REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL/CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 76 OF 2016

NAVTEJ SINGH JOHAR & ORS. …PETITIONERS

VERSUS

UNION OF INDIA …RESPONDENT

WITH

WRIT PETITION (CIVIL) NO.572 OF 2016

WITH

WRIT PETITION (CRIMINAL) NO.88 OF 2018

WITH

WRIT PETITION (CRIMINAL) NO.100 OF 2018

WITH

WRIT PETITION (CRIMINAL) NO.101 OF 2018

WITH

WRIT PETITION (CRIMINAL) NO.121 OF 2018

J U D G M E N T

R.F. Nariman, J.

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

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

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

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

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

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

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

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

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

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

History of Section 377

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

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

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

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

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

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

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

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

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

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

13. He further described the Penal Code as:-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Law in the United Kingdom

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

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

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

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

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

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

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

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

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

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

(Emphasis supplied)

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

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

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

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

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

57. We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and *vice-versa,* though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen."

27. Finally, the Committee stated:

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

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

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

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

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

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

The Law in the United States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The learned Judge then went on to find:

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

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

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

---

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

And finally, it was held:-

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

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

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

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

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

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

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

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

XXX

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

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

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

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

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

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

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

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

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

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

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

XXX

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.

XXX

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

XXX

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

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

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

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

Recent Judgments of this Court

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

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

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

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

> "*33.* It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation."
>
> XXX

26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They

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

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

In a significant paragraph, the learned Judge held:-

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

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

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

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

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

47. Finally, the Court held:-

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

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

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

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

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

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

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

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

> eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of a trumpet—and also to be affected with syphilis in the same region in a manner which distinctly points to unnatural intercourse within the last few months.'"
>
> Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including *hijras* and was used as an instrument of harassment and physical abuse against *hijras* and transgender persons."

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

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

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

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

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

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

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

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

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

54. The conclusion therefore was:-

"**83.** We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our

> Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community."

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

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

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

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

XXX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XXX

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

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

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

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

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

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

XXX

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

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

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

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

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

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

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

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

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

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

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

Mental Healthcare Act, 2017

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

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

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

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

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

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

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

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

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

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

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

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

among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack confidence that the assailants will be caught.

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

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

> "In the opinion of the Indian Psychiatric Society (IPS) homosexuality is not a psychiatric disorder.
>
> This is in line with the position of American Psychiatric Association and The International Classification of Diseases of the World health Organization which removed homosexuality from the list of psychiatric disorders in 1973 and 1992 respectively.
>
> The I.P.S recognizes same-sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. There is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.
>
> The Indian Psychiatric Society further supports de-criminalization of homosexual behavior."

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

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

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

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

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

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

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

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

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

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

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

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

the person. More importantly, mental illness shall not be determined on the basis of non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community. It is thus clear that Parliament has unequivocally declared that the earlier stigma attached to same-sex couples, as persons who are regarded as mentally ill, has gone for good. This is another very important step forward taken by the legislature itself which has undermined one of the basic underpinnings of the judgment in **Suresh Kumar Koushal** (supra).

Section 21(1)(a) is important and set out hereinbelow:

> "***21. Right to equality and non-discrimination.*** (1) Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:–
>
> (a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;"

74. This Section is parliamentary recognition of the fact that gay persons together with other persons are liable to be affected with mental illness, and shall be treated as equal to the

other persons with such illness as there is to be no discrimination on the basis of sexual orientation. Section 30 is extremely important and reads as under:

> "***30. Creating awareness about mental health and illness and reducing stigma associated with mental illness.***
> The appropriate Government shall take all measures to ensure that,—
> (a) the provisions of this Act are given wide publicity through public media, including television, radio, print and online media at regular intervals;
> (b) the programmes to reduce stigma associated with mental illness are planned, designed, funded and implemented in an effective manner;
> (c) the appropriate Government officials including police officers and other officers of the appropriate Government are given periodic sensitisation and awareness training on the issues under this Act."

75. Section 115 largely does away with one other outmoded Section of the Indian Penal Code, namely, Section 309. This Section reads as follows.

> "***115. Presumption of severe stress in case of attempt to commit suicide.*** (1) Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.
>
> (2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to

commit suicide, to reduce the risk of recurrence of attempt to commit suicide."

76. Instead of the inhumane Section 309 which has remained on the statute book for over 150 years, Section 115 makes it clear that Section 309 is rendered largely ineffective, and on the contrary, instead of committing a criminal offence, any person who attempts to commit suicide shall be presumed to have severe stress and shall not be tried and punished under Section 309 of the Indian Penal Code. More importantly, the Government has an affirmative duty to provide care, treatment and rehabilitation to such a person to reduce the risk of recurrence of that person's attempt to commit suicide. This parliamentary declaration under Section 115 again is in keeping with the present constitutional values, making it clear that humane measures are to be taken by the Government in respect of a person who attempts to commit suicide instead of prosecuting him for the offence of attempt to commit suicide.

77. And finally, Section 120 of the Act reads as under:-

"***120. Act to have overriding effect.*** The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith

> contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

78. The Latin maxim *cessant ratione legis, cessat ipsa lex,* meaning when the reason for a law ceases, the law itself ceases, is a rule of law which has been recognized by this Court in **H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Dept,** 1979 4 SCC 642 at paragraph 29, and **State of Punjab v. Devans Modern Breweries Ltd.,** (2004) 11 SCC 26 at paragraph 335. It must not be forgotten that Section 377 was the product of the Victorian era, with its attendant puritanical moral values. Victorian morality must give way to constitutional morality as has been recognized in many of our judgments. Constitutional morality is the soul of the Constitution, which is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in Part III of the Constitution, particularly with respect to those provisions which assure the dignity of the individual. The rationale for Section 377, namely Victorian morality, has long gone and there is no reason to continue with

- as Justice Holmes said in the lines quoted above in this judgment - a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.

79. Given our judgment in **Puttaswamy** (supra), in particular, the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21, it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons.

80. The Union of India, seeing the writing on the wall, has filed an affidavit in which it has not opposed the Petitioners but left the matter to be considered by the wisdom of this Court. Some of the intervenors have argued in favour of the retention of Section 377 *qua* consenting adults on the grounds that homosexual acts are not by themselves proscribed by Section 377. Unless there is penetration in the manner pointed out by the explanation to the Section, no offence takes place. They

have also added that the Section needs to be retained given the fact that it is only a parliamentary reflection of the prevailing social mores of today in large segments of society. According to them, this furthers a compelling state interest to reinforce morals in public life which is not disproportionate in nature. We are afraid that, given the march of events in constitutional law by this Court, and parliamentary recognition of the plight of such persons in certain provisions of the Mental Healthcare Act, 2017, it will not be open for a constitutional court to substitute societal morality with constitutional morality, as has been stated by us hereinabove. Further, as stated in **S. Khushboo v. Kanniammal and Anr.**, (2010) 5 SCC 600, at paragraphs 46 and 50, this Court made it clear that notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive - sin is not punishable on earth by Courts set up by the State but elsewhere; crime alone is punishable on earth. To confuse the one with the other is what causes the death knell of Section 377, insofar as it applies to consenting homosexual adults.

81. Another argument raised on behalf of the intervenors is that change in society, if any, can be reflected by amending laws by the elected representatives of the people. Thus, it would be open to the Parliament to carve out an exception from Section 377, but this Court should not indulge in taking upon itself the guardianship of changing societal mores. Such an argument must be emphatically rejected. The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.[6] One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism

[6] This phrase occurs in one of the most celebrated footnotes in the US Supreme Court's constitutional history – namely, Footnote 4 of **United States v. Carolene Products Co.**, 304 U.S. 144 (1938).

in India.[7] Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.

82. Insofar as Article 14 is concerned, this Court in **Shayara Bano v. Union of India,** (2017) 9 SCC 1, has stated, in paragraph 101, that a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle, as also if it is excessive or disproportionate. We find that Section 377, in penalizing consensual gay sex, is manifestly arbitrary. Given modern psychiatric studies and legislation which recognizes that gay persons and transgenders are not persons suffering from mental disorder and cannot therefore be penalized, the Section must be held to be a provision which is capricious and irrational. Also, roping in such persons with sentences going upto life imprisonment is clearly excessive and disproportionate, as a result of which, when applied to such persons, Articles 14 and 21 of the Constitution

[7] In William Shakespeare's *Julius Caesar* (Act III, Scene 1), Caesar tells Cassius-

"I could be well moved, if I were as you;
If I could pray to move, prayers would move me:
But I am constant as the Northern Star,
Of whose true-fixed and resting quality
There is no fellow in the firmament."

would clearly be violated. The object sought to be achieved by the provision, namely to enforce Victorian mores upon the citizenry of India, would be out of tune with the march of constitutional events that has since taken place, rendering the said object itself discriminatory when it seeks to single out same-sex couples and transgenders for punishment.

83. As has been stated in the judgment of Nariman, J. in **Shreya Singhal v. Union of India**, (2015) 5 SCC 1, the chilling effect caused by such a provision would also violate a privacy right under Article 19(1)(a), which can by no stretch of imagination be said to be a reasonable restriction in the interest of decency or morality (*See* paragraphs 87 to 94).

84. We may hasten to add, that the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* discussed below*,* which were also referred to by Radhakrishnan, J. in **NALSA** (supra), conform to our constitutional view of the fundamental rights of the citizens of India and persons who come to this Court.

85. The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organisations, had undertaken a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations.

86. A distinguished group of human rights experts drafted, developed, discussed and refined these Principles. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6th to 9th November, 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.

87. A few relevant extracts from the Yogyakarta Principles and its Preamble are as follows:-

"***Preamble***

WE, THE INTERNATIONAL PANEL OF EXPERTS IN INTERNATIONAL HUMAN RIGHTS LAW AND ON SEXUAL ORIENTATION AND GENDER IDENTITY,

XX

XX

UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

XX

XX

FOLLOWING AN EXPERTS' MEETING HELD IN YOGYAKARTA, INDONESIA FROM 6 TO 9 NOVEMBER 2006, HEREBY ADOPT THESE PRINCIPLES:

1. ***The right to the universal enjoyment of human rights***.—All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

(*a*) embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

(*b*) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

(*c*) undertake programmes of education and awareness to promote and enhance the full

enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

(*d*) integrate within State policy and decision making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

2. ***The rights to equality and non-discrimination***.—Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

(*a*) embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and

interpretation, and ensure the effective realisation of these principles;

(*b*) repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(*c*) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(*d*) take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

(*e*) in all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

(*f*) take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

3. ***The right to recognition before the law***.— Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery,

sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

(*a*) ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

(*b*) take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

(*c*) take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex—including birth certificates, passports, electoral records and other documents—reflect the person's profound self-defined gender identity;

(*d*) ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

(*e*) ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

(*f*) undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

XXX

4. ***The right to life***.—Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

(*a*) repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same-sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;

(*b*) remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;

(*c*) cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

XXX

6. ***The right to privacy***.—Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and

reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

(*a*) take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;

(*b*) repeal all laws that criminalise consensual sexual activity among persons of the same-sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

(*c*) ensure that criminal and other legal provisions of general application are not applied de facto to criminalise consensual sexual activity among persons of the same-sex who are over the age of consent;

(*d*) repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

(*e*) release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;

(*f*) ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from

arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

XXX

18. ***Protection from medical abuses***.—No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

(*a*) take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

(*b*) take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

(*c*) establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;

(*d*) ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;

(*e*) review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

(*f*) ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

19. ***The right to freedom of opinion and expression***.— Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

(*a*) take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

(*b*) ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of

such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

(*c*) take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

(*d*) ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

(*e*) ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

(*f*) ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate."

(Emphasis supplied)

88. These principles give further content to the fundamental rights contained in Articles 14, 15, 19 and 21, and viewed in the light of these principles also, Section 377 will have to be declared to be unconstitutional.

89. Given the aforesaid, it has now to be decided as to whether the judgment in **Suresh Kumar Koushal** (supra) is correct. **Suresh Kumar Koushal's** judgment (supra) first begins with the presumption of constitutionality attaching to pre-

constitutional laws, such as the Indian Penal Code. The judgment goes on to state that pre-constitutional laws, which have been adopted by Parliament and used with or without amendment, being manifestations of the will of the people of India through Parliament, are presumed to be constitutional. We are afraid that we cannot agree.

90. Article 372 of the Constitution of India continues laws in force in the territory of India immediately before the commencement of the Constitution. That the Indian Penal Code is a law in force in the territory of India immediately before the commencement of this Constitution is beyond cavil. Under Article 372(2), the President may, by order, make such adaptations and modifications of an existing law as may be necessary or expedient to bring such law in accord with the provisions of the Constitution. The fact that the President has not made any adaptation or modification as mentioned in Article 372(2) does not take the matter very much further. The presumption of constitutionality of a statute is premised on the fact that Parliament understands the needs of the people, and that, as per the separation of powers doctrine, Parliament is

aware of its limitations in enacting laws – it can only enact laws which do not fall within List II of Schedule VII of the Constitution of India, and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so. Parliament is therefore deemed to be aware of the aforesaid constitutional limitations. Where, however, a pre-constitution law is made by either a foreign legislature or body, none of these parameters obtain. It is therefore clear that no such presumption attaches to a pre-constitutional statute like the Indian Penal Code. In fact, in the majority judgment of B.P. Jeevan Reddy, J. in **New Delhi Municipal Council v. State of Punjab and Ors.**, (1997) 7 SCC 339, the Punjab Municipal Act of 1911 was deemed to be a post-constitutional law inasmuch as it was extended to Delhi only in 1950, as a result of which the presumption of constitutionality was raised. Ahmadi, C.J.'s dissenting opinion correctly states that if a pre-constitutional law is challenged, the presumption of constitutional validity would not obtain. The relevant paragraph is extracted below:-

> "**119.** Reddy, J. has taken the view that the Doctrine of Presumption of Constitutionality of Legislations requires the saving of the taxes which these Acts impose upon the commercial activities of State

> Governments. The Act is a pre-constitutional enactment. The basis of this doctrine is the assumed intention of the legislators not to transgress constitutional boundaries. It is difficult to appreciate how that intention can be assumed when, at the time that the law was passed, there was no such barrier and the limitation was brought in by a Constitution long after the enactment of the law. (This Court has in a Constitution Bench decision, *Gulabbhai Vallabbhai Desai* v. *Union of India* [AIR 1967 SC 1110 : (1967) 1 SCR 602] , (AIR at p. 1117 raised doubts along similar lines). The Framers obviously wanted the law under Article 289(2) to be of a very high standard. Can these laws, which are silent on the most important aspect required by Article 289(2), i.e., the specification of the trading activities of State Governments which would be liable to Union taxation, be said to meet with that standard?"

91. It is a little difficult to subscribe to the view of the Division Bench that the presumption of constitutionality of Section 377 would therefore attach.

92. The fact that the legislature has chosen not to amend the law, despite the 172nd Law Commission Report specifically recommending deletion of Section 377, may indicate that Parliament has not thought it proper to delete the aforesaid provision, is one more reason for not invalidating Section 377, according to **Suresh Kumar Koushal** (supra). This is a little difficult to appreciate when the Union of India admittedly did not

challenge the Delhi High Court judgment striking down the provision in part. Secondly, the fact that Parliament may or may not have chosen to follow a Law Commission Report does not guide the Court's understanding of its character, scope, ambit and import as has been stated in **Suresh Kumar Koushal** (supra). It is a neutral fact which need not be taken into account at all. All that the Court has to see is whether constitutional provisions have been transgressed and if so, as a natural corollary, the death knell of the challenged provision must follow.

93. It is a little difficult to appreciate the Court stating that the ambit of Section 377 IPC is only determined with reference to the sexual act itself and the circumstances in which it is executed. It is also a little difficult to appreciate that Section 377 regulates sexual conduct regardless of gender identity and orientation.

94. After 2013, when Section 375 was amended so as to include anal and certain other kinds of sexual intercourse between a man and a woman, which would not be criminalized as rape if it was between consenting adults, it is clear that if

Section 377 continues to penalize such sexual intercourse, an anomalous position would result. A man indulging in such sexual intercourse would not be liable to be prosecuted for rape but would be liable to be prosecuted under Section 377. Further, a woman who could, at no point of time, have been prosecuted for rape would, despite her consent, be prosecuted for indulging in anal or such other sexual intercourse with a man in private under Section 377. This would render Section 377, as applied to such consenting adults, as manifestly arbitrary as it would be wholly excessive and disproportionate to prosecute such persons under Section 377 when the legislature has amended one portion of the law in 2013, making it clear that consensual sex, as described in the amended provision, between two consenting adults, one a man and one a woman, would not be liable for prosecution. If, by having regard to what has been said above, Section 377 has to be read down as not applying to anal and such other sex by a male-female couple, then the Section will continue to apply only to homosexual sex. If this be the case, the Section will offend Article 14 as it will discriminate between heterosexual and

homosexual adults which is a distinction which has no rational relation to the object sought to be achieved by the Section - namely, the criminalization of all carnal sex between homosexual and/or heterosexual adults as being against the order of nature.[8] Viewed either way, the Section falls foul of Article 14.

95. The fact that only a minuscule fraction of the country's population constitutes lesbians and gays or transgenders, and that in the last 150 years less than 200 persons have been prosecuted for committing the offence under Section 377, is neither here nor there. When it is found that privacy interests come in and the State has no compelling reason to continue an existing law which penalizes same-sex couples who cause no harm to others, on an application of the recent judgments delivered by this Court after **Suresh Kumar Koushal** (supra), it is clear that Articles 14, 15, 19 and 21 have all been transgressed without any legitimate state rationale to uphold such provision.

[8] An argument was made by the Petitioners that Section 377, being vague and unintelligible, should be struck down on this ground as it is not clear as to what is meant by "against the order of nature". Since Section 377 applies down the line to carnal sex between human beings and animals as well, which is not the subject matter of challenge here, it is unnecessary to go into this ground as the Petitioners have succeeded on other grounds raised by them.

96. For all these reasons therefore, we are of the view that, **Suresh Kumar Koushal** (supra) needs to be, and is hereby, overruled.

97. We may conclude by stating that persons who are homosexual have a fundamental right to live with dignity, which, in the larger framework of the Preamble of India, will assure the cardinal constitutional value of fraternity that has been discussed in some of our judgments (*See* (1) *Nandini Sundar v. State of Chhattisgarh*, (2011) 7 SCC 547 at paragraphs 16, 25 and 52; and (2) *Subramaniam Swamy v. Union of India* (2016) 7 SCC 221 at paragraphs 153 to 156). We further declare that such groups are entitled to the protection of equal laws, and are entitled to be treated in society as human beings without any stigma being attached to any of them. We further declare that Section 377 insofar as it criminalises homosexual sex and transgender sex between consenting adults is unconstitutional.

98. We are also of the view that the Union of India shall take all measures to ensure that this judgment is given wide publicity through the public media, which includes television, radio, print and online media at regular intervals, and initiate programs to

reduce and finally eliminate the stigma associated with such persons. Above all, all government officials, including and in particular police officials, and other officers of the Union of India and the States, be given periodic sensitization and awareness training of the plight of such persons in the light of the observations contained in this judgment.

……..J.
(R.F. Nariman)

New Delhi;
September 06, 2018.