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. Submissions on behalf of the petitioners

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

[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

[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,

[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.
>
> > ... 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

[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.

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[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

[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

[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. Sexual orientation

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:-

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[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. Doctrine of progressive realization of rights

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. International perspective

(i) United States

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 "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." 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) Canada

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) South Africa

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. Conclusions

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