REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL.) NO. 76 OF 2016

Navtej Singh Johar and Others …Petitioners

VERSUS

Union of India Ministry of Law
and Justice Secretary …Respondent

WITH

W.P. (C) No. 572/2016

W.P. (CRL.) No. 88/2018

W.P. (CRL.) No. 100/2018

W.P. (CRL.) No. 101/2018

W.P. (CRL.) No. 121/2018

J U D G E M E N T

INDU MALHOTRA, J.

1. I have had the advantage of reading the opinions prepared by the Hon'ble Chief Justice, and my brother Judges Justice

Nariman and Justice Chandrachud. The Judgments have dealt in-depth with the various issues that are required to be examined by this Bench, to answer the reference.

2. The present batch of Writ Petitions have been filed to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 ("**IPC**") on the specific ground that it criminalises consensual sexual intercourse between adult persons belonging to the same sex in private.

3. The issue as to whether the decision in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.*[1] requires re-consideration was referred to the Constitution Bench *vide* Order dated 8th January, 2018.

4. The Petitioners have *inter alia* submitted that sexual expression and intimacy between consenting adults of the same sex in private ought to receive protection under Part III of the Constitution, as sexuality lies at the core of a human being's innate identity. Section 377 inasmuch as it criminalises consensual relationships between same sex couples is violative of the fundamental rights guaranteed by Articles 21, 19 and 14, in Part III of the Constitution.

[1] (2014) 1 SCC 1

The principal contentions raised by the Petitioners during the course of hearing are:

i. Fundamental rights are available to LGBT persons regardless of the fact that they constitute a minority.

ii. Section 377 is violative of Article 14 being wholly arbitrary, vague, and has an unlawful objective.

iii. Section 377 penalises a person on the basis of their sexual orientation, and is hence discriminatory under Article 15.

iv. Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of a human being.

5. During the course of hearing, the Union of India tendered an Affidavit dated 11th July, 2018 wherein it was submitted that with respect to the Constitutional validity of Section 377 insofar as it applies to consensual acts of adults in private, the Union of India would leave the said question to the wisdom of this Hon'ble Court.

However, if the Court is to decide and examine any issue other than the Constitutional validity of Section 377, or construe any other right in favour of the LGBT community, the Union of India would like to file a detailed Affidavit as that would have far-reaching and wide ramifications, not contemplated by the reference.

6. LEGISLATIVE BACKGROUND

6.1. The legal treatises Fleta and Britton, which date back to 1290 and 1300 respectively, documented prevailing laws in England at the time. These treatises made references to sodomy as a crime.[2]

6.2. The Buggery Act, 1533 was re-enacted in 1563 during the regime of Queen Elizabeth I, which penalized acts of sodomy by hanging.

In 1861, death penalty for buggery was abolished in England and Wales. However, it remained a crime "not to be mentioned by Christians".

6.3. The 1861 Act became the charter for enactments framed in the colonies of Great Britain.

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

6.4. The Marginal Note of Section 377, refers to "Unnatural Offences". Section 377 reads as under:

> *"**377. Unnatural offences.—** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*
> *Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."*
>
> (emphasis supplied)

6.5. Section 377 does not define "carnal intercourse against the order of nature". Even though the provision is facially neutral, the Petitioners submit that the thrust of this provision has been to target the LGBT community in light of the colonial history of anti-sodomy laws, and penalise what was perceived to be 'deviant' or 'perverse' sexual behaviour.

7. In the early 20th century, there were many psychiatric theories which regarded homosexuality as a form of psychopathology or developmental arrest.[3] It was believed that normal development resulted in a child growing up to be a heterosexual adult, and that homosexuality was but a state of

[3] *Report of the Committee on Homosexual Offences and Prostitution,* 1957, at para 30.

arrested development.[4] Homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.

8. Towards the end of the 20th century, this notion began to change, and the earlier theories gave way to a more enlightened perspective that characterized homosexuality as a normal and natural variant of human sexuality. Scientific studies indicated that human sexuality is complex and inherent.[5]

Kurt Hiller in his speech delivered at the Second International Congress for Sexual Reform held at Copenhagen in 1928[6], stated:

> *"Same-sex love is not a mockery of nature, but rather nature at play…As Nietzsche expressed it in Daybreak, Procreation is a frequently occurring accidental result of one way of satisfying the sexual drive – it is neither its goal nor its necessary consequence. The theory which would make procreation the goal of sexuality is exposed as hasty, simplistic and false by the phenomenon of same-sex love alone. Nature's laws, unlike the laws formulated by the human mind, cannot be violated. The assertion that a specific phenomenon of nature could somehow be "contrary to nature" amounts to pure absurdity…To belong, not to the rule, not to the norm, but rather to the exception, to the minority, to the variety, is neither a symptom of degeneration nor of pathology."*

[4] Benjamin J. Sadock *et al.*, *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* (9th ed., 2009), at pp. 2060-89

[5] *Id*

[6] Great Speeches on Gay Rights (James Daley ed.; Dover Publications, 2010), at pp. 24-30

(emphasis supplied)

9. In 1957, the United Kingdom published the Wolfenden Committee Report (supra) which recognised how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. An extract of the findings of this Committee reads as under:

> *"We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position."*

Pursuant to this Report, the House of Lords initiated legislation to de-criminalise homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 came to be passed in England which de-criminalised homosexual acts done in private, provided the parties had consented to it, and were above the age of 21.

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

2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report[7] that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments.

Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children.[8] For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognised in England and Wales.

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[7] Aengus Carroll And Lucas Ramón Mendos, *Ilga Annual State Sponsored Homophobia Report 2017: A World Survey Of Sexual Orientation Laws: Criminalisation, Protection And Recognition* (12th Edition, 2017), at pp. 26-36

[8] *Id*

The British Prime Minister Theresa May in her speech at the Commonwealth Joint Forum on April 17, 2018 urged Commonwealth Nations to overhaul "outdated" anti-gay laws, and expressed regret regarding Britain's role in introducing such laws.[9] The relevant excerpt of her speech is extracted hereinbelow:

> *" Across the world, discriminatory laws made many years ago continue to affect the lives of many people, criminalising same-sex relations and failing to protect women and girls.*
> *I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced, and the legacy of discrimination, violence and even death that persists today. "*

11. Section 377 has, however, remained in its original form in the IPC to date.

12. JUDICIAL INTERPRETATION

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

[9] Theresa May's Speech at the Commonwealth Joint Forum Plenary available at https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-plenary-17-april-2018

to ten years. Section 377 applies irrespective of gender, age, or consent.

12.2. The expression 'carnal intercourse' used in Section 377 is distinct from 'sexual intercourse' which appears in Sections 375 and 497 of the IPC. The phrase "carnal intercourse against the order of nature" is not defined by Section 377, or in the Code.

12.3. The term 'carnal' has been the subject matter of judicial interpretation in various decisions. According to the New International Webster's Comprehensive Dictionary of the English Language[10], 'carnal' means:

> "*1.Pertaining to* the *fleshly nature or to bodily appetites.*
> *2. Sensual ; sexual.*
> *3.Pertaining to the flesh or to the body; not spiritual; hence* worldly."

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

[10] *The New International Webster's Comprehensive Dictionary of the English Language* (Deluxe Encyclopedic Edition, 1996)

In *Khanu* v. *Emperor*[11], the Sindh High Court was dealing with a case where the accused was found guilty of having committed Gomorrah *coitus per os* with a little child, and was convicted under Section 377. The Court held that the act of carnal intercourse was clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible.

The Lahore High Court in *Khandu* v. *Emperor*[12] was dealing with a case wherein the accused had penetrated the nostril of a bullock with his penis. The Court, while relying on the decision of the Sindh High Court in *Khanu* v. *Emperor* (supra) held that the acts of the accused constituted *coitus per os*, were punishable under Section 377.

In *Lohana Vasantlal Devchand & Ors* v. *State*[13] the Gujarat High Court convicted two accused under Section 377 read with Section 511 of the IPC, on account of

[11] AIR 1925 Sind 286
[12] AIR 1934 Lah 261 : 1934 Cri LJ 1096
[13] AIR 1968 Guj 252

having carnal intercourse per anus, and inserting the penis in the mouth of a young boy. It was held that:

> "*…words used (in Section 377) are quite comprehensive and in my opinion, an act like the present act (oral sex), which was an imitative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable under Section 377 of the Indian Penal Code.*"

Later this Court in *Fazal Rab Choudhary* v. *State of Bihar*[14] while reducing the sentence of the appellant who was convicted for having committed an offence on a young boy under Section 377 IPC, held that:

> "*…The offence is one under Section 377 I.P.C., which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.*"
>
> (emphasis supplied)

The test for attracting penal provisions under Section 377 changed over the years from non-procreative sexual acts in *Khanu* v. *Emperor* (supra), to imitative sexual intercourse like oral sex in *Lohana Vasantlal Devchand & Ors.* v. *State* (supra), to sexual perversity in *Fazal Rab*

[14] (1982) 3 SCC 9

v. *State of Bihar* (supra). These cases referred to non-consensual sexual intercourse by coercion.

13. HOMOSEXUALITY – NOT AN ABERRATION BUT A VARIATION OF SEXUALITY

13.1. Whilst a great deal of scientific research has examined possible genetic, hormonal, developmental, psychological, social and cultural influences on sexual orientation, no findings have conclusively linked sexual orientation to any one particular factor or factors. It is believed that one's sexuality is the result of a complex interplay between nature and nurture.

Sexual orientation is an innate attribute of one's identity, and cannot be altered. Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.

The U.S. Supreme Court in *Lawrence et al.* v. *Texas*[15] relied upon the Brief of the Amici Curiae[16] which stated:

> "*Heterosexual and homosexual behavior are both normal aspects of human sexuality. Both have been documented in many different human cultures* and *historical eras, and in a wide variety of animal species*. *There is no consensus among*

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

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

scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation. According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience. Most or many gay men and lesbians experience little or no choice about their sexual orientation."

(emphasis supplied)

13.2. An article by K.K. Gulia and H.N. Mallick titled "Homosexuality: A Dilemma in Discourse"[17] states:

"*In general, homosexuality as a sexual orientation refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It also refers to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex…*

…In the course of the 20th century, homosexuality became a subject of considerable study and debate in western societies. It was predominantly viewed as a disorder or mental illness. At that time, emerged two major pioneering studies on homosexuality carried out by Alfred Charles Kinsey (1930) and Evelyn Hooker (1957)…This empirical study of sexual behavior among American adults revealed that a significant

[17] KK Gulia and HN Mallick, *Homosexuality: a dilemma in discourse*, 54 Indian Journal of Physiology and Pharmacology (2010), at pp. 5, 6 and 8

number of participants were homosexuals. In this study when people were asked directly if they had engaged in homosexual relations, the percentage of positive responses nearly doubled. The result of this study became the widely popularized Kinsey Scale of Sexuality. This scales rates all individuals on a spectrum of sexuality, ranging from 100% heterosexual to 100% homosexual…"

(emphasis supplied)

13.3. The American Psychiatric Association in December 1973 removed 'homosexuality' from the Diagnostic and Statistical Manual of Psychological Disorders, and opined that the manifestation of sexual attraction towards persons of the opposite sex, or same sex, is a natural condition.[18]

13.4. The World Health Organization removed homosexuality from the list of diseases in the International Classification of Diseases in the publication of ICD-10 in 1992.[19]

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

[19] *The ICD-10 classification of mental and behavioural disorders*: *clinical descriptions and diagnostic guidelines*, World Health Organization, Geneva (1992) available at http://www.who.int/classifications/icd/en/bluebook.pdf

13.5. In India, the Indian Psychiatric Society has also opined that sexual orientation is not a psychiatric disorder.[20] It was noted that:

> "*…there is no scientific evidence that sexual orientation can be* altered *by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.*"

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

14. SECTION 377 IF APPLIED TO CONSENTING ADULTS IS VIOLATIVE OF ARTICLE 14

14.1. One of the main contentions raised by the Petitioners to challenge the Constitutional validity of Section 377 is founded on Article 14 of the Constitution. Article 14 enshrines the principle of equality as a fundamental right, and mandates that the State shall not deny to any

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

person equality before the law, or the equal protection of the laws within the territory of India. It recognizes and guarantees the right of equal treatment to all persons in this country.

It is contended that Section 377 discriminates against adults of the same gender, from having a consensual sexual relationship in private, by treating it as a penal offence, and hence is violative of Article 14.

14.2. The twin-test of classification under Article 14 provides that:

(i) there should be a reasonable classification based on intelligible differentia; and,

(ii) this classification should have a rational nexus with the objective sought to be achieved.

14.3. Section 377 operates in a vastly different manner for two classes of persons based on their "sexual orientation" i.e. the LGBT persons and heterosexual persons. Section 377 penalises all forms of non penile-vaginal intercourse. In effect, voluntary consensual relationships between LGBT persons are criminalised in totality.

The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be 'carnal', and against the order of nature.

Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia.

14.4. In *National Legal Services Authority* v. *Union of India & Ors.*[21] this Court granted equal protection of laws to transgender persons. There is therefore no justification to deny the same to LGBT persons.

14.5. A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.

[21] (2014) 5 SCC 438

14.6. In contemporary civilised jurisprudence, with States increasingly recognising the status of same-sex relationships, it would be retrograde to describe such relationships as being 'perverse', 'deviant', or 'unnatural'.

14.7. Section 375 defines the offence of rape. It provides for penetrative acts which if performed by a man against a woman without her consent, or by obtaining her consent under duress, would amount to rape. Penetrative acts (after the 2013 Amendment) include anal and oral sex.

The necessary implication which can be drawn from the amended provision is that if such penetrative acts are done with the consent of the woman they are not punishable under Section 375.

While Section 375 permits consensual penetrative acts (the definition of 'penetration' includes oral and anal sex), Section 377 makes the same acts of penetration punishable irrespective of consent. This creates a dichotomy in the law.

14.8. The proscription of a consensual sexual relationship under Section 377 is not founded on any known or rational criteria. Sexual expression and intimacy of a

consensual nature, between adults in private, cannot be treated as "carnal intercourse against the order of nature".

14.9. Emphasising on the second part of Article 14 which enjoins the State to provide equal protection of laws to all persons, Nariman, J. in his concurring opinion in *Shayara Bano* v. *Union of India & Ors.*[22] elucidated on the doctrine of manifest arbitrariness as a facet of Article 14. Apart from the conventional twin-tests of classification discussed in the preceding paragraphs, a legislation, or part thereof, can also be struck down under Article 14 on the ground that it is manifestly arbitrary. It would be instructive to refer to the following passage from the judgment of this Court in *Shayara Bano* v. *Union of India & Ors.* (supra):

> "*101…Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.*"

Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on

[22] (2017) 9 SCC 1

any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice".

Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community.

Thus, apart from not satisfying the twin-test under Article 14, Section 377 is also manifestly arbitrary, and hence violative of Article 14 of the Constitution.

15. SECTION 377 IS VIOLATIVE OF ARTICLE 15

Article 15 prohibits the State from discrimination against any citizen on the grounds of religion, race, caste, sex, or place of birth. The object of this provision was to guarantee protection to those citizens who had suffered historical disadvantage, whether it be of a political, social, or economic nature.

15.1. The term 'sex', as it occurs in Article 15 has been given an expansive interpretation by this Court in *National Legal Services Authority* v. *Union of India & Ors.* (supra)

to include sexual identity. Paragraph 66 of the judgment reads thus:

> "*66…Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 and 16, therefore includes discrimination on the ground of gender identity. The expression sex used in Articles 15 and 16 is not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female.*"
> (emphasis supplied and internal quotations omitted)

Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their "sexual identity and character".

The J.S. Verma Committee[23] had recommended that 'sex' under Article 15 must include 'sexual orientation':

> "*65. We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a*

[23] Report of the Committee on Amendments to Criminal Law (2013)

triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of India uses the word "sex" as including sexual orientation."

The prohibition against discrimination under Article 15 on the ground of 'sex' should therefore encompass instances where such discrimination takes place on the basis of one's sexual orientation.

In this regard, the view taken by the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia*[24] is relevant to cite, wherein the Committee noted that the reference to 'sex' in Article 2, Paragraph 1 and Article 26 of the International Covenant on Civil and Political Rights would include 'sexual orientation'.

15.2. In an article titled "*Reading Swaraj into Article 15: A New Deal For All Minorities*"[25], Tarunabh Khaitan notes that the underlying commonality between the grounds specified in Article 15 is based on the ideas of 'immutable status' and 'fundamental choice'. He refers to the

[24] Communication No. 488/1992, U.N. Doc.CCPR/C/50/D/488/1992 (1994)
[25] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities*, 2 NUJS Law Review (2009), at p. 419

following quote by John Gardener to provide context to the aforesaid commonality:

> "*Discrimination on the basis of our immutable status tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. .... And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.*"[26]
>
> (emphasis supplied)

Race, caste, sex, and place of birth are aspects over which a person has no control, *ergo* they are immutable. On the other hand, religion is a fundamental choice of a person.[27] Discrimination based on any of these grounds would undermine an individual's personal autonomy.

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[26] John Gardner, *On the Ground of Her Sex (uality)*, 18(2) Oxford Journal of Legal Studies (1998), at p. 167

[27] *Supra* note 25

The Supreme Court of Canada in its decisions in the cases of *Egan* v. *Canada*[28], and *Vriend* v. *Alberta*[29], interpreted Section 15(1)[30] of the Canadian Charter of Rights and Freedoms which is *pari materia* to Article 15 of the Indian Constitution.

Section 15(1), of the Canadian Charter like Article 15 of our Constitution, does not include "sexual orientation" as a prohibited ground of discrimination. Notwithstanding that, the Canadian Supreme Court in the aforesaid decisions has held that sexual orientation is a "ground analogous" to the other grounds specified under Section 15(1). Discrimination based on any of these grounds has adverse impact on an individual's personal autonomy, and is undermining of his personality.

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[28] [1995] SCC 98

[29] [1998] SCC 816

[30] "*15. Equality before and under law and equal protection and benefit of law*

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

Article 15(1), Canadian Charter of Rights and Freedoms.

A similar conclusion can be reached in the Indian context as well in light of the underlying aspects of immutability and fundamental choice.

The LGBT community is a sexual minority which has suffered from unjustified and unwarranted hostile discrimination, and is equally entitled to the protection afforded by Article 15.

16. SECTION 377 VIOLATES THE RIGHT TO LIFE AND LIBERTY GUARANTEED BY ARTICLE 21

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable.[31]

The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination.

16.1. RIGHT TO LIVE WITH DIGNITY

This Court has expansively interpreted the terms "life" and "personal liberty" to recognise a panoply of rights

[31] *Maneka Gandhi* v. *Union of India & Anr.*, (1978) 1 SCC 248, at paragraph 48

under Article 21 of the Constitution, so as to comprehend the true scope and contours of the right to life under Article 21. Article 21 is "*the most precious human right and forms the ark of all other rights*" as held in *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi & Ors.,*[32] wherein it was noted that the right to life could not be restricted to a mere animal existence, and provided for much more than only physical survival.[33] Bhagwati J. observed as under:

> "*8…We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing* oneself *in diverse forms, freely moving about and mixing and commingling with fellow human beings…it must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.*"
>
> (emphasis supplied)

[32] (1981) 1 SCC 608
[33] (1981) 1 SCC 608 at paragraph 7

This was re-affirmed by the Constitution bench decision in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*[34] and *Common Cause (A Registered Society)* v. *Union of India & Anr.*[35]

Although dignity is an amorphous concept which is incapable of being defined, it is a core intrinsic value of every human being. Dignity is considered essential for a meaningful existence.[36]

In *National Legal Services Authority* v. *Union of India & Ors.* (supra), this Court recognised the right of transgender persons to decide their self-identified gender. In the context of the legal rights of transgender persons, this Court held that sexual orientation and gender identity is an integral part of their personality.

The relevant excerpt from Radhakrishnan, J.'s view is extracted hereinbelow:

> "*22. …Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom…*"
>
> (emphasis supplied)

[34] (2017) 10 SCC 1
[35] (2018) 5 SCC 1 at paragraphs 156, 437, 438, 488 & 516
[36] *Common Cause (A Registered Society)* v. *Union of India and Anr.*, (2018) 5 SCC 1, at paragraphs 437 and 438

Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.

The following excerpt from the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Anr.* v. *Minister of Justice and Ors.*[37] is also instructive in this regard:

> "*While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and*

[37] [1998] ZACC 15

> *socially disconnected self. It acknowledges* that *people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or arrange the choice of partner, but for the partners to choose themselves.*"
>
> (emphasis supplied)

Section 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21. It inhibits them from entering and nurturing enduring relationships. As a result, LGBT individuals are forced to either lead a life of solitary existence without a companion, or lead a closeted life as "*unapprehended felons*".[38]

Section 377 criminalises the entire class of LGBT persons since sexual intercourse between such persons, is considered to be carnal and "against the order of nature". Section 377 prohibits LGBT persons from engaging in intimate sexual relations in private.

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[38] According to Professor Edwin Cameron, LGBT persons are reduced to the status of "*unapprehended felons*" owing to the ever-so-present threat of prosecution.
Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 South African Law Journal (1993), at p. 450

The social ostracism against LGBT persons prevents them from partaking in all activities as full citizens, and in turn impedes them from realising their fullest potential as human beings.

On the issue of criminalisation of homosexuality, the dissenting opinion of Blackmun J. of the U.S. Supreme Court in *Bowers* v. *Hardwick*[39] is instructive, which cites a previous decision in *Paris Adult Theatre I* v. *Slaton*[40] and noted as follows:

> "*Only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality*."
>
> (emphasis supplied)

The U.S. Supreme Court over-ruled *Bowers* v. *Hardwick* (supra) in *Lawrence et al.* v. *Texas.* (supra) and declared that a statute proscribing homosexuals from engaging in intimate sexual conduct as invalid on the ground that it violated the right to privacy, and dignity of homosexual persons. Kennedy, J. in his majority opinion observed as under:

[39] 478 U.S. 186 (1986)
[40] 413 U.S. 49 (1973)

"*To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put* forward, *just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse…*

…It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct *can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice…This stigma this criminal statute imposes, moreover, is not trivial. The offence, to be sure, is but a class C misdemeanour, a minor offence in the Texas legal system. Still, it remains a criminal offence with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of criminal convictions…*

…The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It *does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexuals persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engage in sexual practices, common to a homosexual lifestyle. The Petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. Casey, supra at 847. The Texas statute*

furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

(emphasis supplied)

Thus, Section 377 prevents LGBT persons from leading a dignified life as guaranteed by Article 21.

16.2. RIGHT TO PRIVACY

The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty under Article 21.[41]

Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15, and 21.[42]

The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal

[41] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1

[42] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 144, 145, 479 and 647

decisions and preserves the sanctity of the private sphere of an individual.[43]

The right to privacy is not simply the "right to be let alone", and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice.[44] It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.

Section 377 affects the private sphere of the lives of LGBT persons. It takes away the decisional autonomy of LGBT persons to make choices consistent with their sexual orientation, which would further a dignified existence and a meaningful life as a full person. Section 377 prohibits LGBT persons from expressing their sexual orientation and engaging in sexual conduct in private, a decision which inheres in the most intimate spaces of one's existence.

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[43] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraph 248, 250, 371 and 403

[44] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 248, 249, 371 and 521

The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Anr.* v. *Minister of Justice & Ors.* (supra) noted as under:

> "*Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without* interference *from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.*"

Just like other fundamental rights, the right to privacy is not an absolute right and is subject to reasonable restrictions. Any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.[45]

A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest.

[45] *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*, (2017) 10 SCC 1, at paragraphs 325, 638 and 645

The theme of inclusiveness permeates through Part III of the Constitution. Apart from the equality code of the Constitution comprised in Articles 14, 15(1), 16, and other provisions in the form of Article 17 (Abolition of Untouchability), Article 21A (Right to Education), Article 25 (Freedom of Conscience and Free Profession, Practice and Propagation of Religion), Article 26 (Freedom to Manage Religious Affairs), Article 29 (Protection of Interest of Minorities), Article 30 (Right of Minorities to Establish and Administer Educational Institutions) are aimed at creating an inclusive society where rights are guaranteed to all, regardless of their status as a minority.

16.3. RIGHT TO HEALTH

The right to health, and access to healthcare are also crucial facets of the right to life guaranteed under Article 21 of the Constitution.[46]

LGBT persons being a sexual minority have been subjected to societal prejudice, discrimination and

[46] *Common Cause (A Registered Society)* v. *Union of India & Anr.*, (2018) 5 SCC 1, at paragraph 304; *C.E.S.C. Limited & Ors.* v. *Subhash Chandra Bose & Ors.*, (1992) 1 SCC 441, at paragraph 32; *Union of India* v. *Mool Chand Khairati Ram Trust*, (2018) SCC OnLine SC 675, at paragraph 66; and, *Centre for Public Interest Litigation* v. *Union of India & Ors.*, (2013) 16 SCC 279, at paragraph 25

violence on account of their sexual orientation. Since Section 377 criminalises "carnal intercourse against the order of nature" it compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access to health-care facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community.[47]

LGBT persons, and more specifically the MSM, and transgender persons are at a higher risk of contracting HIV as they lack safe spaces to engage in safe-sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being 'exposed' and the resultant prosecution.[48] Higher rates of prevalence of HIV-AIDS in MSM, who are in turn married to other people of the opposite sex, coupled with the difficulty in detection and

[47] M.V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, World Bank Group (2014) available at http://documents.worldbank.org/curated/en/527261468035379692/The-economic-cost-of-stigma-and-the-exclusion-of-LGBT-people-a-case-study-of-India (Last accessed on August 11, 2018)

[48] Govindasamy Agoramoorthy and Minna J Hsu, *India's homosexual discrimination and health consequences*, 41(4) Rev Saude Publica (2007), at pp. 567-660 available at http://www.scielo.br/pdf/rsp/v41n4/6380.pdf

treatment, makes them highly susceptible to contraction and further transmission of the virus.

It is instructive to refer to the findings of the Human Rights Committee of the United Nations in *Nicholas Toonen* v. *Australia* (supra):

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

The American Psychological Association, American Psychiatric Association, National Association of Social Workers and the Texas Chapter of the National Association of Social Workers in their Amicus Brief in *Lawrence et al.* v. *Texas* (supra) stated as follows:

> "*III. Texas Penal Code S. 21.06 reinforces prejudice, discrimination, and violence against gay men and lesbians…Although* many *gay men and lesbians learn to cope with the social stigma against homosexuality, this pattern of prejudice can cause gay people serious psychological distress, especially if they attempt to conceal or deny their sexual orientation*…."[49]
>
> (emphasis supplied)

It is pertinent to mention that in India the Mental Healthcare Act, 2017 came into force on July 7, 2018. Sections 18(1) and (2) read with 21(1)(a) of the Mental Healthcare Act, 2017 provide for the right to access mental healthcare and equal treatment of people with physical and mental illnesses without discrimination, *inter alia*, on the basis of "*sexual orientation*".

This gives rise to a paradoxical situation since Section 377 criminalises LGBT persons, which inhibits them from accessing health-care facilities, while the Mental Healthcare Act, 2017 provides a right to access mental healthcare without discrimination, even on the ground of 'sexual orientation'.

[49] *Supra* note 16, at page 3

17. SECTION 377 VIOLATES THE RIGHT TO FREEDOM OF EXPRESSION OF LGBT PERSONS

17.1. Article 19(1)(a) guarantees freedom of expression to all citizens. However, reasonable restrictions can be imposed on the exercise of this right on the grounds specified in Article 19(2).

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those proscribed under Section 377.[50] Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay 'in the closet'. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality. Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified

[50] *Lawrence et al.* v. *Texas*, 539 U.S. 558 (2003); and, *National Coalition for Gay and Lesbian Equality & Anr.* v. *Minister of Justice & Ors.*, [1998] ZACC 15

existence. It also has an impact on their mental well-being.

17.2. In *National Legal Services Authority* v. *Union of India & Ors.* (supra), this Court noted that gender identity is an important aspect of personal identity and is inherent to a person. It was held that transgender persons have the right to express their self-identified gender by way of speech, mannerism, behaviour, presentation and clothing, *etc.*[51]

The Court also noted that like gender identity, sexual orientation is integral to one's personality, and is a basic aspect of self-determination, dignity and freedom.[52] The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K.S. Puttaswamy & Anr.* v. *Union of India & Ors.*[53]

In this regard, it is instructive to refer to the decision of this Court in *S. Khushboo* v. *Kanniammal & Anr.*[54] wherein the following observation was made in the

[51] (2014) 5 SCC 438, at paragraphs 69-72
[52] (2014) 5 SCC 438, at paragraph 22
[53] (2017) 10 SCC 1, at paragraphs 144, 145, 647
[54] (2010) 5 SCC 600

context of the phrase "decency and morality" as it occurs in Article 19(2):

> "*45. Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as "decency and morality" among others, we must lay stress on the need to tolerate unpopular views in the sociocultural space. The Framers of our Constitution recognised the importance of* safeguarding *this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a* culture *of open dialogue when it comes to societal attitudes.*
> *46…Notions of social morality are inherently subjective and the* criminal *law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not coextensive.*"
>
> (emphasis supplied)

Therefore, Section 377 cannot be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it is inherently subjective.

18. SURESH KUMAR KOUSHAL OVERRULED

The two-Judge bench of this Court in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) over-ruled the

decision of the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi & Ors.*[55] which had declared Section 377 insofar as it criminalised consensual sexual acts of adults in private to be violative of Articles 14, 15 and 21 of the Constitution.

The grounds on which the two-judge bench of this Court over-ruled the judgment in *Naz Foundation* v. *Government of NCT of Delhi & Ors.* (supra) were that:

i. Section 377 does not criminalise particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct, regardless of gender identity and orientation.

   Those who indulge in carnal intercourse in the ordinary course, and those who indulge in carnal intercourse against the order of nature, constitute different classes. Persons falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational

[55] (2009) 111 DRJ 1 (DB)

classification. Section 377 merely defines a particular offence, and prescribes a punishment for the same.

ii. LGBT persons constitute a "miniscule fraction" of the country's population, and there have been very few prosecutions under this Section. Hence, it could not have been made a sound basis for declaring Section 377 to be ultra-vires Articles 14, 15, and 21.

iii. It was held that merely because Section 377, IPC has been used to perpetrate harassment, blackmail and torture to persons belonging to the LGBT community, cannot be a ground for challenging the vires of the Section.

iv. After noting that Section 377 was *intra vires*, this Court observed that the legislature was free to repeal or amend Section 377.

19. The fallacy in the Judgment of *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) is that:

i. The offence of "carnal intercourse against the order of nature" has not been defined in Section

377. It is too wide, and open-ended, and would take within its sweep, and criminalise even sexual acts of consenting adults in private.

In this context, it would be instructive to refer to the decision of a Constitution Bench of this Court in *A.K. Roy* v. *Union of India*[56] wherein it was held that:

> " *62. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding....*"
>
> (emphasis supplied)

[56] (1982) 1 SCC 271

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

Furthermore, consensual relationships between adults cannot be classified along with offences of bestiality, sodomy and non-consensual relationships.

Sexual orientation is immutable, since it is an innate feature of one's identity, and cannot be changed at will. The choice of LGBT persons to enter into intimate sexual relations with persons of the same sex is an exercise of their personal choice, and an expression of their autonomy and self-determination.

Section 377 insofar as it criminalises voluntary sexual relations between LGBT persons of the same sex in private,

discriminates against them on the basis of their "sexual orientation" which is violative of their fundamental rights guaranteed by Articles 14, 19, and 21 of the Constitution.

ii. The mere fact that the LGBT persons constitute a "miniscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights guaranteed by Part III of the Constitution. Even though the LGBT constitute a sexual minority, members of the LGBT community are citizens of this country who are equally entitled to the enforcement of their Fundamental Rights guaranteed by Articles 14, 15, 19, and 21.

Fundamental Rights are guaranteed to all citizens alike, irrespective of whether they are a numerical minority. Modern democracies are based on the twin principles of majority rule, and protection of fundamental rights guaranteed under Part III of the Constitution. Under the Constitutional scheme, while the majority is

entitled to govern; the minorities like all other citizens are protected by the solemn guarantees of rights and freedoms under Part III.

The J.S. Verma Committee, in this regard, in paragraph 77 of its Report (supra) states that:

> *"77. We need to remember that the founding fathers of our Constitution never thought that the Constitution is 'mirror of perverse social discrimination'. On the contrary, it promised the mirror in which equality will be reflected brightly. Thus, all the sexual identities, including sexual minorities, including transgender communities are entitled to be totally protected. The Constitution enables change of beliefs, greater understanding and is also an equally guaranteed instrument to secure the rights of sexually despised minorities. "*
>
> (emphasis supplied)

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

The criminalisation of "*carnal intercourse against the order of nature*" has the effect of criminalising the entire class of LGBT persons

since any kind of sexual intercourse in the case of such persons would be considered to be against the "*order of nature*", as per the existing interpretation.

iv. The conclusion in case of *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.* (supra) to await legislative amendments to this provision may not be necessary. Once it is brought to the notice of the Court of any violation of the Fundamental Rights of a citizen, or a group of citizens the Court will not remain a mute spectator, and wait for a majoritarian government to bring about such a change.

Given the role of this Court as the sentinel on the *qui vive*, it is the Constitutional duty of this Court to review the provisions of the impugned Section, and read it down to the extent of its inconsistency with the Constitution.

In the present case, reading down Section 377 is necessary to exclude consensual sexual relationships between adults, whether of the

same sex or otherwise, in private, so as to remove the vagueness of the provision to the extent it is inconsistent with Part III of the Constitution.

20. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'.

21. CONCLUSION

i. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises

consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.

It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

ii. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

iii. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercouse against minors, and acts of beastiality.

iv. The judgment in *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.*[57] is hereby overruled for the reasons stated in paragraph 19.

[57] (2014) 1 SCC 1

The Reference is answered accordingly.

In view of the above findings, the Writ Petitions are allowed.

.....J.
(Indu Malhotra)

New Delhi;
September 6, 2018.