuality. At the hospital, the staff learned about T's sexual orientation, and pejoratively discussed it in his presence. He also had to endure "a local prayer group that visited the ward daily to provide spiritual support to patients" which "prayed at his bedside to rectify his "devious" sexuality. When he requested that they leave, or that he be transferred to another ward, the nurses did not intervene, and the prayer group visited regularly to continue to recite their homophobic prayers. T did not file an official complaint, fearing future ramifications in accessing care. Following his discharge, he decided not to return for follow up appointments and had his casts removed at another facility.[201]

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[198] Supra note 185, at pages 195–208.
[199] Ibid.
[200] Ibid.
[201] Ibid.

Another woman, P, who had been with her female partner for three years, wanted to get tested for HIV. The nurse at the hospital asked certain questions to discern potential risk behaviours. When asked why she did not use condoms or contraception, P revealed that she did not need to on account of her sexuality. The nurse immediately exclaimed that P was not at risk for HIV, and that she should "go home and not waste her time any longer." P has not attempted to have another HIV test since.[202]

These examples are illustrative of a wider issue: individuals across the world are denied access to equal healthcare on the basis of their sexual orientation. That people are intimidated or blatantly denied healthcare access on a discriminatory basis around the world proves that this issue is not simply an ideological tussle playing out in classrooms and courtrooms, but an issue detrimentally affecting individuals on the ground level and violating their rights including the right to health.

81 The right to health is one of the major rights at stake in the struggle for equality amongst gender and sexual minorities:[203]

> "The right to physical and mental health is at conflict with discriminatory policies and practices, some physicians' homophobia, the lack of adequate training for health care

[202] Ibid.
[203] Study Guide: Sexual Orientation and Human Rights, University of Minnesota Human RIghts Library (2003).

> personnel regarding sexual orientation issues or the general assumption that patients are heterosexuals."[204]

While the enumeration of the right to equal healthcare is crucial, an individual's sexual health is also equally significant to holistic well-being. A healthy sex life is integral to an individual's physical and mental health, regardless of whom an individual is attracted to. Criminalising certain sexual acts, thereby shunning them from the mainstream discourse, would invariably lead to situations of unsafe sex, coercion, and a lack of sound medical advice and sexual education, if any at all.

82 A report by the Francois-Xavier Bagnoud Center for Health and Human Rights at Harvard School of Public Health defines the term 'sexual health' as follows:

> "A state of physical, emotional, mental, and social well-being in relation to sexuality. Like health generally, it is not merely the absence of disease, but encompasses positive and complex experiences of sexuality as well as freedom to determine sexual relationships, as well as the possibility of having pleasurable sexual experiences, free of coercion, discrimination and violence."[205]

83 Laws that criminalize same-sex intercourse create social barriers to accessing healthcare, and curb the effective prevention and treatment of

[204] Ibid.
[205] Center for Health and Human Rights and Open Society Foundations. "Health and Human Rights Resource Guide (2013).

HIV/AIDS.[206] Criminal laws are the strongest expression of the State's power to punish certain acts and behaviour, and it is therefore incumbent upon the State to ensure full protection for all persons, including the specific needs of sexual minorities. The equal protection of law mandates the state to fulfill this constitutional obligation. Indeed, the state is duty bound to revisit its laws and executive decisions to ensure that they do not deny equality before the law and the equal protection of laws. That the law must not discriminate is one aspect of equality. But there is more. The law must take affirmative steps to achieve equal protection of law to all its citizens, irrespective of sexual orientation.

In regard to sexuality and health, it is important to distinguish between behaviour that is harmful to others, such as rape and coerced sex, and that which is not, such as consensual same-sex conduct between adults, conduct related to gender-expression such as cross-dressing, as well as seeking or providing sexual and reproductive health information and services. The use of criminal laws in relation to an expanding range of otherwise consensual sexual conduct has been found to be discriminatory by international and

[206] Supra note 172.

domestic courts, often together with violations of other human rights, such as the rights to privacy, self-determination, human dignity and health.[207]

## G.I Section 377 and HIV prevention efforts

84 Section 377 has a significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV – men who have sex with men ("MSM")[208] and transgender persons.[209] The Global Commission on HIV and the Law has noted the impact of Section 377 on the right of health of persons afflicted with or vulnerable to contracting HIV:

> "The law and its institutions can protect the dignity of all people living with HIV, and in so doing fortify those most vulnerable to HIV, so-called "key populations", such as sex workers, MSM, transgender people, prisoners and migrants. The law can open the doors to justice when these people's rights are trampled…. But the law can also do grave harm to the bodies and spirits of people living with HIV. It can perpetuate discrimination and isolate the people most vulnerable to HIV from the programmes that would help them to avoid or cope with the virus. By dividing people into criminals and victims or sinful and innocent, the legal environment can destroy the social, political, and economic

[207] Eszter Kismodi, Jane Cottingham, Sofia Gruskin & Alice M. Miller, "Advancing sexual health through human rights: The role of the law", Taylor and Francis, (2015), at pages 252-267.

[208] The term "men who have sex with men" (MSM) denotes all men who have sex with men, regardless of their sexual identity, sexual orientation and whether or not they also have sex with females. MSM is an epidemiological term which focuses on sexual behaviours for the purpose of HIV and STI surveillance. The assumption is that behaviour, not sexual identity, places people at risk for HIV. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).

[209] Transgender people continue to be included under the umbrella term "MSM". However, it has increasingly been recognized that Transgender people have unique needs and concerns, and it would be more useful to view them as a separate group. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).

> solidarity that is necessary to overcome this global epidemic."[210]

85 Mr Anand Grover, learned Senior Counsel in his submissions, highlighted the vulnerability of MSM and transgender persons. According to a study published by the Global Commission on HIV and the Law, MSM were found to be 19 times more susceptible to be infected with HIV than other adult men.[211]

86 The UN Human Rights Committee has recognized the impact of the criminalization of homosexuality on the spread of HIV/AIDS. In **Toonen** v **Australia**[212], a homosexual man from Tasmania, where homosexual sex was criminalized, argued that criminalization of same-sex activities between consenting adults was an infringement of his right to privacy under Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"). The Committee rejected the argument of the Tasmanian authorities that the law was justified on grounds of public health and morality as it was enacted to prevent the spread of HIV/AIDS in Tasmania. The Committee observed that:

> "... the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV …

[210] United Nations Development Programme, "Global Commission on HIV and the Law: Risks, Rights and Health" (2012), at pages 11-12.
[211] Ibid at page 45; HIV prevalence amongst MSM is 4.3% and amongst transgender persons it is 7.5% as opposed to the overall adult HIV prevalence of 0.26%.
[212] Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), decision dated 31/03/1994.

> Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus."

In response to the Committee's decision, a law was enacted to overcome the Tasmanian law criminalizing homosexual sex.

87 Section 377 has had far-reaching consequences for this "key population", pushing them out of the public health system. MSM and transgender persons may not approach State health care providers for fear of being prosecuted for engaging in criminalized intercourse. Studies show that it is the stigma attached to these individuals that contributes to increased sexual risk behaviour and/or decreased use of HIV prevention services.[213]

88 The silence and secrecy that accompanies institutional discrimination may foster conditions which encourage escalation of the incidence of HIV/AIDS.[214] The key population is stigmatized by health providers, employers and other service providers.[215] As a result, there exist serious obstacles to effective HIV prevention and treatment as discrimination and

[213] Beena Thomas, Matthew J. Mimiaga, Senthil Kumar, Soumya Swaminathan, Steven A. Safren, and Kenneth H. Mayer, "HIV in Indian MSM: Reasons for a concentrated epidemic & strategies for prevention", Indian Journal Medical Research (2011), at pages 920–929.
[214] Ibid.
[215] Ibid.

harassment can hinder access to HIV and sexual health services and prevention programmes.[216]

89 An incisive article, based on extensive empirical research carried out in various countries, has concluded that there is a demonstrable relationship between "laws which criminalize same-sex conduct and adverse health effects on HIV-AIDs rates as well as other health indicators for the MSM community" due to poor access to key HIV prevention tools and outreach programmes.[217] According to a report published by the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), in Caribbean countries where same-sex relations are criminalised, almost one in four MSMs is infected with HIV.[218] In the absence of such criminal provisions, the prevalence of HIV is one in fifteen among MSMs.[219]

90 Closer to home, the UNAIDS project found that in the four years following the judgement in **Naz**, there had been an increase of more than 50% in the number of healthcare centers providing HIV services to MSM and transgender persons in India.[220] If same-sex relations remain criminalised, it is

[216] Ibid.
[217] Supra note 172, at page 636.
[218] Supra note 210, at page 45.
[219] Ibid.
[220] UNAIDS, "UNAIDS Calls on India and All Countries to Repeal Laws That Criminalize Adult Consensual Same Sex Sexual Conduct" (2013).

likely that HIV interventions for MSMs will continue to be inadequate, MSMs will continue to be marginalised from health services, and the prevalence of HIV will exacerbate.[221]

91 To safeguard the health of persons who are at the greatest risk of HIV infection, it is imperative that access is granted to effective HIV prevention and treatment services and commodities such as clean needles, syringes, condoms and lubricants.[222] A needle or a condom can only be considered a concrete representation of the entitlements of vulnerable groups: the fundamental human rights of dignity, autonomy and freedom from ill-treatment, along with the right to the highest attainable standard of physical and mental health, without regard to sexuality or legal status.[223] This is the mandate of the Directive Principles contained in Part IV of the Constitution.

92 In 2017, Parliament enacted the HIV (Prevention and Control) Act, to provide for the prevention and control of the spread of HIV/AIDS and for the protection of the human rights of persons affected. Parliament recognized the importance of prevention interventions for vulnerable groups including MSMs. Section 22 of this Act provides for protection against criminal sanctions as well as any civil liability arising out of promoting actions or practices or "any

[221] UNAIDS, "Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law" (2013) at page 165.
[222] Supra note 210, at page 26.
[223] Ibid, at page 26.

strategy or mechanism or technique" undertaken for reducing the risk of HIV transmission. Illustrations (a) and (b) to Section 22 read as follows:

> "(a) A supplies condoms to B who is a sex worker or to C, who is a client of B. Neither A nor B nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the strategy.
> (b) M carries on an intervention project on HIV or AIDS and sexual health information, education and counselling for men, who have sex with men, provides safer sex information, material and condoms to N, who has sex with other men. Neither M nor N can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention."

Persons who engage in anal or oral intercourse face significant sexual health risks due to the operation of Section 377. Prevalence rates of HIV are high, particularly among men who have sex with men. Discrimination, stigma and a lack of knowledge on the part of many healthcare providers means that these individuals often cannot and do not access the health care they need. In order to promote sexual health and reduce HIV transmission among LGBT individuals, it is imperative that the availability, effectiveness, and quality of health services to the LGBT community be significantly improved.

Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. By the application of Section 377 of the Indian Penal Code, MSM and transgender persons are excluded from access to healthcare due to the

societal stigma attached to their sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity.

## G.2 Mental health

93 The treatment of homosexuality as a disorder has serious consequences on the mental health and well-being of LGBT persons. The mental health of citizens "growing up in a culture that devalues and silences same-sex desire" is severely impacted.[224] Global psychiatric expert Dinesh Bhugra has emphasised that radical solutions are needed to combat the high levels of mental illness among the LGBT population stating there is a "clear correlation between political and social environments" and how persecutory laws against LGBT individuals are leading to greater levels of depression, anxiety, self-harm, and suicide. Even in Britain, gay people are at greater risk of a range of mental health problems, and, it is believed, are more likely to take their own lives.

> "A number of studies this year have highlighted the disproportionate levels of mental illness among LGBT people. In Britain, one of the world's most legally equal countries for this community, research in the last few months has revealed that LGBT people are nearly **twice as likely** to have

[224] Ketki Ranade, "Process of Sexual Identity Development for Young People with Same Sex Desires: Experiences of Exclusion", Psychological Foundations - The Journal (2008).

> attempted suicide or harmed themselves, gay men are more than **twice as likely** to have a mental illness than heterosexual men, and 4 in 5 **transgender people** have suffered depression in the last five years."[225]
> (Emphasis supplied)

He discusses studies from various countries which indicate that in countries where laws continue to discriminate against LGBT individuals, there are high rates of mental illness. Similarly he states that there have been a series of studies showing that in America, rates of psychiatric disorders have dropped when state policies have recognised the equal rights of LGBT individuals.

94 Mr Chander Uday Singh, learned Senior Counsel appearing on behalf of an intervenor, a psychiatrist, has brought to our notice how even the mental health sector has often reflected the societal prejudice regarding homosexuality as a pathological condition.

95 Medical and scientific authority has now established that consensual same sex conduct is not against the order of nature and that homosexuality is natural and a normal variant of sexuality. Parliament has provided legislative acknowledgment of this global consensus through the enactment of the Mental Healthcare Act, 2017. Section 3 of the Act mandates that mental illness is to be determined in accordance with 'nationally' or 'internationally'

[225] Dinesh Bhugra, globally renowned psychiatrist (article annexed in compilation provided by Mr. Chander Uday Singh, learned Senior Counsel).

accepted medical standards. The International Classification of Diseases (ICD-10) by the World Health Organisation is listed as an internationally accepted medical standard and does not consider non-peno-vaginal sex between consenting adults either a mental disorder or an illness. The Act through Section 18(2)[226] and Section 21[227] provides for protection against discrimination on the grounds of sexual orientation.

The repercussions of prejudice, stigma and discrimination continue to impact the psychological well-being of individuals impacted by Section 377. Mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality.

96 Counselling practices will have to focus on providing support to homosexual clients to become comfortable with who they are and get on with their lives, rather than motivating them for change. Instead of trying to cure something that isn't even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and

[226] Section 18. **Right to access mental healthcare**.—(1) Every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government. (2) The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.

[227] Section 21. **Right to equality and non-discrimination**.—(1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:—(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability.

changing societal values. There is not only a need for special skills of counsellors but also heightened sensitivity and understanding of LGBT lives. The medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination[228] where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights.

## H Judicial review

97 The Constitution entrusts the function of making laws to Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. Parliament and the State Legislatures are empowered to create offences against laws with respect to the heads of legislation, falling within the purview of their legislative authority. (See Entry 93 of List I and Entry 64 of List II of the Seventh Schedule). Criminal law is a subject which falls within the Concurrent List. Entry I of List III provides thus:

> "1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

[228] Vinay Chandran, "From judgement to practice: Section 377 and the medical sector", Indian Journal of Medical Ethics, Vol. 4 (2009).

The power to enact legislation in the field of criminal law has been entrusted to Parliament and, subject to its authority, to the State Legislatures. Both Parliament and the State Legislatures can enact laws providing for offences arising out of legislation falling within their legislative domains. The authority to enact law, however, is subject to the validity of the law being scrutinised on the touchstone of constitutional safeguards. A citizen, or, as in the present case, a community of citizens, having addressed a challenge to the validity of a law which creates an offence, the authority to determine that question is entrusted to the judicial branch in the exercise of the power of judicial review. The Court will not, as it does not, in the exercise of judicial review, second guess a value judgment made by the legislature on the need for or the efficacy of legislation. But where a law creating an offence is found to be offensive to fundamental rights, such a law is not immune to challenge. The constitutional authority which is entrusted to the legislatures to create offences is subject to the mandate of a written Constitution. Where the validity of the law is called into question, judicial review will extend to scrutinising whether the law is manifestly arbitrary in its encroachment on fundamental liberties. If a law discriminates against a group or a community of citizens by denying them full and equal participation as citizens, in the rights and liberties granted by the Constitution, it would be for the Court to adjudicate upon validity of such a law.

## I India's commitments at International Law

98 International human rights treaties and jurisprudence impose obligations upon States to protect all individuals from violations of their human rights, including on the basis of their sexual orientation.[229] Nevertheless, laws criminalizing same-sex relations between consenting adults remain on the statute books in more than seventy countries. Many of them, including so-called "sodomy laws", are vestiges of colonial-era legislation that prohibits either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex.[230] In some cases, the language used refers to vague and indeterminate concepts, such as 'crimes against the order of nature', 'morality', or 'debauchery'.[231] There is a familiar ring to it in India, both in terms of history and text.

99 International law today has evolved towards establishing that the criminalization of consensual sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination. These rights are recognised in international treaties, covenants, and

[229] Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law", Human Rights Law Review, Vol. 16 (2016).
[230] UN Human Rights Council, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011).
[231] UN Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development" (2008).

agreements which India has ratified, including the UDHR, ICCPR, and the ICESCR. India has a constitutional duty to honour these internationally recognized rules and principles.[232] Article 51 of the Constitution, which forms part of the Directive Principles of State Policy, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

100 The human rights treaties that India has ratified require States Parties to guarantee the rights to equality before the law, equal protection of the law and freedom from discrimination. For example, Article 2 of the ICESCR requires states to ensure that:

> "The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

101 The Committee on Economic, Social and Cultural Rights - the body mandated by the ICESCR to monitor States Parties' implementation of the treaty – has stated that "other status" in article 2 (2) includes sexual orientation, and reaffirmed that "gender identity is recognized as among the

[232] Vishaka v State of Rajasthan, (1997) 6 SCC 241.

prohibited grounds of discrimination", as "persons who are transgender, transsexual or intersex often face serious human rights violations."[233]

102 The prohibition against discrimination in the ICCPR is contained in Article 26, which guarantees equality before the law:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

India is also required to protect the right to privacy, which includes within its ambit the right to engage in consensual same-sex sexual relations.[234] Article 12 of the UDHR recognises the right to privacy:

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

[233] Committee on Economic, Social and Cultural Rights, "General Comment 20: Non-discrimination in economic, social and cultural rights" (2009), at para 32.
[234] Toonen.

Similarly, Article 17 of the ICCPR, which India ratified on 11 December 1977, provides that:

> "The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."

In its General Comment No. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[235]

In their general comments, concluding observations and views on communications, human rights treaty bodies have affirmed that States are obliged to protect individuals from discrimination on grounds of sexual orientation and/or gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights to which they are entitled.[236]

103 In **NALSA**, while dealing with the rights of transgender persons, this Court recognized the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' – which

[235] Supra note 230, at page 6.
[236] Ibid.

outline the rights that sexual minorities enjoy as human persons under the protection of international law – and held that they should be applied as a part of Indian law. Principle 33 provides thus:

> "Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics."

While the Yogyakarta Principles are not legally binding, **NALSA** nevertheless signifies an affirmation of the right to non-discrimination on the grounds of gender identity, as well as the relevance of international human rights norms in addressing violations of these rights.

104 There is a contradiction between India's international obligations and Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts between same-sex adults in private. In adjudicating the validity of this provision, the Indian Penal Code must be brought into conformity with both the Indian Constitution and the rules and principles of international law that India has recognized. Both make a crucial contribution towards recognizing the human rights of sexual and gender minorities.

## J Transcending borders - comparative law

105 Over the past several decades, international and domestic courts have developed a strong body of jurisprudence against discrimination based on sexual orientation. This section analyses the evolution of the perspective of the law towards sexual orientation from a comparative law perspective, and looks at how sodomy laws have been construed in various jurisdictions based on their histories.

106 In 1967, England and Wales decriminalized same-sex intercourse between consenting adult males in private, and in 1980, Scotland followed suit. The law in Northern Ireland only changed in 1982 with the decision of the ECtHR in **Dudgeon** v **The United Kingdom** ("Dudgeon").[237] The Petitioners challenged the Offences against the Person Act, 1861, the Criminal Law Amendment Act, 1885 and a sodomy law that made buggery and "gross indecency" a criminal offense, irrespective of consent. Although the law did not specifically define these terms, the Court interpreted 'buggery' to mean anal intercourse by a man with a man or woman and gross indecency to mean any act "involving sexual indecency between male persons." Regarding acts prohibited by these provisions, the ECtHR observed that:

[237] App No 7525/76, (1981) ECHR 5.

> "Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery, there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation."

The ECtHR concluded that Dudgeon had suffered and continued to suffer an unjustified interference with his right to respect for his private life. Hence, the Court struck down the laws under challenge as violative of Article 8 of the European Convention on Human Rights, in so far as they criminalised "private homosexual relations between adult males capable of valid consent." In observing that these laws were not proportionate to their purported need, the Court observed:

> "On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[238]

The ECtHR thus concluded:

> "To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible

[238] Ibid, at para 60.

> penalties provided for, disproportionate to the aims sought to be achieved."[239]

Later, in **Norris** v **Ireland**[240], the Applicant challenged Ireland's criminalization of certain homosexual acts between consenting adult men as being violative of Article 8 of the European Convention on Human Rights, which protected the right to respect for private and family life. The ECtHR held that the law violated Article 8, regardless of whether it was actively enforced:

> "A law which remains on the statute books even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example, there is a change of policy. The applicant can therefore be said to 'run the risk of being directly affected' by the legislation in question."

This decision was affirmed in **Modinos** v **Cyprus**[241], where the Criminal Code of Cyprus, which penalized homosexual conduct, was alleged to constitute an unjustified interference with the Applicant's private life.

107 Five years after **Dudgeon**, the United States Supreme Court, in **Bowers** v. **Hardwick** ("Bowers")[242], held that "sodomy" laws had been a significant part of American history and did not violate the Constitution. The Supreme Court's reasoning in **Bowers** is a clear departure from that of the

[239] Ibid, at para 61.
[240] Application No. 10581/83, (1988) ECHR 22.
[241] Application No. 15070/89,16 EHRR 485.
[242] 478 U.S. 186 (1986).

ECtHR in **Dudgeon**. In **Bowers**, the Supreme Court declined to accept that the question concerned the right to privacy. Instead, it stated that the issue was about "a fundamental right upon homosexuals to engage in sodomy",[243] which was held not to be protected by the US Constitution.

Seventeen years later, the United States Supreme Court laid the constitutional foundation for LGBT rights in the country with its judgment in **Lawrence** v **Texas** ("Lawrence").[244] In **Lawrence**, the Petitioner had been arrested under a Texas statute, which prohibited same-sex persons from engaging in sexual conduct, regardless of consent. The validity of the statute was considered.

Relying on **Dudgeon**, the U S Supreme Court struck down the statute as violative of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Overruling the judgment in **Bowers**, Justice Kennedy, writing for the majority, upheld Justice Stevens' dissent in **Bowers** – who was also part of the majority in **Lawrence** – to note that:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual

[243] Bowers, at para 190.
[244] 539 U.S. 558 (2003).

> decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[245]

He also noted that the case concerned the private, personal relationships of consenting adults, and that the laws challenged did not further any legitimate state interest:

> "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter [eg, a right to marry or to register a 'civil union']. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual...."

108 Justice Kennedy also identified the harm caused by the operation of the criminal law:

> "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to

[245] Bowers, at para 216.

> subject homosexual persons to discrimination both in the public and in the private spheres."

The Court thus struck down the Texas law banning "deviate sexual intercourse" between persons of the same sex (and similar laws in 13 other US states and Puerto Rico), holding that:

> "The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. **Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home**. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." (Emphasis supplied)

109 In **Toonen**, the UN Human Rights Committee held that laws used to criminalize private, adult, consensual same-sex sexual relations violate the right to privacy and the right to non-discrimination. Mr Toonen – a member of the Tasmanian Gay Law Reform Group – had complained to the Committee about a Tasmanian law that criminalized 'unnatural sexual intercourse', 'intercourse against nature' and 'indecent practice between male persons'. The law allowed police officers to investigate intimate aspects of his private life and to detain him if they had reason to believe that he was involved in sexual activities with his long-term partner in the privacy of their home. Mr

Toonen challenged these laws as violative of Article 2(1)[246], Article 17[247] and Article 26[248] of the ICCPR, on the ground that:

> "[The provisions] have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights."[249]

The Committee rejected the argument that criminalization may be justified as "reasonable" on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate:[250]

> "As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV."

[246] Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[247] Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

[248] Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[249] Toonen, at para 2.4.

[250] Toonen, at para. 8.5.

The Court concluded that the legislation was violative of Article 7 of the ICCPR, holding that:

> "… It is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws."[251]

110 In **X** v. **Colombia**[252], the Committee clarified that there is no "Global South exception" to **Toonen**.[253] The Egyptian and Tunisian members of the Committee, who dissented from the majority's decision requiring equal treatment of unmarried same-sex and different-sex couples, concurred with the principle laid down in **Toonen**:

> "[T]here is no doubt that [A]rticle 17…is violated by discrimination on grounds of sexual orientation. The Committee…has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults."

111 The Constitutional Tribunal of Ecuador was the first Constitutional Court in the Global South to decriminalise sodomy laws.[254] The constitutionality of Article 516 of the Penal Code, which penalised "cases of homosexualism, that do not constitute rape", was challenged before the Tribunal. The Tribunal's

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[251] Toonen, at para 8.2.
[252] Communication No. 1361/2005.
[253] Robert Wintemute, "Same-Sex Love and Indian Penal Code §377: An Important Human Rights Issue for India" National University of Juridical Sciences Law Review, (2011).
[254] Case No. 111-97-TC (27 November 1997).

reasoning was that "this abnormal behaviour should be the object of medical treatment ... imprisonment in jails, creates a suitable environment for the development of this dysfunction." The Tribunal's line of reasoning – referring to homosexual activity as 'abnormal behaviour', requiring medical treatment – is seriously problematic.[255] That assumption is unfounded in fact and is an incorrect doctrine for a constitutional court which protects liberty and dignity. However ultimately, the Tribunal struck down the first paragraph of Article 516 of the Penal Code, holding that:

> "Homosexuals are above all holders of all the rights of the human person and therefore, have the right to exercise them in conditions of full equality ... that is to say that their rights enjoy legal protection, as long as in the exteriorisation of their behaviour they do not harm the rights of others, as is the case with all other persons."

112 The adverse impact of sodomy laws on the lives of homosexual adults was also considered by the Constitutional Court of South Africa in **National Coalition for Gay and Lesbian Equality** v. **Minister of Justice** ("National Coalition")[256], in which the constitutionality of the common law offence of sodomy and other legislations which penalised unnatural sexual acts between men was at issue. The Constitutional Court unanimously found that the sodomy laws, all of which purported to proscribe sexual intimacy between

[255] The Tribunal's decision was criticized by LGBT rights activists for its description of homosexuality as "abnormal conduct." However, a year after this decision, Ecuador became the third country in the world to include sexual orientation as a constitutionally protected category against discrimination.
[256] 1999 (1) SA 6 (CC).

homosexual adult men, violated their right to equality and discriminated against them on the basis of their sexual orientation.

Justice Ackerman, concurring with the ECtHR's observation in **Norris**, noted that:

> "The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives."[257]

Justice Ackerman quoted from Edwin Cameron's "Sexual Orientation and the Constitution: A Test Case for Human Rights"[258]:

> "Even when these provisions are not enforced, they reduce gay men… to what one author has referred to as '**unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation**."[259] (Emphasis supplied)

Commenting on the violation of individuals' rights to privacy and dignity, the Court held that:

> "Gay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences criminalise private conduct

[257] National Coalition, at para 23.
[258] (1993) 110 SALJ 450.
[259] National Coalition, at para 23.

> between consenting adults which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy. The fact that the offences, which lie at the heart of the discrimination, also violate the rights to privacy and dignity strengthens the conclusion that the discrimination against gay men is unfair."

In its conclusion, the Court held that all persons have a right to a "sphere of private intimacy and autonomy that allows [them] to establish and nurture human relationships without interference from the outside community."[260]

113 In 2005, the High Court of Fiji, in **Dhirendra Nadan Thomas McCoskar** v. **State**[261], struck down provisions of the Fijian Penal Code, which punished any person who permits a male person to have "carnal knowledge" of him, as well as acts of "gross indecency" between male persons. The High Court read down the provisions to the extent that they were inconsistent with the Constitution of Fiji, drawing a clear distinction between consensual and non-consensual sexual behavior:

> "What the constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality…**A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties**

[260] National Coalition, at para 32.
[261] [2005] FJHC 500.

> **of keeping sexual expression in check by protecting the vulnerable and penalizing the predator**." (Emphasis supplied)

In recent years, the Caribbean States of Belize and Trinidad and Tobago have also decriminalized consensual sexual acts between adults in private. In **Caleb Orozco** v. **The Attorney General of Belize** ("Caleb Orozco")[262], provisions of the Belize Criminal Code which penalized "every person who has intercourse against the order of nature with any person…" were challenged before the Supreme Court. Commenting on the concept of dignity, Justice Benjamin borrowed from the Canadian Supreme Court's observations and noted that:[263]

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. **Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits.** It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying the differences." (Emphasis supplied)

Relying on the judgments in **Dudgeons**, **National Coalition**, **McCoskar**, **Toonen**, and **Lawrence**, the Supreme Court struck down the provision as violative of the claimant's constitutional rights to privacy, dignity, and equality. Justice Benjamin held thus:

[262] Claim No. 668 of 2010.
[263] Law v Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497.

> "However, from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral…There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the real likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution."[264]

114 In **Jason Jones** v. **The Attorney General of Trinidad and Tobago** ("Jones")[265], an expatriate gay rights activist living in the United Kingdom challenged the provisions of Trinidad and Tobago's Sexual Offences Act, which criminalized 'buggery' and 'serious indecency' before the High Court of Justice at Trinidad and Tobago. The central issue before the Court was whether the provisions were 'saved' under Section 6 of the Constitution, which protects laws that were in existence before the Constitution came into force and were only marginally changed since, from being struck down for breach of fundamental rights.

The High Court struck down the provisions as unconstitutional, observing that the right to choose a partner and to have a family is intrinsic to an individual's personal autonomy and dignity:

> "To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any

[264] Caleb Orozco, at para 81.
[265] Claim no. CV2017-00720.

> unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with who to make a family."[266]

The High Court also held that the existence of such laws deliberately undermined the lives of homosexuals:

> "A citizen should not have to live under the constant threat, the proverbial "Sword of Damocles," that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded, that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed to be of a lesser value than anyone else…The Parliament has taken the deliberate decision to criminalise the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallised in an act which is statutorily unlawful, whether or not enforced."[267] (Emphasis supplied)

The High Court compared the impugned provisions to racial segregation, the Holocaust, and apartheid, observing that:

> "To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority, based on the genuinely held beliefs of some."[268]

[266] Jones, at para 91.
[267] Ibid.
[268] Jones, at para 171.

115 In **Leung TC William Roy** v. **Secretary for Justice**[269], the High Court of Hong Kong considered the constitutional validity of provisions that prescribed different ages of consent for buggery and regular sexual intercourse. The court held that these provisions violated the petitioner's rights to privacy and equality:

> "Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation."[270]

The Court concluded that the difference in the ages of consent was unjustifiable, noting that:

> "No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument."[271]

Courts around the world have not stopped at decriminalizing sodomy laws; they have gone a step further and developed a catena of broader rights and protections for homosexuals. These rights go beyond the mere freedom to

[269] Civil Appeal No. 317 of 2005.
[270] Ibid, at para 48.
[271] Ibid, at para 51.

engage in consensual sexual activity in private, and include the right to full citizenship, the right to form unions and the right to family life.

116 Israel was one of the first countries to recognize the rights of homosexuals against discrimination in matters of employment. In **El-Al Israel Airlines Ltd** v. **Jonathan Danielwitz** ("El-Al Israel Airlines")[272], the Supreme Court of Israel considered an airline company's policy of giving discounted tickets to their employees and a 'companion recognized as the husband/wife of the employee'. This benefit was also given to a partner with whom the employee was living together like husband and wife, but not married. However, the airline refused to give the discounted tickets to the Respondent and his male partner.

The Supreme Court of Israel observed thus:

> "The principle of equality demands that the existence of a rule that treats people differently is justified by the nature and substance of the issue…therefore, a particular law will create discrimination when two individuals who are different from one another (factual inequality), are treated differently by the law, **even though the factual difference between them does not justify different treatment in the circumstances**."[273] (Emphasis supplied)

[272] HCJ 721/94.
[273] El-A Israel Airlines, at para 14.

The Supreme Court held that giving a benefit to an employee who has a spouse of the opposite sex and denying the same benefit to an employee whose spouse is of the same sex amounts to discrimination based on sexual orientation. This violated the Petitioner's right to equality and created an unjustifiable distinction in the context of employee benefits.

117 In **Vriend** v **Alberta**[274], the appellant, a homosexual college employee, was terminated from his job. He alleged that his employer had discriminated against him because of his sexual orientation, but that he could not make a complaint under Canada's anti-discrimination statute – the Individual's Rights Protection Act ("IRPA") – because it did not include sexual orientation as a protected ground. The Supreme Court of Canada held that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of the right to equality under the Canadian Charter of Rights and Freedoms.

118 The Supreme Court held that the State had failed to provide a rational justification for the omission of sexual orientation as a protected ground under the IRPA. Commenting on the domino effect that such discriminatory measures have on the lives of homosexuals, the Supreme Court noted thus:

[274] (1998) 1 S.C.R. 493.

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."

The next breakthrough for LGBTQ rights came from the Supreme Court of Nepal, in **Sunil Babu Pant** v. **Nepal Government**[275]. Sunil Pant – the first openly gay Asian national leader – filed a PIL before the Supreme Court of Nepal praying for the recognition of the rights of lesbians, gays, and third gender persons. The Supreme Court located the rights of LGBTQ persons to their sexuality within the right to privacy, holding that:

> "The right to privacy is a fundamental right of any individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural."

The Court held that all individuals have an inherent right to marriage, regardless of their sexual orientation:

[275] Writ Petition No. 917 of 2007.

> "Looking at the issue of same sex marriage, we hold that it is an inherent right of an adult to have marital relation with another adult with his/her free consent and according to her/his will."

In concluding, the Court directed the Nepalese government to enact new legislation or amend existing legislation to ensure that persons of all sexual orientations and gender identities could enjoy equal rights.

119 In 2015, in **Oliari** v **Italy** ("Oliari")[276], the Applicants before the ECtHR argued that the absence of legislation in Italy permitting same-sex marriage or any other type of civil union constituted discrimination on the basis of sexual orientation, in violation of Articles 8, 12, and 14 of the European Convention on Human Rights. In line with its previous case law, the Court affirmed that same-sex couples "are in need of legal recognition and protection of their relationship."[277] The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as heterosexual couples.[278]

120 The ECtHR examined the domestic context in Italy, and noted a clear gap between the "social reality of the applicants",[279] who openly live their

[276] [2015] ECHR 716
[277] Oliari, at para 165.
[278] Ibid.
[279] Oliari, at para. 173.

relationship, and the law, which fails to formally recognize same-sex partnerships. The Court held that in the absence of any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[280]

121 In 2013, in **United States** v. **Windsor**[281], US Supreme Court considered the constitutionality of the Defense of Marriage Act ("DOMA") which states that, for the purposes of federal law, the words 'marriage' and 'spouse' refer to legal unions between one man and one woman. Windsor, who had inherited the estate of her same-sex partner, was barred from claiming the federal estate tax exemption for surviving spouses since her marriage was not recognized by federal law.[282] Justice Kennedy writing for the majority, held that restricting the federal interpretation of 'marriage' and 'spouse' to apply only to opposite-sex unions was unconstitutional under the Due Process Clause of the Fifth Amendment:

> "Its [the DOMA's] unusual deviation from the tradition of recognizing and accepting state definitions of marriage

[280] Oliari, at para 185.
[281] 570 U.S. 744 (2013).
[282] Section 3, Defense of Marriage Act.

> operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

Two years later, in **Obergefell** v. **Hodges** ("Obergefell"),[283] while analysing precedent and decisions of other US courts recognizing same-sex marriage, Justice Kennedy observed that:

> "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy… Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."[284]

122 Justice Kennedy expressed the need to go beyond the narrow holding in **Lawrence**, towards a more expansive view of the rights of homosexuals:

> "Lawrence invalidated laws that made same- sex intimacy a criminal act... **But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty**." (Emphasis supplied)

[283] 576 U.S. ___ (2015).
[284] Obergefell, at page 12.

By a 5-4 majority, the US Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. Commenting on the right to marriage, Justice Kennedy noted:

> "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. … It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

123 The recent case of **Masterpiece Cakeshop** v. **Colorado Civil Rights Commission** ("Masterpiece Cakeshop")[285] concerned a Christian baker who was accused of violating an anti-discrimination ordinance for refusing to make a wedding cake for a same-sex couple based on his religious beliefs. The Colorado Civil Rights Commission ("CCRC") decided against the baker, and, on appeal, the Supreme Court ruled 7-2 that the CCRC violated the baker's rights under the First Amendment, which guarantees freedom of expression.

Writing for the majority, Justice Kennedy said the CCRC showed "hostility" to the baker's religious beliefs:

[285] 584 U.S. ____ (2018).

> "It must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside."

The majority held that while the Constitution allows gay persons to exercise their civil rights, "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." The Supreme Court found merit in the baker's First Amendment claim, noting that his dilemma was understandable, especially given that the cause of action arose in 2012, before the enactment of Colorado's anti-discrimination law and the **Obergefell** judgment that legalised same-sex marriage.

The court buttressed its position by noting that in several other cases, bakers had declined to decorate cakes with messages that were derogatory towards gay persons and the State Civil Rights Division had held that the bakers were within their rights to have done so. According to the majority in **Masterpiece Cakeshop**, the owner was similarly entitled to decline the order, and his case should have been treated no differently.

124 Justice Ginsburg's dissenting opinion, which was supported by Justice Sotomayor, distinguished the baker in **Masterpiece Cakeshop** from the other three bakers. Justice Ginsburg noted that while the other bakers would have refused the said cake decorations to *all* customers, Phillips refused to bake a wedding cake (which he baked for other customers), specifically for the couple. She observed that:

> "Phillips declined to make a cake he found offensive where the **offensiveness of the product was determined solely by the identity of the customer requesting it.** The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display." (Emphasis supplied)
>
> "When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied."

Justice Ginsburg concluded that a proper application of the Colorado Anti-Discrimination Act would require upholding the lower courts' rulings.

125 **Masterpiece Cakeshop** is also distinguishable from a similar case, **Lee** v. **Ashers Bakery Co. Ltd**.[286], which is currently on appeal to the United Kingdom Supreme Court. In that case, a bakery in Northern Ireland offered a

[286] [2015] NICty 2.

service whereby customers could provide messages, pictures or graphics that would be iced on a cake. Lee – a member of an LGBT organisation – ordered a cake with the words “support gay marriage” on it. The Christian owners refused, stating that preparing such an order would conflict with their religious beliefs. Lee claimed that in refusing his order, the bakery discriminated against him on grounds of sexual orientation. Both the County Court and the Court of Appeal ruled in favour of Lee, on the ground that the respondent’s refusal on the ground of his religious beliefs was contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment Order 1998.

From an analysis of comparative jurisprudence from across the world, the following principles emerge:

1. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;
2. Intimacy between consenting adults of the same-sex is beyond the legitimate interests of the state;
3. Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;

4. Such a law perpetrates stereotypes, lends authority of the state to societal stereotypes and has a chilling effect on the exercise of freedom;
5. The right to love and to a partner, to find fulfillment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;
6. Sexual orientation implicates negative and positive obligations on the state. It not only requires the state not to discriminate, but also calls for the state to recognise rights which bring true fulfillment to same-sex relationships; and
7. The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection.

The past two decades have witnessed several decisions by constitutional and international courts, recognizing both the decriminalization of same-sex intercourse in private, as well as broader rights recognizing sexual orientation equality. In 1996, South Africa became the first country in the world to

constitutionally prohibit discrimination based on sexual orientation.[287] As on the date of this judgment, ten countries constitutionally prohibit discrimination on grounds of sexual orientation.[288] The United Kingdom, Bolivia, Ecuador, Fiji, and Malta specifically prohibit discrimination on the basis of gender identity, either constitutionally or through enacted laws.[289] According the International Lesbian, Gay, Bisexual, Trans and Intersex Association, 74 countries (including India) criminalize same-sex sexual conduct, as of 2017.[290] Most of these countries lie in the Sub-Saharan and Middle East region. Some of them prescribe death penalty for homosexuality.[291]

126 We are aware that socio-historical contexts differ from one jurisdiction to another and that we must therefore look at comparative law-making allowances for them. However, the overwhelming weight of international opinion and the dramatic increase in the pace of recognition of fundamental rights for same-sex couples reflects a growing consensus towards sexual orientation equality. We feel inclined to concur with the accumulated wisdom reflected in these judgments, not to determine the meaning of the guarantees

[287] Amy Raub, "Protections Of Equal Rights Across Sexual Orientation And Gender Identity: An Analysis Of 193 National Constitutions", Yale Journal of Law and Feminism, Vol. 28 (2017).
[288] Ibid. Of these, three are in the Americas (Bolivia, Ecuador, and Mexico), four are in Europe and Central Asia (Malta, Portugal, Sweden, and the United Kingdom), two are in East Asia and the Pacific (Fiji and New Zealand), and one is in Sub-Saharan Africa (South Africa).
[289] Ibid.
[290] The International Lesbian, Gay, Bisexual, Trans And Intersex Association, "Sexual Orientation Laws of the World", (2017).
[291] Ibid.

contained within the Indian Constitution, but to provide a sound and appreciable confirmation of our conclusions about those guarantees.

This evolution has enabled societies governed by liberal constitutional values – such as liberty, dignity, privacy, equality and individual autonomy – to move beyond decriminalisation of offences involving consensual same-sex relationships. Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind.

## K Crime, morality and the Constitution

127 The question of what qualifies as a punishable offence under the law has played a central role in legal theory. Attempts have been made by legal scholars and jurists alike, to define a crime. **Halsbury's Laws of England** defines a crime as "an unlawful act or default which is an offence against the

public and renders the person guilty of the act or default liable to legal punishment."[292] As Glanville Williams observes:

> "A crime is an act capable of being followed by criminal proceedings, having a criminal outcome…criminal law is that branch of law which deals with conduct…by prosecution in the criminal courts."[293]

Henry Hart, in his essay titled "The Aims of Criminal Law", [294] comments on the difficulty of a definition in this branch of law. A crime is a crime because it is called a crime:

> "If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name."[295]

However, Hart confesses that such a simplistic definition would be "a betrayal of intellectual bankruptcy."[296] Roscoe Pound articulates the dilemma in defining what constitutes an offence:

> "A final answer to the question 'what is a crime?', is impossible, because law is a living, changing thing, which may at one time be uniform, and at another time give much room for judicial discretion, which may at one time be more

[292] Halsbury's Laws of England. 3rd edition, Vol. 3, Butterworths (1953) at page. 271.
[293] Glanville Williams, 'The Definition of Crime', Current Legal Problems, Vol. 8 (1955).
[294] Henry M. Hart, "The Aims of the Criminal Law", Law and Contemporary Problems, Vol. 23 (1958), at pages 401–441.
[295] Ibid.
[296] Ibid.

> specific in its prescription and at another time much more general."[297]

Early philosophers sought to define crime by distinguishing it from a civil wrong. In his study of rhetoric, Aristotle observed that:

> "Justice in relation to the person is defined in two ways. For it is defined either in relation to the community or to one of its members what one should or should not do. Accordingly, it is possible to perform just and unjust acts in two ways, either towards a defined individual or towards the community."[298]

Kant, in the Metaphysics of Morals,[299] observed that:

> "A transgression of public law that makes someone who commits it unfit to be a citizen is called a *crime* simply (crimen) but is also called a *public crime* (crimen publicum); so the first (private crime) is brought before a civil court, the latter before a criminal court."[300]

Another method of defining crime is from the nature of injury caused, "of being public, as opposed to private, wrongs."[301] This distinction was brought out by Blackstone and later by Duff, in their theories on criminal law. Blackstone, in his "Commentaries on the Laws of England" put forth the idea that only

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297 Roscoe Pound, Interpretation of Legal History, Harvard University Press (1946).
298 H.C. Lawson-Tancred, The Art of Rhetoric/ Aristotle, Penguin (2004).
299 Immanuel Kant: The Metaphysics of Morals (Mary Gregor ed.), Cambridge University Press (1996).
300 Ibid, at pages 353, 331.
301 Grant Lamond, "What is a Crime?", Oxford Journal of Legal Studies, Vol.27 (2007).

actions which constitute a 'public wrong' will be classified as a crime.[302] He characterised public wrongs as "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[303] Duff adds to the idea of public wrong by arguing that "[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole."[304]

Nozick and Becker also support the theory that crime is conduct that harms the public. Nozick argues that the harm caused by a crime, unlike other private law wrongs, extends beyond the immediate victim to all those who view themselves as potential victims of the crime.[305] When such an act is done on purpose, it spreads fear in the general community, and it is *due to this additional harm to the community* [of causing fear and insecurity], that such actions are classified as crimes and pursued by the state.[306] Becker preferred to describe crime as something which disrupts social stability and has "the potential for destructive disturbance of fundamental social structures."[307]

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[302] Sir William Blackstone, Commentaries on the Laws of England, Book IV, Ch. 1 & 2.
[303] Ibid.
[304] Antony Duff and Sandra Marshall, "Criminalization and Sharing Wrongs", Canadian Journal of Law and Jurisprudence, Vol. 11, (1998) at pages 7-22.
[305] Robert Nozick, Anarchy, State and Utopia, Basic Books (1974) ,at page 65.
[306] Supra note 301.
[307] Lawrence C. Becker, "Criminal Attempts and the Theory of the Law of Crimes", Philosophy & Public Affairs, Vol 3 (1974), at page 273.

However, Hart questioned the theory of simply defining crime as a public wrong, for all wrongs affect society in some way or the other:

> "Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfilment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation." [308]

128 Hart preferred to define crime in terms of the methodology of criminal law and the characteristics of this method. He described criminal law as possessing the following features:

> "1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do…
>
> 2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words…
>
> 3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce…
>
> 4. **What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition**."[309] (Numbering and emphasis supplied)

[308] Supra note 294.
[309] Ibid.

According to Hart, the first three characteristics above are common to both civil and criminal law.[310] However, the key differentiating factor between criminal and civil law, he observed, is the "community condemnation." [311] Thus, he attempted to define crime as:

> "Conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." [312]

Perhaps it is difficult to carve out a single definition of crime due to the multi-dimensional nature of criminal law. The process of deconstructing the criminalisation of consensual sexual acts by adults will be facilitated by examining some criminal theories and their interplay with Section 377.

## Criminal Law Theories

### Bentham's Utilitarian Theory

129 Utilitarianism has provided some of the most powerful critiques of existing laws. Bentham was one of the earliest supporters for reform in sodomy laws. In his essay, "Offences Against One's Self",[313] Bentham rebutted all the justifications given by the state for enacting laws on

[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Jeremy Bentham, "Offences Against One's Self" (Louis Crompton Ed.), Columbia University.

sodomy.[314] According to Bentham, homosexuality, if viewed outside the realms of morality and religion, is neutral behaviour which gives the participants pleasure and does not cause pain to anyone else.[315] Therefore, he concluded that such an act cannot constitute an offence, and there is "no reason for punishing it at all."[316]

130 Bentham tested sodomy laws on three main principles: (i) whether they produce any primary mischief, i.e., direct harm to another person; (ii) whether they produce any secondary mischief, i.e., harm to the stability and security of society; and (iii) whether they cause any danger to society.[317] He argued that sodomy laws do not satisfy any of the above tests, and hence, should be repealed. On the first principle of primary mischief, Bentham said:

> "As to any primary mischief, it is evident that it produces no pain in anyone. On the contrary it produces pleasure, and that a pleasure which, by their perverted taste, is by this supposition preferred to that pleasure which is in general reputed the greatest. The partners are both willing. If either of them be unwilling, the act is not that which we have here in view: it is an offence totally different in its nature of effects: it is a personal injury; it is a kind of rape." [318]

[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.

Thus, Bentham argued that consensual homosexual acts do not harm anyone else. Instead, they are a source of pleasure to adults who choose to engage in them. Bentham was clear about the distinction between 'willing' partners and 'unwilling' partners, and the latter according to him, would not fall under his defence.

Bentham's second argument was that there was no secondary mischief, which he described as something which may "produce any alarm in the community." On this, Bentham argued:

> "As to any secondary mischief, it produces not any pain of apprehension. For what is there in it for any body to be afraid of? By the supposition, those only are the objects of it who choose to be so, who find a pleasure, for so it seems they do, in being so."[319]

Bentham's explanation was that only those adults who *choose* will be the objects of homosexual sexual acts. It does not involve any activity which will create anxiety among the rest of the society. Therefore, homosexuality does not cause secondary harm either.

Lastly, Bentham tested sodomy laws on whether they cause danger to society. The only danger that Bentham could apprehend was the supposed

[319] Ibid.

danger of encouraging others to engage in homosexual practices. However, Bentham argues that since homosexual activities in themselves do not cause any harm, there is no danger even if they have a domino effect on other individuals:

> "As to any danger exclusive of pain, the danger, if any, must consist in the tendency of the example. But what is the tendency of this example? To dispose others to engage in the same practises: but this practise for anything that has yet appeared produces not pain of any kind to anyone." [320]

Thus, according to Bentham, sodomy laws fail on all three grounds- they neither cause primary mischief, nor secondary mischief, nor any danger to society.

Bentham also critiqued criminal laws by analysing the utility of the punishment prescribed by them. He succinctly described the objective of law through the principles of utility- "The general object which all laws have, or ought to have…is to augment the total happiness of the community; [and] to exclude…everything that tends to subtract from that happiness."[321] According to Bentham, "all punishment in itself is evil"[322] because it reduces the level of happiness in society, and should be prescribed only if it "excludes some

[320] Ibid.
[321] Ibid.
[322] Ibid.

greater evil."[323] Bentham stipulated four kinds of situations where it is not utilitarian to inflict punishment:

> "1. Where it is *groundless:* where there is no mischief for it to prevent; the act not being mischievous upon the whole.
> 2. Where it must be *inefficacious:* where it cannot act so as to prevent the mischief.
> 3. Where it is *unprofitable,* or too *expensive:* where the mischief it would produce would be greater than what it prevented.
> 4. Where it is *needless:* where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate."[324]

## The Harm Principle

131 John Stuart Mill, in his treatise "On Liberty," makes a powerful case to preclude governments from interfering in those areas of an individual's life which are private. Mill's theory, which came to be called the "harm principle", suggests that the state can intrude into private life by way of sanction only if harm is caused to others or if the conduct is "other-affecting."[325] In Mill's words:

> "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the

[323] Ibid.
[324] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, The Library of Economics and Liberty (1823).
[325] John Stuart Mill, On Liberty, (Elizabeth Rapaport ed), Hackett Publishing Co, Inc (1978).

> opinions of others, to do so would be wise, or even right… The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. **Over himself, over his own body and mind, the individual is sovereign**." [326] (Emphasis supplied)

Mill created a dichotomy between "self-regarding" actions (those which affect the individual himself and have no significant effect on society at large) and "other-regarding" actions (those which affect the society).[327] He was aware that in a way, all actions of an individual are likely to affect "those nearly connected with him and, in a minor degree, society at large."[328] However, he argued that as long as an action does not "violate a distinct and assignable obligation to any other person or persons", it may not be taken out of the self-regarding class of actions.[329] Thus, Mill proposed that "all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation" should be free from state interference.[330] He further added that the state and society are not justified in interfering in the self-regarding sphere, merely because they believe certain conduct to be "foolish, perverse, or wrong."[331]

[326] Ibid.
[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid.

Essentially, Mill created a taxonomy on types of conduct – (a) self-regarding actions should not be the subject of sanctions either from the state or society; (b) actions which may hurt others but do not violate any legal rights may only be the subject of public condemnation but not state sanction; (c) only action which violate the legal rights of others should be the subject of legal sanction (and public condemnation).[332] The harm principle thus, operated as a negative or limiting principle, with the main objective of restricting criminal law from penalising conduct merely on the basis of its perceived immorality or unacceptability when the same is not harmful.[333]

While Mill's theory was not propounded in relation to LGBTQ rights, his understanding of criminal law is well-suited to argue that sodomy laws criminalise 'self-regarding' actions which fall under the first category of conduct, and should not be subjected to sanctions either by the state or the society.

132 A jurisprudential debate on the interplay between criminal law and morality was set off when Lord Devlin delivered the 1959 Maccabean Lecture,

[332] Mark Strasser, "Lawrence, Mill, and Same Sex Relationships: On Values, Valuing and the Constitution", Southern California Interdisciplinary Law Journal, Vol. 15 (2006).

[333] Joseph Raz, 'Autonomy, Toleration and the Harm Principle', in Issues in Contemporary Legal Philosophy: The Influence of HLA Hart (R. Gavison ed.), Oxford University Press (1987).

titled "The Enforcement of Morals."[334] Lord Devlin's lecture was an attack against the Report of the Wolfenden Committee on Homosexual Offences and Prostitution ("Wolfenden Report"), which had recommended the decriminalisation of sodomy laws in England.[335] The Wolfenden Committee, headed by Sir John Wolfenden, Vice-Chancellor of Reading University, was set up in 1954 to consider the criminalisation of homosexuality and prostitution, in the wake of increased arrests and convictions in the UK for homosexuality between men.[336] Among those prosecuted for 'gross indecency' under the Buggery Act of 1553 and Sexual Offences Act of 1967 were eminent persons like Oscar Wilde, Alan Turing and Lord Montagu of Beaulieu.[337] After conducting a three-year long inquiry, carrying out empirical research, and interviewing three gay men, the Wolfenden Committee released its Report in 1957.[338] The Wolfenden Report recommended that:

> "Homosexual behaviour between consenting adults should no longer be a criminal offence... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[339]

[334] Graham Hughes, "Morals and the Criminal Law", The Yale Law Journal, Vol.71 (1962).
[335] Supra note 29.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Supra note 29, at paras 61 and 62.

The Wolfenden Report stated that "it is not the purpose of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour…"[340] The Wolfenden Report acknowledged that the law and public opinion have a close relationship with each other – the law ought to "follow behind public opinion" so that it garners the community support, while at the same time, the law must also fortify and lead public opinion.[341] However, it made out a strong case for divorcing morality from criminal law and stated that - "moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind."[342] Stating that homosexuality is not a mental illness, the Wolfenden Report clarified that homosexuality is "a sexual propensity for persons of one's own sex…[it] is a state or condition, and as such does not, and cannot, come within the purview of criminal law."[343]

133 Lord Devlin, perturbed by the Wolfenden Report's line of reasoning, framed questions on the issue of criminal law and morality:

> "1. Has society the right to pass judgments on all matters of morals?

[340] Ibid, at para 14.
[341] Ibid, at para 16.
[342] Ibid, at para 54.
[343] Ibid, at para 18.

> 2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?"[344]

Devlin believed that society depends upon a common morality for its stability and existence.[345] On the basis of this belief, Devlin answered the above questions in the affirmative, stating that – society has the right to pass judgments on all matters of morality and also the right to use law to enforce such morality.[346] Devlin reasoned that society would disintegrate if a common morality was not observed. Therefore, society is justified in taking steps to preserve its morality as much as it preserves the government.[347] Devlin proposed that the common morality or "collective judgment of the society" should be ascertained taking into consideration the "reasonable man."[348] According to him, a reasonable man is an ordinary man whose judgment "may largely be a matter of feeling."[349] He added that if the reasonable man believed a practice to be immoral, and held this belief honestly and dispassionately, then for the purpose of law such practice should be considered immoral.[350]

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[344] Sir Patrick Arthur Devlin, "The Enforcement Of Morals" Oxford University Press (1959) at page 9.
[345] Supra note 334, at page 662.
[346] Animesh Sharma, "Section 377: No Jurisprudential Basis." Economic and Political Weekly, Vol. 43 (2008) at pages 12-14.
[347] Supra note 344.
[348] Ibid.
[349] Ibid.
[350] Ibid.

134 Countering Devlin's theory, Hart argued that society is not held together by a common morality, for, after all, it is not a hive mind or a monolith, governed by a singular set of morals and principles.[351] Hart rebutted Devlin's argument in the following way:

> "…apart from one vague reference to 'history' showing the 'the loosening of moral bonds is often the first stage of disintegration,' no evidence is produced to show that deviation from accepted sexual morality, even by adults in private is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it…Lord Devlin's belief in it [that homosexuality is a cause of societal disintegration], and his apparent indifference to the question of evidence, are at points traceable to an undiscussed assumption. This is that all morality – sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty -- forms a single seamless web, so that those who deviate from any part are likely to perhaps bound to deviate from the whole. It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others. But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society."[352]

Despite countering Devlin, Hart was not completely opposed to a relationship between law and morality, and in fact, he emphasised that the two are closely related:

[351] Supra note 346, at pages 12-14.
[352] Hart, H. L. A, "The Changing Sense of Morality" In Political Thought (Michael Rosen and Jonathan Wolff eds.), Oxford University Press (1999) at pages 140-141.

> "The law of every modem state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process…The further ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fair- ness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility." [353]

However, unlike Devlin, Hart did not propose that morality is a necessary condition for the validity of law.[354] Hart argued, in summary, that "law is morally relevant," but "not morally conclusive."[355] Hart vehemently disagreed with Devlin's view that if laws are not based on some collective morality and enacted to buttress that morality, society will disintegrate.[356] Hart draws this distinction by conceding that certain sexual acts (including homosexual acts) were considered 'immoral' by mainstream Western society but adding that private sexual acts are an issue of "private morality" over which society has no interest and the law, no control.[357]

Hart further expounded his warning about the imposition of majoritarian morals, propounding that "[I]t is fatally easy to confuse the democratic

[353] H.L.A. Hart, Law, Liberty And Morality (1979).
[354] William Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy", Marquette Law Review, Vol. 67 (1984).
[355] Ibid.
[356] Supra note 352.
[357] Peter August Bittlinger, "Government enforcement of morality: a critical analysis of the Devlin-Hart controversy", Doctoral Dissertations 1896-February 2014 (1975) at pages 69-70.

principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits"[358]:

> "Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an "overwhelming majority" or marked by widespread "intolerance, indignation, and disgust" that loyalty to democratic principles requires him to admit that its imposition on a minority is justified."[359]

In this way, Hart avoided the specious generalization that the law must be severely quarantined from morality but still made it clear that laws like Section 377, which impose a majoritarian view of right and wrong upon a minority in order to protect societal cohesion, are jurisprudentially and democratically impermissible.

Bentham had a different view on morality and weighed morality against utilitarian principles. Bentham argued that if the punishment is not utilitarian (i.e. does not serve as a deterrent, is unprofitable, or unnecessary), the 'immoral' action would have to go unpunished.[360] He opined that legislators should not be overly swayed by the society's morality:

[358] Ibid at page 91.
[359] Ibid at page 93.
[360] Supra note 334.

> "The strength of their prejudice is the measure of the indulgence which should be granted to it…The legislator ought to yield to the violence of a current which carries away everything that obstructs it.
>
> But ought the legislator to be a slave to the fancies of those whom he governs? No. Between an imprudent opposition and a servile compliance, there is a middle path, honourable and safe."[361]

In other words, it appears that Bentham argued that the morality of the people ought not be ignored in creating laws but also must not become their unchecked fount. And if prejudicial moralities arise from the people, they should not be unthinkingly and permanently cemented into the law, but rather addressed and conquered.

John Stuart Mill also made a strong argument against popular morality being codified into laws. He argued that 'disgust' cannot be classified as harm, and those "who consider as an injury to themselves any conduct which they have a distaste for", cannot dictate the actions of others merely because such actions contradict their own beliefs or views.[362] Mill believed that society is not the right judge when dealing with the question of when to interfere in conduct

[361] Ibid.
[362] Supra note 325.

that is purely personal, and that when society does interfere, "the odds are that it interferes wrongly and in the wrong place."[363]

135 Christopher R Leslie points out the dangers of letting morality creep into law:

> "Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children. Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. The underlying premises of ancient laws are rarely discussed, let alone scrutinized."[364]

Leslie further adds that "sodomy laws do not merely express societal disapproval; they go much further by creating a criminal class"[365]:

> "Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning… In short, the primary importance of sodomy laws today is the government's message to diminish the societal status of gay men and lesbians."[366]

136 A broad analysis of criminal theory points to the general conclusion that criminologists and legal philosophers have long been in agreement about one basic characteristic of crime: that it should injure a third person or the society.

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[363] Ibid.
[364] Christopher. R. Leslie, "Creating criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws", Harvard Civil Rights and Civil Liberties Law Review, Vol. 35 (2000).
[365] Ibid, at pages 103-181.
[366] Ibid.

An element of larger public interest emerges as the crux of crime. The conduct which Section 377 criminalises voluntary 'carnal intercourse against the order of nature' with a man or woman, *inter alia* – pertains solely to acts between consenting adults. Such conduct is purely private, or as Mill would call it, "self-regarding," and is neither capable of causing injury to someone else nor does it pose a threat to the stability and security of society. Once the factor of consent is established, the question of such conduct causing *any* injury, does not arise.

Although Section 377 prima facie appears to criminalise certain acts or conduct, it creates a class of criminals, consisting of individuals who engage in consensual sexual activity. It typecasts LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation. Section 377 not only criminalises acts (consensual sexual conduct between adults) which should not constitute crime, but also stigmatises and condemns LGBTQ individuals in society.

137 We are aware of the perils of allowing morality to dictate the terms of criminal law. If a single, homogenous morality is carved out for a society, it will undoubtedly have the effect of hegemonizing or 'othering' the morality of minorities. The LGBTQ community has been a victim of the pre-dominant

(Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of Section 377.

## L Constitutional morality

138 With the attainment of independence on 15 August 1947, Indians were finally free to shape their own destiny.[367] The destiny was to be shaped through a written Constitution. Constitutions are scripts in which people inscribe the text of their professed collective destiny. They write down who they think they are, what they want to be, and the principles that will guide their interacting along that path in the future.[368] The Constitution of India was burdened with the challenge of "drawing a curtain on the past"[369] of social inequality and prejudices. Those who led India to freedom established into the Constitution the ideals and vision of a vibrant equitable society. The framing of India's Constitution was a medium of liberating the society by initiating the process of establishing and promoting the shared values of liberty, equality

[367] Jawaharlal Nehru, "Tryst with Destiny", address to the Constituent Assembly of India, delivered on 14-15 August 1947.
[368] Uday S. Mehta, "Constitutionalism", In The Oxford Companion to Politics in India (Niraja Gopal Jayal and Pratap Bhanu Mehta eds.), Oxford University Press (2010), at page 15.
[369] Ibid, at page 16.

and fraternity. Throughout history, socio-cultural revolts, anti-discrimination assertions, movements, literature and leaders have worked at socializing people away from supremacist thought and towards an egalitarian existence. The Indian Constitution is an expression of these assertions. It was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society. All citizens were to be free from coercion or restriction by the state, or by society privately.[370] Liberty was no longer to remain the privilege of the few. The judgment in **Puttaswamy** highlights the commitment of the constitution makers, thus:

> "The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere."

139 Understanding the vision of India at a time when there was little else older than that vision, is of paramount importance for the reason that though the people may not have played any role in the actual framing of the Constitution, the Preamble professes that the Constitution has been adopted by the people themselves. Constitutional historian Granville Austin has said that the Indian Constitution is essentially a social document.[371] The Indian Constitution does not provide merely a framework of governance. It embodies a vision. It is goal-oriented and its purpose is to bring about a social

[370] Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 65.
[371] Ibid, at page 63.

transformation in the country. It represents the aspirations of its framers. The democratic Constitution of India embodies provisions which are value-based.

140 During the framing of the Constitution, it was realized by the members of the Constituent Assembly that there was a wide gap between constitutional precept and reality. The draftspersons were clear that the imbibing of new constitutional values by the population at large would take some time. Society was not going to change overnight. Dr Ambedkar remarked in the Constituent Assembly:

> "Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."

141 The values of a democracy require years of practice, effort, and experience to make the society work with those values. Similar is the position of non-discrimination, equality, fraternity and secularism. While the Constitution guarantees equality before the law and equal protection of the law, it was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. Dr Ambedkar described this commitment to be the presence of constitutional morality among the members of the society. The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of

society is determined by popular perceptions existent in society. The continuance of certain symbols, labels, names or body shapes determine the notions, sentiments and mental attitudes of the people towards individuals and things.[372] Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the Constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures. For this reason, constitutional morality has to be imbibed by the citizens consistently and continuously. Society must always bear in mind what Dr Ambedkar observed before the Constituent Assembly:

> "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it."

[372] Babasaheb.R. Ambedkar, Annihilation of Caste, Navayana Publishing (2014); See also Martha C. Nussbaum, "Disgust or Equality? Sexual Orientation and Indian Law", Journal of Indian Law and Society, Vol. 6 (2010).

142 In the decision in **Government of NCT of Delhi** v. **Union of India**[373], the Constitution Bench of this Court dealt with the constitutive elements of constitutional morality which govern the working of a democratic system and representative form of government. Constitutional morality was described as founded on a "constitutional culture", which requires the "existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain." This Court held thus:

> "If the moral values of our .Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values."

This Court held that constitutional morality acts a check against the "tyranny of the majority" and as a "threshold against an upsurge in mob rule." It was held to be a balance against popular public morality.

143 Constitutional morality requires in a democracy the assurance of certain minimum rights, which are essential for free existence to every member of society. The Preamble to the Constitution recognises these rights as "Liberty of thought, expression, belief, faith and worship" and "Equality of status and of opportunity." Constitutional morality is the guarantee which seeks that all inequality is eliminated from the social structure and each individual is

[373] 2018 (8) SCALE 72

assured of the means for the enforcement of the rights guaranteed. Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections. Constitutional morality cannot, however, be nurtured unless, as recognised by the Preamble, there exists fraternity, which assures and maintains the dignity of each individual. In his famous, yet undelivered speech titled "Annihilation of Caste" (which has been later published as a book), Dr Ambedkar described 'fraternity' as "primarily a mode of associated living, of conjoint communicated experience" and "essentially an attitude of respect and reverence towards fellow men."[374] He remarked:

> "An ideal society should be mobile, should be full of channels for conveying a change taking place in one part to other parts. In an ideal society there should be many interests consciously communicated and shared. There should be varied and free points of contact with other modes of association. In other words there must be social endosmosis. This is fraternity, which is only another name for democracy."

In his last address to the Constituent Assembly, he defined fraternity as "a sense of common brotherhood of all Indians." As on the social and economic plane, Indian society was based on graded inequality, Dr Ambedkar had warned in clear terms:

> "Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to

[374] Supra note 372, at para 14.2.

> enforce them… Without fraternity equality and liberty will be no deeper than coats of paint."[375]

144 Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court. Lord Neuberger (of the UK Supreme Court) has aptly observed:

> "[W]e must always remember that Parliament has democratic legitimacy – but that has disadvantages as well as advantages. The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an

[375] Constituent Assembly Debates (25 November 1949).

> independent body of people who do not have to worry about short term popularity."[376]

The flourishing of a constitutional order requires not only the institutional leadership of constitutional courts, but also the responsive participation of the citizenry.[377] Constitutional morality is a pursuit of this responsive participation. The Supreme Court cannot afford to denude itself of its leadership as an institution in expounding constitutional values. Any loss of its authority will imperil democracy itself.

145 The question of morality has been central to the concerns around homosexuality and the rights of LGBT individuals. Opponents – including those of the intervenors who launched a diatribe in the course of hearing – claim that homosexuality is against popular culture and is thus unacceptable in Indian society. While dealing with the constitutionality of Section 377 of the Indian Penal Code, the Delhi High Court in **Naz Foundation** had held:

> "Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality

[376] Lord Neuberger, "UK Supreme Court decisions on private and commercial law: The role of public policy and public interest", Centre for Commercial Law Studies Conference (2015).

[377] Marc Galanter, "Fifty Years on", in BN Kirpal et al, Supreme but Not Infallible: Essays in Honour of the Supreme Court of India, Oxford University Press (2000), at page 57.

> and not public morality… In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."

The invocation of constitutional morality must be seen as an extension of Dr Ambedkar's formulation of social reform and constitutional transformation. Highlighting the significance of individual rights in social transformation, he had observed:

> "The assertion by the individual of his own opinions and beliefs, his own independence and interest—over and against group standards, group authority, and group interests—is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion."[378]

After the enactment of the Constitution, every individual assertion of rights is to be governed by the principles of the Constitution, by its text and spirit. The Constitution assures to every individual the right to lead a dignified life. It prohibits discrimination within society. It is for this reason that constitutional morality requires this court to issue a declaration - which we now do - that LGBT individuals are equal citizens of India, that they cannot be discriminated against and that they have a right to express themselves through their intimate choices. In upholding constitutional morality, we affirm that the protection of the rights of LGBT individuals are not only about guaranteeing a

[378] Supra note 373, at para 12.1.

minority their rightful place in the constitutional scheme, but that we equally speak of the vision of the kind of country we want to live in and of what it means for the majority.[379] The nine-judge Bench of this Court in **Puttaswamy** had held in clear terms that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Bench held:

> "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties."

Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will

[379] Supra note 41.

supersede any culture or tradition.

The interpretation of a right in a matter of decriminalisation and beyond must be determined by the norms of the Constitution.

146 LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.[380] Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

## M In summation : transformative constitutionalism

147 This case has required a decision on whether Section 377 of the Penal Code fulfills constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such

[380] Ibid.

sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

148 Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

149 The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

150 Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

151 The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

152 This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

153 Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks – as well – to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

154 A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

155 The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate

of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored.

156 We hold and declare that:

(i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

(ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

(iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

(iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

(v) The decision in **Koushal** stands overruled.

**Acknowledgment**

Before concluding, I acknowledge the efforts of counsel for the petitioners and intervenors who appeared in this case – Mr Mukul Rohatgi, Mr Arvind Datar, Mr Ashok Desai, Mr Anand Grover, Mr Shyam Divan, Mr CU Singh and Mr Krishnan Venugopal, Senior Counsel; and Mr Saurabh Kirpal, Dr Menaka Guruswamy and Ms Arundhati Katju, and Ms Jayna Kothari, learned Counsel. Their erudition has enabled us to absorb, as we reflected and wrote. Mr Tushar Mehta, learned Additional Solicitor General appeared for the Union of India. We acknowledge the assistance rendered by the counsel for the intervenors who opposed the petitioners.

**……...….....J**
**[Dr Dhananjaya Y Chandrachud]**

**New Delhi;**
**September 06, 2018.**

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CRIMINAL ORIGINAL JURISDICTION**

**WRIT PETITION (CRL.) NO. 76 OF 2016**

Navtej Singh Johar and Others ...Petitioners

VERSUS

Union of India Ministry of Law
and Justice Secretary ...Respondent

**WITH**

**W.P. (C) No. 572/2016**

**W.P. (CRL.) No. 88/2018**

**W.P. (CRL.) No. 100/2018**

**W.P. (CRL.) No. 101/2018**

**W.P. (CRL.) No. 121/2018**

**J U D G E M E N T**

**INDU MALHOTRA, J.**

1. I have had the advantage of reading the opinions prepared by the Hon'ble Chief Justice, and my brother Judges Justice

Nariman and Justice Chandrachud. The Judgments have dealt in-depth with the various issues that are required to be examined by this Bench, to answer the reference.

2. The present batch of Writ Petitions have been filed to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 ("**IPC**") on the specific ground that it criminalises consensual sexual intercourse between adult persons belonging to the same sex in private.

3. The issue as to whether the decision in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.*[1] requires re-consideration was referred to the Constitution Bench *vide* Order dated 8th January, 2018.

4. The Petitioners have *inter alia* submitted that sexual expression and intimacy between consenting adults of the same sex in private ought to receive protection under Part III of the Constitution, as sexuality lies at the core of a human being's innate identity. Section 377 inasmuch as it criminalises consensual relationships between same sex couples is violative of the fundamental rights guaranteed by Articles 21, 19 and 14, in Part III of the Constitution.

[1] (2014) 1 SCC 1

The principal contentions raised by the Petitioners during the course of hearing are:

i. Fundamental rights are available to LGBT persons regardless of the fact that they constitute a minority.

ii. Section 377 is violative of Article 14 being wholly arbitrary, vague, and has an unlawful objective.

iii. Section 377 penalises a person on the basis of their sexual orientation, and is hence discriminatory under Article 15.

iv. Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of a human being.

5. During the course of hearing, the Union of India tendered an Affidavit dated 11th July, 2018 wherein it was submitted that with respect to the Constitutional validity of Section 377 insofar as it applies to consensual acts of adults in private, the Union of India would leave the said question to the wisdom of this Hon'ble Court.

However, if the Court is to decide and examine any issue other than the Constitutional validity of Section 377, or construe any other right in favour of the LGBT community, the Union of India would like to file a detailed Affidavit as that would have far-reaching and wide ramifications, not contemplated by the reference.

6. LEGISLATIVE BACKGROUND

6.1. 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.[2]

6.2. 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".

6.3. The 1861 Act became the charter for enactments framed in the colonies of Great Britain.

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

6.4. 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."*
>
> (emphasis supplied)

6.5. Section 377 does not define "carnal intercourse against the order of nature". Even though the provision is facially neutral, the Petitioners submit that the thrust of this provision has been to target the LGBT community in light of the colonial history of anti-sodomy laws, and penalise what was perceived to be 'deviant' or 'perverse' sexual behaviour.

7. 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

[3] *Report of the Committee on Homosexual Offences and Prostitution,* 1957, at para 30.

arrested development.[4] Homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.

8. 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 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."*

[4] Benjamin J. Sadock *et al.*, *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* (9th ed., 2009), at pp. 2060-89

[5] *Id*

[6] Great Speeches on Gay Rights (James Daley ed.; Dover Publications, 2010), at pp. 24-30

(emphasis supplied)

9. In 1957, the United Kingdom published the Wolfenden Committee Report (supra) which recognised how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. An extract of the findings of this Committee reads as under:

> *"We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position."*

Pursuant to this Report, the House of Lords initiated legislation to de-criminalise homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalised homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.

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

2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report[7] that 124 countries no longer penalise 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 recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children.[8] 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 recognised in England and Wales.

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[7] Aengus Carroll And Lucas Ramón Mendos, *Ilga Annual State Sponsored Homophobia Report 2017: A World Survey Of Sexual Orientation Laws: Criminalisation, Protection And Recognition* (12th Edition, 2017), at pp. 26-36

[8] *Id*

The British Prime Minister Theresa May in her speech at the Commonwealth Joint Forum on April 17, 2018 urged Commonwealth Nations to overhaul "outdated" anti-gay laws, and expressed regret regarding Britain's role in introducing such laws.[9] The relevant excerpt of her speech is extracted hereinbelow:

> *" Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls.*
> *I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today. "*

11. Section 377 has, however, remained in its original form in the IPC to date.

12. <u>JUDICIAL INTERPRETATION</u>

    12.1. 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

[9] Theresa May's Speech at the Commonwealth Joint Forum Plenary available at https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-plenary-17-april-2018

to ten years. Section 377 applies irrespective of gender, age, or consent.

12.2. 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.

12.3. 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[10], 'carnal' means:

> "*1.Pertaining to* the *fleshly nature or to bodily appetites.*
> *2. Sensual ; sexual.*
> *3.Pertaining to the flesh or to the body; not spiritual; hence* worldly."

12.4. 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.

[10] *The New International Webster's Comprehensive Dictionary of the English Language* (Deluxe Encyclopedic Edition, 1996)

In *Khanu* v. *Emperor*[11], 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*[12] was dealing with a case wherein the accused had penetrated the nostril of a bullock with his penis. The Court, while relying on the decision of the Sindh High Court in *Khanu* v. *Emperor* (supra) held that the acts of the accused constituted *coitus per os*, were punishable under Section 377.

In *Lohana Vasantlal Devchand & Ors* v. *State*[13] the Gujarat High Court convicted two accused under Section 377 read with Section 511 of the IPC, on account of

[11] AIR 1925 Sind 286
[12] AIR 1934 Lah 261 : 1934 Cri LJ 1096
[13] AIR 1968 Guj 252

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*[14] while reducing the sentence of 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.*"
>
> (emphasis supplied)

The test for attracting penal provisions under Section 377 changed over the years from non-procreative sexual acts in *Khanu* v. *Emperor* (supra), to imitative sexual intercourse like oral sex in *Lohana Vasantlal Devchand & Ors.* v. *State* (supra), to sexual perversity in *Fazal Rab*

[14] (1982) 3 SCC 9

v. *State of Bihar* (supra). These cases referred to non-consensual sexual intercourse by coercion.

13. HOMOSEXUALITY – NOT AN ABERRATION BUT A VARIATION OF SEXUALITY

13.1. Whilst a great deal of scientific research has examined possible genetic, hormonal, developmental, psychological, social and cultural influences on sexual orientation, no findings have conclusively linked sexual orientation to any one particular factor or factors. It is believed that one's sexuality is the result of a complex interplay between nature and nurture.

Sexual orientation is an innate attribute of one's identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.

The U.S. Supreme Court in *Lawrence et al.* 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*

[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 et al.* v. *Texas* 539 U.S. 558(2003), available at http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf

*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.*"

(emphasis supplied)

13.2. An article by K.K. Gulia and H.N. Mallick titled "Homosexuality: A Dilemma in Discourse"[17] states:

"*In general, homosexuality as a sexual orientation refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It also refers to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex…*

*…In the course of the 20th century, homosexuality became a subject of considerable study and debate in western societies. It was predominantly viewed as a disorder or mental illness. At that time, emerged two major pioneering studies on homosexuality carried out by Alfred Charles Kinsey (1930) and Evelyn Hooker (1957)…This empirical study of sexual behavior among American adults revealed that a significant*

[17] KK Gulia and HN Mallick, *Homosexuality: a dilemma in discourse*, 54 Indian Journal of Physiology and Pharmacology (2010), at pp. 5, 6 and 8

> *number of participants were homosexuals. In this study when people were asked directly if they had engaged in homosexual relations, the percentage of positive responses nearly doubled. The result of this study became the widely popularized Kinsey Scale of Sexuality. This scales rates all individuals on a spectrum of sexuality, ranging from 100% heterosexual to 100% homosexual…"*
>
> (emphasis supplied)

13.3. 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.[18]

13.4. The World Health Organization removed homosexuality from the list of diseases in the International Classification of Diseases in the publication of ICD-10 in 1992.[19]

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

[19] *The ICD-10 classification of mental and behavioural disorders*: *clinical descriptions and diagnostic guidelines*, World Health Organization, Geneva (1992) available at http://www.who.int/classifications/icd/en/bluebook.pdf

13.5. In India, the Indian Psychiatric Society has also opined that sexual orientation is not a psychiatric disorder.[20] 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.*"

13.6. 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 Organisation.

14. <u>SECTION 377 IF APPLIED TO CONSENTING ADULTS IS VIOLATIVE OF ARTICLE 14</u>

14.1. One of the main contentions raised by the Petitioners to challenge the Constitutional validity of Section 377 is founded on Article 14 of the Constitution. Article 14 enshrines the principle of equality as a fundamental right, and mandates that the State shall not deny to any

[20] 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

person equality before the law, or the equal protection of the laws within the territory of India. It recognizes and guarantees the right of equal treatment to all persons in this country.

It is contended that Section 377 discriminates against adults of the same gender, from having a consensual sexual relationship in private, by treating it as a penal offence, and hence is violative of Article 14.

14.2. The twin-test of classification under Article 14 provides that:

(i) there should be a reasonable classification based on intelligible differentia; and,

(ii) this classification should have a rational nexus with the objective sought to be achieved.

14.3. Section 377 operates in a vastly different manner for two classes of persons based on their "sexual orientation" i.e. the LGBT persons and heterosexual persons. Section 377 penalises all forms of non penile-vaginal intercourse. In effect, voluntary consensual relationships between LGBT persons are criminalised in totality.

The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be 'carnal', and against the order of nature.

Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.

14.4. In *National Legal Services Authority* v. *Union of India & Ors.*[21] this Court granted equal protection of laws to transgender persons. There is therefore no justification to deny the same to LGBT persons.

14.5. A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.

[21] (2014) 5 SCC 438

14.6. In contemporary civilised jurisprudence, with States increasingly recognising the status of same-sex relationships, it would be retrograde to describe such relationships as being 'perverse', 'deviant', or 'unnatural'.

14.7. Section 375 defines the offence of rape. It provides for penetrative acts which if performed by a man against a woman without her consent, or by obtaining her consent under duress, would amount to rape. Penetrative acts (after the 2013 Amendment) include anal and oral sex.

The necessary implication which can be drawn from the amended provision is that if such penetrative acts are done with the consent of the woman they are not punishable under Section 375.

While Section 375 permits consensual penetrative acts (the definition of 'penetration' includes oral and anal sex), Section 377 makes the same acts of penetration punishable irrespective of consent. This creates a dichotomy in the law.

14.8. The proscription of a consensual sexual relationship under Section 377 is not founded on any known or rational criteria. Sexual expression and intimacy of a

consensual nature, between adults in private, cannot be treated as "carnal intercourse against the order of nature".

14.9. Emphasising on the second part of Article 14 which enjoins the State to provide equal protection of laws to all persons, Nariman, J. in his concurring opinion in *Shayara Bano* v. *Union of India & Ors.*[22] elucidated on the doctrine of manifest arbitrariness as a facet of Article 14. Apart from the conventional twin-tests of classification discussed in the preceding paragraphs, a legislation, or part thereof, can also be struck down under Article 14 on the ground that it is manifestly arbitrary. It would be instructive to refer to the following passage from the judgment of this Court in *Shayara Bano* v. *Union of India & Ors.* (supra):

> "*101…Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.*"

Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on

[22] (2017) 9 SCC 1

any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice".

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community.

Thus, apart from not satisfying the twin-test under Article 14, Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution.

15. SECTION 377 IS VIOLATIVE OF ARTICLE 15

Article 15 prohibits the State from discrimination against any citizen on the grounds of religion, race, caste, sex, or place of birth. The object of this provision was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature.

15.1. The term 'sex', as it occurs in Article 15 has been given an expansive interpretation by this Court in *National Legal Services Authority* v. *Union of India & Ors.* (supra)

to include sexual identity. Paragraph 66 of the judgment reads thus:

> "*66…Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 and 16, therefore includes discrimination on the ground of gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female.*"
> (emphasis supplied and internal quotations omitted)

Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their "sexual identity and character".

The J.S. Verma Committee[23] had recommended that 'sex' under Article 15 must include 'sexual orientation':

> "*65. We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a*

[23] Report of the Committee on Amendments to Criminal Law (2013)

> *triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of India uses the word "sex" as including sexual orientation.*"

The prohibition against discrimination under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation.

In this regard, the view taken by the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia*[24] is relevant to cite, wherein the Committee noted that the reference to 'sex' in Article 2, Paragraph 1 and Article 26 of the International Covenant on Civil and Political Rights would include 'sexual orientation'.

15.2. In an article titled "*Reading Swaraj into Article 15: A New Deal For All Minorities*"[25], Tarunabh Khaitan notes that the underlying commonality between the grounds specified in Article 15 is based on the ideas of 'immutable status' and 'fundamental choice'. He refers to the

[24] Communication No. 488/1992, U.N. Doc.CCPR/C/50/D/488/1992 (1994)
[25] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities*, 2 NUJS Law Review (2009), at p. 419

following quote by John Gardener to provide context to the aforesaid commonality:

> "*Discrimination on the basis of our immutable status tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. .... And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.*"[26]
>
> (emphasis supplied)

Race, caste, sex, and place of birth are aspects over which a person has no control, *ergo* they are immutable. On the other hand, religion is a fundamental choice of a person.[27] Discrimination based on any of these grounds would undermine an individual's personal autonomy.

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[26] John Gardner, *On the Ground of Her Sex (uality)*, 18(2) Oxford Journal of Legal Studies (1998), at p. 167

[27] *Supra* note 25

The Supreme Court of Canada in its decisions in the cases of *Egan* v. *Canada*[28], and *Vriend* v. *Alberta*[29], interpreted Section 15(1)[30] of the Canadian Charter of Rights and Freedoms which is *pari materia* to Article 15 of the Indian Constitution.

Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include "sexual orientation" as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a "ground analogous" to the other grounds specified under Section 15(1). Discrimination based on any of these grounds has adverse impact on an individual's personal autonomy, and is undermining of his personality.

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[28] [1995] SCC 98

[29] [1998] SCC 816

[30] "*15. Equality before and under law and equal protection and benefit of law*

*(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability…*"

Article 15(1), Canadian Charter of Rights and Freedoms.

A similar conclusion can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice.

The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

## 16. SECTION 377 VIOLATES THE RIGHT TO LIFE AND LIBERTY GUARANTEED BY ARTICLE 21

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable.[31]

The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination.

### 16.1. RIGHT TO LIVE WITH DIGNITY

This Court has expansively interpreted the terms "life" and "personal liberty" to recognise a panoply of rights

[31] *Maneka Gandhi* v. *Union of India & Anr.*, (1978) 1 SCC 248, at paragraph 48

under Article 21 of the Constitution, so as to comprehend the true scope and contours of the right to life under Article 21. Article 21 is "*the most precious human right and forms the ark of all other rights*" as held in *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi & Ors.,*[32] wherein it was noted that the right to life could not be restricted to a mere animal existence, and provided for much more than only physical survival.[33] Bhagwati J. observed as under:

> "*8…We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing* oneself *in diverse forms, freely moving about and mixing and commingling with fellow human beings…it must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.*"
>
> (emphasis supplied)

[32] (1981) 1 SCC 608
[33] (1981) 1 SCC 608 at paragraph 7

This was re-affirmed by the Constitution bench decision in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*[34] and *Common Cause (A Registered Society)* v. *Union of India & Anr.*[35]

Although dignity is an amorphous concept which is incapable of being defined, it is a core intrinsic value of every human being. Dignity is considered essential for a meaningful existence.[36]

In *National Legal Services Authority* v. *Union of India & Ors.* (supra), this Court recognised the right of transgender persons to decide their self-identified gender. In the context of the legal rights of transgender persons, this Court held that sexual orientation and gender identity is an integral part of their personality.

The relevant excerpt from Radhakrishnan, J.'s view is extracted hereinbelow:

> "*22. …Each person's self-defined <u>sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom</u>…*"
>
> (emphasis supplied)

[34] (2017) 10 SCC 1
[35] (2018) 5 SCC 1 at paragraphs 156, 437, 438, 488 & 516
[36] *Common Cause (A Registered Society)* v. *Union of India and Anr.*, (2018) 5 SCC 1, at paragraphs 437 and 438

Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.

The following excerpt from the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Anr.* v. *Minister of Justice and Ors.*[37] is also instructive in this regard:

> "*While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and*

[37] [1998] ZACC 15

> *socially disconnected self. It acknowledges* that *people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or arrange the choice of partner, but for the partners to choose themselves.*"
>
> (emphasis supplied)

Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without a companion, or lead a closeted life as "*unapprehended felons*".[38]

Section 377 criminalises the entire class of LGBT persons since sexual intercourse between such persons, is considered to be carnal and "against the order of nature". Section 377 prohibits LGBT persons from engaging in intimate sexual relations in private.

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[38] According to Professor Edwin Cameron, LGBT persons are reduced to the status of "*unapprehended felons*" owing to the ever-so-present threat of prosecution.
Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 South African Law Journal (1993), at p. 450

The social ostracism against LGBT persons prevents them from partaking in all activities as full citizens, and in turn impedes them from realising their fullest potential as human beings.

On the issue of criminalisation of homosexuality, the dissenting opinion of Blackmun J. of the U.S. Supreme Court in *Bowers* v. *Hardwick*[39] is instructive, which cites a previous decision in *Paris Adult Theatre I* v. *Slaton*[40] and noted as follows:

> "*Only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality*."
>
> (emphasis supplied)

The U.S. Supreme Court over-ruled *Bowers* v. *Hardwick* (supra) in *Lawrence et al.* v. *Texas.* (supra) and declared that a statute proscribing homosexuals from engaging in intimate sexual conduct as invalid on the ground that it violated the right to privacy, and dignity of homosexual persons. Kennedy, J. in his majority opinion observed as under:

[39] 478 U.S. 186 (1986)
[40] 413 U.S. 49 (1973)

"*To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put* forward, *just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse…*

*…It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the* conduct *can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice…This stigma this criminal statute imposes, moreover, is not trivial. The offence, to be sure, is but a class C misdemeanour, a minor offence in the Texas legal system. Still, it remains a criminal offence with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of criminal convictions…*

*…The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.* It *does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexuals persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engage in sexual practices, common to a homosexual lifestyle. The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. Casey, supra at 847. The Texas statute*

*furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.*"

(emphasis supplied)

Thus, Section 377 prevents LGBT persons from leading a dignified life as guaranteed by Article 21.

16.2. RIGHT TO PRIVACY

The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty under Article 21.[41]

Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21.[42]

The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal

[41] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1

[42] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 144, 145, 479 and 647

decisions and preserves the sanctity of the private sphere of an individual.[43]

The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice.[44] It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.

Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.

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[43] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraph 248, 250, 371 and 403

[44] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 248, 249, 371 and 521

The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Anr.* v. *Minister of Justice & Ors.* (supra) noted as under:

> "*Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without* interference *from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.*"

Just like other fundamental rights, the right to privacy is not an absolute right and is subject to reasonable restrictions. Any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.[45]

A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest.

[45] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 325, 638 and 645

The theme of inclusiveness permeates through Part III of the Constitution. Apart from the equality code of the Constitution comprised in Articles 14, 15(1), 16, and other provisions in the form of Article 17 (Abolition of Untouchability), Article 21A (Right to Education), Article 25 (Freedom of Conscience and Free Profession, Practice and Propagation of Religion), Article 26 (Freedom to Manage Religious Affairs), Article 29 (Protection of Interest of Minorities), Article 30 (Right of Minorities to Establish and Administer Educational Institutions) are aimed at creating an inclusive society where rights are guaranteed to all, regardless of their status as a minority.

16.3. RIGHT TO HEALTH

The right to health, and access to healthcare are also crucial facets of the right to life guaranteed under Article 21 of the Constitution.[46]

LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and

[46] *Common Cause (A Registered Society)* v. *Union of India & Anr.*, (2018) 5 SCC 1, at paragraph 304; *C.E.S.C. Limited & Ors.* v. *Subhash Chandra Bose & Ors.*, (1992) 1 SCC 441, at paragraph 32; *Union of India* v. *Mool Chand Khairati Ram Trust*, (2018) SCC OnLine SC 675, at paragraph 66; and, *Centre for Public Interest Litigation* v. *Union of India & Ors.*, (2013) 16 SCC 279, at paragraph 25

violence on account of their sexual orientation. Since Section 377 criminalises "carnal intercourse against the order of nature" it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community.[47]

LGBT persons, and more specifically the MSM, and transgender persons are at a higher risk of contracting HIV as they lack safe spaces to engage in safe-sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being 'exposed' and the resultant prosecution.[48] Higher rates of prevalence of HIV-AIDS in MSM, who are in turn married to other people of the opposite sex, coupled with the difficulty in detection and

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[47] M.V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, World Bank Group (2014) available at http://documents.worldbank.org/curated/en/527261468035379692/The-economic-cost-of-stigma-and-the-exclusion-of-LGBT-people-a-case-study-of-India (Last accessed on August 11, 2018)

[48] Govindasamy Agoramoorthy and Minna J Hsu, *India's homosexual discrimination and health consequences*, 41(4) Rev Saude Publica (2007), at pp. 567-660 available at http://www.scielo.br/pdf/rsp/v41n4/6380.pdf

treatment, makes them highly susceptible to contraction and further transmission of the virus.

It is instructive to refer to the findings of the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia* (supra):

> "*8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes by driving underground many of the people at the risk of infection. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus*."
>
> (emphasis supplied and internal footnotes omitted)

The American Psychological Association, American Psychiatric Association, National Association of Social Workers and the Texas Chapter of the National Association of Social Workers in their Amicus Brief in *Lawrence et al.* v. *Texas* (supra) stated as follows:

> "*III. Texas Penal Code S. 21.06 reinforces prejudice, discrimination, and violence against gay men and lesbians…Although* many *gay men and lesbians learn to cope with the social stigma against homosexuality, this pattern of prejudice can cause gay people serious psychological distress, especially if they attempt to conceal or deny their sexual orientation*…."[49]
>
> (emphasis supplied)

It is pertinent to mention that in India the Mental Healthcare Act, 2017 came into force on July 7, 2018. Sections 18(1) and (2) read with 21(1)(a) of the Mental Healthcare Act, 2017 provide for the right to access mental healthcare and equal treatment of people with physical and mental illnesses without discrimination, *inter alia*, on the basis of "*sexual orientation*".

This gives rise to a paradoxical situation since Section 377 criminalises LGBT persons, which inhibits them from accessing health-care facilities, while the Mental Healthcare Act, 2017 provides a right to access mental healthcare without discrimination, even on the ground of 'sexual orientation'.

[49] *Supra* note 16, at page 3

## 17. SECTION 377 VIOLATES THE RIGHT TO FREEDOM OF EXPRESSION OF LGBT PERSONS

17.1. Article 19(1)(a) guarantees freedom of expression to all citizens. However, reasonable restrictions can be imposed on the exercise of this right on the grounds specified in Article 19(2).

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377.[50] Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified

[50] *Lawrence et al.* v. *Texas*, 539 U.S. 558 (2003); and, *National Coalition for Gay and Lesbian Equality & Anr.* v. *Minister of Justice & Ors.*, [1998] ZACC 15

existence. It also has an impact on their mental well-being.

17.2. In *National Legal Services Authority* v. *Union of India & Ors.* (supra), this Court noted that gender identity is an important aspect of personal identity and is inherent to a person. It was held that transgender persons have the right to express their self-identified gender by way of speech, mannerism, behaviour, presentation and clothing, *etc.*[51]

The Court also noted that like gender identity, sexual orientation is integral to one's personality, and is a basic aspect of self-determination, dignity and freedom.[52] The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*[53]

In this regard, it is instructive to refer to the decision of this Court in *S. Khushboo* v. *Kanniammal & Anr.*[54] wherein the following observation was made in the

[51] (2014) 5 SCC 438, at paragraphs 69-72
[52] (2014) 5 SCC 438, at paragraph 22
[53] (2017) 10 SCC 1, at paragraphs 144, 145, 647
[54] (2010) 5 SCC 600

context of the phrase "decency and morality" as it occurs in Article 19(2):

> "*45. Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as "decency and morality" among others, we must lay stress on the need to tolerate unpopular views in the sociocultural space. The Framers of our Constitution recognised the importance of* safeguarding *this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a* culture *of open dialogue when it comes to societal attitudes.*
> *46…Notions of social morality are inherently subjective and the* criminal *law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive.*"
>
> (emphasis supplied)

Therefore, Section 377 cannot be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it is inherently subjective.

18. SURESH KUMAR KOUSHAL OVERRULED

The two-Judge bench of this Court in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) over-ruled the

decision of the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi & Ors.*[55] which had declared Section 377 insofar as it criminalised consensual sexual acts of adults in private to be violative of Articles 14, 15 and 21 of the Constitution.

The grounds on which the two-judge bench of this Court over-ruled the judgment in *Naz Foundation* v. *Government of NCT of Delhi & Ors.* (supra) were that:

i. Section 377 does not criminalise 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

[55] (2009) 111 DRJ 1 (DB)

classification. Section 377 merely defines a particular offence, and prescribes a punishment for the same.

ii. 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.

iii. 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.

iv. After noting that Section 377 was *intra vires*, this Court observed that the legislature was free to repeal or amend Section 377.

19. The fallacy in the Judgment of *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) is that:

i. 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 criminalise 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*[56] wherein it was held that:

> " *62. 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....*"
>
> (emphasis supplied)

[56] (1982) 1 SCC 271

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 criminalises 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.

ii. 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 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 (supra) states that:

> *"77. 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. "*
>
> (emphasis supplied)

iii. 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 criminalisation of "*carnal intercourse against the order of nature*" has the effect of criminalising 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.

iv. The conclusion in case of *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) 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.

20. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.

21. <u>CONCLUSION</u>

i. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises

consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.

It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

ii. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

iii. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercouse against minors, and acts of beastiality.

iv. The judgment in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.*[57] is hereby overruled for the reasons stated in paragraph 19.

[57] (2014) 1 SCC 1

The Reference is answered accordingly.

In view of the above findings, the Writ Petitions are allowed.

**.....J.**
**(Indu Malhotra)**

**New Delhi;**
**September 6, 2018.**