REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL/CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO 76 OF 2016

NAVTEJ SINGH JOHAR & ORS. ...Petitioner

VERSUS

UNION OF INDIA, THR. SECRETARY,
MINISTRY OF LAW AND JUSTICE …Respondent

WITH

WRIT PETITION (CIVIL) NO 572 OF 2016

AKKAI PADMASHALI ...Petitioner

VERSUS

UNION OF INDIA, THR.SECRETARY,
MINISTRY OF LAW AND JUSTICE ...Respondent

WITH

WRIT PETITION (CRIMINAL) NO 88 OF 2018

KESHAV SURI ...Petitioner

VERSUS

UNION OF INDIA ...Respondent

WITH

WRIT PETITION (CRIMINAL) NO 100 OF 2018

ARIF JAFAR ...Petitioner

VERSUS

UNION OF INDIA AND ORS. ...Respondents

WITH

WRIT PETITION (CRIMINAL) NO 101 OF 2018

ASHOK ROW KAVI AND ORS. ...Petitioners

VERSUS

UNION OF INDIA AND ORS. ...Respondents

AND

WITH

WRIT PETITION (CRIMINAL) NO 121 OF 2018

ANWESH POKKULURI AND ORS. ...Petitioners

VERSUS

UNION OF INDIA ...Respondent

J U D G M E N T

Index to the judgment

Dr Dhananjaya Y Chandrachud, J

A From denial to freedom

> "What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization, or worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter."[1]

1 The lethargy of the law is manifest yet again.

2 A hundred and fifty eight years ago, a colonial legislature made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The law deprived them of the simple right as human beings to live, love and partner as nature made them. The human instinct to love was caged by constraining the physical manifestation of their sexuality. Gays and lesbians[2] were made subordinate to the authority of a coercive state. A charter of morality made their relationships hateful. The criminal law became a willing instrument of repression. To engage in 'carnal intercourse' against 'the order of nature' risked being tucked away for ten years in a jail. The offence would

[1] Justice Leila Seth, "A mother and a judge speaks out on Section 377", The Times of India, 26 January, 2014.

[2] These terms as well as terms such as "LGBT" and "LGBTIQ" used in the judgement are to be construed in an inclusive sense to include members of all gender and sexual minorities, whose sexual activity is criminalized by the application of Section 377 of the Indian Penal Code, 1860.

be investigated by searching the most intimate of spaces to find tell-tale signs of intercourse. Civilisation has been brutal.

3 Eighty seven years after the law was made, India gained her liberation from a colonial past. But Macaulay's legacy - the offence under Section 377 of the Penal Code - has continued to exist for nearly sixty eight years after we gave ourselves a liberal Constitution. Gays and lesbians, transgenders and bisexuals continue to be denied a truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. Their entitlement should be as equal participants in a society governed by the morality of the Constitution. That in essence is what Section 377 denies to them. The shadows of a receding past confront their quest for fulfillment.

4 Section 377 exacts conformity backed by the fear of penal reprisal. There is an unbridgeable divide between the moral values on which it is based and the values of the Constitution. What separates them is liberty and dignity. We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society. Does the Constitution allow a quiver of fear to become the quilt around the bodies of her citizens, in the intimacies which

define their identities? If there is only one answer to this question, as I believe there is, the tragedy and anguish which Section 377 inflicts must be remedied.

5 The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation. The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.

Section 377 provides for rule by the law instead of the rule of law. The rule of law requires a just law which facilitates equality, liberty and dignity in all its facets. Rule by the law provides legitimacy to arbitrary state behaviour.

6 Section 377 has consigned a group of citizens to the margins. It has been destructive of their identities. By imposing the sanctions of the law on consenting adults involved in a sexual relationship, it has lent the authority of

the state to perpetuate social stereotypes and encourage discrimination. Gays, lesbians, bisexuals and transgenders have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.

7 It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations. Sexual orientation is recognised and protected by the Constitution. Section 377 of the Penal Code is unconstitutional in so far as it penalises a consensual relationship between adults of the same gender. The constitutional values of liberty and dignity can accept nothing less.

B "To the wisdom of the Court"

Union Government before the Court

8 After the hearing commenced, the Additional Solicitor General tendered an affidavit. The Union government states that it leaves a decision on the

validity of Section 377 ‘to the wisdom of this Court’. Implicit in this is that the government has no view of its own on the subject and rests content to abide by the decision of this Court. During the parleys in Court, the ASG however submitted that the court should confine itself to the reference by ruling upon the correctness of **Suresh Kumar Koushal** v. **Naz Foundation**[3] (“Koushal”).

9 We would have appreciated a categorical statement of position by the government, setting out its views on the validity of Section 377 and on the correctness of **Koushal**. The ambivalence of the government does not obviate the necessity for a judgment on the issues raised. The challenge to the constitutional validity of Section 377 must squarely be addressed in this proceeding. That is plainly the duty of the Court. Constitutional issues are not decided on concession. The statement of the Union government does not concede to the contention of the petitioners that the statutory provision is invalid. Even if a concession were to be made, that would not conclude the matter for this Court. All that the stand of the government indicates is that it is to the ‘wisdom’ of this Court that the matter is left. In reflecting upon this appeal to our wisdom, it is just as well that we as judges remind ourselves of a truth which can unwittingly be forgotten: flattery is a graveyard for the gullible.

[3] (2014) 1 SCC 1

10 Bereft of a submission on behalf of the Union government on a matter of constitutional principle these proceedings must be dealt with in the only manner known to the constitutional court: through an adjudication which fulfills constitutional values and principles.

11 The ASG made a fair submission when he urged that the court should deal with the matter in reference. The submission, to its credit, would have the court follow a path of prudence. Prudence requires, after all, that the Court should address itself to the controversy in the reference without pursuing an uncharted course beyond it. While accepting the wisdom of the approach suggested by the ASG, it is nonetheless necessary to make some prefatory observations on the scope of the reference.

12 The correctness of the decision in **Koushal** is in question. **Koushal** [as indeed the decision of the Delhi High Court in **Naz Foundation** v. **Government of NCT of Delhi**[4] ("**Naz**")] dealt with the validity of Section 377 which criminalizes even a consensual relationship between adults of the same gender who engage in sexual conduct ('carnal intercourse against the order of nature'). In dealing with the validity of the provision, it is necessary to understand the nature of the constitutional right which LGBT individuals claim.

[4](2010) Cri LJ 94

According to them, the right to be in a relationship with a consenting adult of the same gender emanates from the right to life, as a protected value under the Constitution. They ground their right on the basis of an identity resting in their sexual orientation. According to them, their liberty and dignity require both an acknowledgement as well as a protection under the law, of their sexual orientation. Representing their identity, based on sexual orientation, to the world at large and asserting it in their relationship with the community and the state is stated to be intrinsic to the free exercise of speech and expression guaranteed by the Constitution. Sexual orientation is claimed to be intrinsic to the guarantee against discrimination on the ground of sex. The statutory provision, it has been asserted, also violates the fundamental guarantee against arbitrariness because it unequally targets gay men whose sexual expression falls in the area prohibited by Section 377.

13 In answering the dispute in regard to the validity of Section 377, the court must of necessity understand and explain in a constitutional perspective, the nature of the right which is claimed. The challenge to Section 377 has to be understood from the perspective of a rights discourse. While doing so, it becomes necessary to understand the constitutional source from which the claim emerges. When a right is claimed to be constitutionally protected, it is but necessary for the court to analyze the basis of that assertion. Hence, in

answering the reference, it is crucial for the court to place the entitlement of the LGBT population in a constitutional framework. We have approached the matter thus far from the perspective of constitutional analysis. But there is a more simple line of reasoning as well, grounded as we believe, in common-sense. Sexual acts between consenting adults of the same gender constitute one facet – albeit an important aspect – of the right asserted by gay men to lead fulfilling lives. Gay and lesbian relationships are sustained and nurtured in every aspect which makes for a meaningful life. In understanding the true nature of those relationships and the protection which the Constitution affords to them, it is necessary to adopt a perspective which leads to their acceptance as equal members of a humane and compassionate society. Forming a holistic perspective requires the court to dwell on, but not confine itself, to sexuality. Sexual orientation creates an identity on which there is a constitutional claim to the entitlement of a dignified life. It is from that broad perspective that the constitutional right needs to be adjudicated.

C From "The Ashes of the Gay"

"Democracy
It's coming through a hole in the air,
…
It's coming from the feel
that this ain't exactly real,
or it's real, but it ain't exactly there.
From the wars against disorder,
from the sirens night and day,

from the fires of the homeless,
from the ashes of the gay:
Democracy is coming…"[5]

14 Section 377 of the Indian Penal Code, 1860 ("IPC") has made 'carnal intercourse against the order of nature' an offence. This provision, understood as prohibiting non-peno vaginal intercourse, reflects the imposition of a particular set of morals by a colonial power at a particular point in history. A supposedly alien law,[6] Section 377 has managed to survive for over 158 years, impervious to both the anticolonial struggle as well as the formation of a democratic India, which guarantees fundamental rights to all its citizens. An inquiry into the colonial origins of Section 377 and its postulations about sexuality is useful in assessing the relevance of the provision in contemporary times.[7]

15 Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India and principal architect of the IPC, cited two main sources from which he drew in drafting the Code: the French (Napoleonic) Penal Code, 1810 and Edward Livingston's Louisiana Code.[8] Lord Macaulay also

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5 Lyrics from Leonard Cohen's song "Democracy" (1992).

6 See Same-Sex Love in India: A Literary History (Ruth Vanita and Saleem Kidwai, eds.), Penguin India (2008) for writings spanning over more than 2,000 years of Indian literature which demonstrate that same-sex love has flourished, evolved and been embraced in various forms since ancient times.

7 Law like Love: Queer Perspectives on Law (Arvind Narrain and Alok Gupta, eds.), Yoda Press (2011).

8 K. N. Chandrasekharan Pillai and Shabistan Aquil, "Historical Introduction to the Indian Penal Code", in Essays on the Indian Penal Code, New Delhi, Indian Law Institute (2005); Siyuan Chen, "Codification, Macaulay and the Indian Penal Code [Book Review], Singapore Journal of Legal Studies, National University of Singapore, Faculty of Law (2011), at pages 581-584.

drew inspiration from the English common law and the British Royal Commission's 1843 Draft Code.[9] Tracing that origin, English jurist Fitzjames Stephen observes:

> "The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India."[10]

In order to understand the colonial origins of Section 377, it is necessary to go further back to modern English law's conception of anal and oral intercourse, which was firmly rooted in Judeo-Christian morality and condemned non-procreative sex.[11] Though Jesus himself does not reference homosexuality or homosexual sex,[12] the "Holiness Code"[13] found in Leviticus provides thus:

> "You shall not lie with a male as with a woman. It is an abomination. [18:22]
>
> If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. [19:13]
>
> If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them. [20:13]"

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[9] Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia", Asian Journal of Comparative Law, Vol. 4 (2009), at page 11 ("Douglas"); David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century", Modern Asian Studies, Vol. 32 (1998), at pages 513-557.

[10] Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", Carleton University (2011).

[11] Michael Kirby, "The Sodomy Offence: England's Least Lovely Law Export?" Journal of Commonwealth Criminal Law, Inaugural Issue (2011).

[12] Douglas, supra note 9, at page 4.

[13] Ibid at page 2.

Another Judeo-Christian religious interpretation refers to “sodomy”, a term used for anal intercourse that is derived from an interpretation of Genesis 18:20 of the Old Testament,[14] known as the story of Sodom and Gomorrah. Briefly, when two angels took refuge in the home of Lot, the men of the town of Sodom surrounded the house and demanded that the angels be sent out so that the men may “know” them (in this interpretation, with sexual connotations). When Lot offered them his two virgin daughters instead, the men of Sodom responded by threatening Lot. The angels then blinded the “Sodomites.”[15] The use of the term “sodomites” to describe those who engaged in anal intercourse emerged in the 13th Century, and the term “sodomy” was used as a euphemism for a number of sexual ‘sins’ two centuries earlier.[16]

16 The preservation of the Judeo-Christian condemnation of homosexuality is also attributed to the Jewish theologian, Philo of Alexandria, who is regarded as the father of the Church Fathers and who reviled homosexuals and called for their execution.[17] The condemnation of homosexuality can also be traced to Roman law. Emperor Justinian’s Code of 529, for instance, stated

[14] Douglas, supra note 9, at page 4.
[15] Jessica Cecil, “The Destruction of Sodom and Gomorrah”, British Broadcasting Company, 11 February 2017.
[16] Douglas, supra note 9, at page 4; KSN Murthy’s Criminal Law: Indian Penal Code (KVS Sarma ed), Lexis Nexis (2016).
[17] Philo, translated by F.H. Colson and G.H. Whitaker, 10 Volumes, (Cambridge: Harvard University Press, 1929-1962).

that persons who engaged in homosexual sex were to be executed.[18] From Rome, the condemnation of homosexuality spread across Europe, where it manifested itself in ecclesiastical law.[19] During the Protestant Reformation, these laws shifted from the ecclesiastical to the criminal domain, beginning with Germany in 1532.[20]

While ecclesiastical laws against homosexual intercourse were well established in England by the 1500s,[21] England's first criminal (non-ecclesiastical) law was the Buggery Act of 1533, which condemned "the detestable and abominable vice of buggeri committed with mankind or beest."[22] "Buggery" is derived from the old French word for heretic, "bougre", and was taken to mean anal intercourse.[23]

17 The Buggery Act, 1533, which was enacted by Henry VIII, made the offence of buggery punishable by death, and continued to exist for nearly 300 years before it was repealed and replaced by the Offences against the Person Act, 1828. Buggery, however, remained a capital offence in England until 1861, one year after the enactment of the IPC. The language of Section 377

[18] David F. Greenberg and Marcia H. Bystryn, "Christian Intolerance of Homosexuality", American Journal of Sociology, Vol. 88 (1982), at pages 515-548.
[19] Douglas, supra note 9, at pages 5 and 8.
[20] Ibid at page 5.
[21] Ibid at page 2.
[22] The Buggery Act, 1533.
[23] Douglas, supra note 9, at page 2.

has antecedents in the definition of buggery found in Sir Edward Coke's late 17th Century compilation of English law:[24]

> "...Committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."[25]

18 The Criminal Law Amendment Act, 1885 made "gross indecency" a crime in the United Kingdom, and was used to prosecute homosexuals where sodomy could not be proven. In 1895, Oscar Wilde was arrested under the Act for 'committing acts of gross indecency with male persons'.[26] During Wilde's trial, the Prosecutor, referring to homosexual love, asked him, "What is 'the love that dare not speak its name'?" Wilde responded:

> "The love that dare not speak its name" in this century is such a great affection of an elder for a younger man as there was between David and Jonathan, such as Plato made the very basis of his philosophy, and such as you find in the sonnets of Michelangelo and Shakespeare. It is that deep spiritual affection that is as pure as it is perfect. It dictates and pervades great works of art, like those of Shakespeare and Michelangelo, and those two letters of mine, such as they are. It is in this century misunderstood, so much misunderstood that it may be described as "the love that dare not speak its name," and on that account of it I am placed where I am now. It is beautiful, it is fine, it is the noblest form of affection. There is nothing unnatural about it. It is intellectual, and it repeatedly exists between an older and a younger man, when the older man has intellect, and the younger man has all the joy, hope and glamour of life before him. That it should be so, the world

[24] Ibid at 7.
[25] Human Rights Watch. This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism (2008).
[26] Douglas, supra note 9, at page 15.

> does not understand. The world mocks at it, and sometimes puts one in the pillory for it."[27]

Wilde was held guilty and was sentenced to two years' hard labour and subsequently incarcerated.

Following World War II, arrests and prosecutions of homosexuals increased. Alan Turing, the renowned mathematician and cryptographer who was responsible for breaking the Nazi Enigma code during World War II, was convicted of 'gross indecency' in 1952. In order to avoid a prison sentence, Turing was forced to agree to chemical castration. He was injected with synthetic female hormones. Less than two years after he began the hormone treatment, Turing committed suicide. The Amendment Act (also known as the Labouchere Amendment) remained in English law until 1967. Turing was posthumously pardoned in 2013, and in 2017, the UK introduced the Policing and Crime Bill, also called the "Turing Law," posthumously pardoning 50,000 homosexual men and providing pardons for the living.

In the wake of several court cases in which homosexuality had been featured, the British Parliament in 1954 set up the Wolfenden Committee, headed by

[27] H. Montgomery Hyde, John O'Connor, and Merlin Holland, The Trials of Oscar Wilde (2014), at page 201.

John Wolfenden, to "consider…the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts", as well as the laws relevant to prostitution and solicitation. The Wolfenden Report of 1957, which was supported by the Church of England,[28] proposed that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business' and recommended that homosexual acts between two consenting adults should no longer be a criminal offence.[29]

19 The success of the report led England and Wales to enact The Sexual Offences Act, 1967, which decriminalized private homosexual sex between two men over the age of twenty-one. Britain continued to introduce and amend laws governing same-sex intercourse to make them more equal, including the lowering of the age of consent for gay/bisexual men to sixteen in 2001.[30] In May 2007, in a statement to the UN Human Rights Council, the UK, which imposed criminal prohibitions against same-sex intercourse in its former colonies across the world, committed itself to the cause of worldwide decriminalization of homosexuality.[31] Today, India continues to enforce a law

[28] Ibid at 25.
[29] Report of the Departmental Committee on Homosexual Offences and Prostitution (1957) ("Wolfenden Report").
[30] Sexual Offences (Amendment) Act 2000, Parliament of the United Kingdom.
[31] Douglas, supra note 9, at page 29.

imposed by an erstwhile colonial government, a law that has been long done away with by the same government in its own jurisdiction.

C.I "Arc of the moral universe"

20 Lord Macaulay was greatly influenced by English philosopher and jurist Jeremy Bentham, who coined the term codification and argued for replacing existing laws with clear, concise, and understandable provisions that could be universally applied across the Empire.[32] Ironically, in a 1785 essay, Bentham himself wrote one of the earliest known defences of homosexuality in the English language, arguing against the criminalization of homosexuality. However, this essay was only discovered 200 years after his death.[33]

21 The Law Commission's 1837 draft of the Penal Code (prepared by Lord Macaulay) contained two sections (Clauses 361 and 362), which are considered the immediate precursors to Section 377:

> "OF UNNATURAL OFFENCES
>
> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and

[32] Douglas, supra note 9, at page 9.
[33] Ibid.

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

Both the draft clauses are vague in their description of the acts they seek to criminalize. Lord Macaulay also omitted an explanation to the Clauses. In a note presented with the 1837 draft, Lord Macaulay elaborated:

> "Clauses 361 and 362 relate to an odious class of offences respecting which **it is desirable that as little as possible be said.** We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. **We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community** by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."[34] (Emphasis supplied)

So abominable did Macaulay consider these offences that he banished the thought of providing a rationale for their being made culpable. The prospect of a public discussion was revolting.

[34] Enze Han, Joseph O'Mahoney, "British Colonialism and the Criminalization of Homosexuality: Queens, Crime and Empire", Routledge (2018).

After twenty-five years of revision, the IPC entered into force on 1 January 1862, two years after Lord Macaulay's death. The IPC was the first codified criminal code in the British Empire. Section 377 of the revised code read as follows:

> "Of Unnatural Offences
>
> 377. Unnatural Offences.- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life][35], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation.- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

22 The Explanation is unique in that it requires proof of penetration – something that British Law did not. The two clauses in the Draft Code fell somewhere in between, requiring proof of "touch".[36]

By the time India gained independence in 1947, Britain had introduced Penal Codes similar to the IPC in other former colonies, including Zanzibar (Tanzania) in 1867, Singapore, Malaysia, and Brunei in 1871, Ceylon (Sri Lanka) in 1885, Burma (Myanmar) in 1886,[37] East Africa Protectorate (Kenya)

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35 Changed from "transportation for life" by Act 26 of 1955.

36 Douglas, supra note 9, at page 16.

37 Nang Yin Kham, "An Introduction to the Law and Judicial System of Myanmar", Centre for Asia Legal Studies Faculty of Law, National University of Singapore, Working Paper 14/02, (2014).

in 1897, Sudan in 1889, Uganda in 1902, and Tanganyika (Tanzania) in 1920.[38] Under Article 372(1) of the Indian Constitution, which provides that all laws in force prior to the commencement of the Constitution shall continue to be in force until altered or repealed, the IPC and many other pre-Independence laws were "saved" and allowed to operate in Independent India.

23 While Section 377 has been used to prosecute non-consensual sexual acts, it has also been used to prosecute consensual sexual acts. In **(Meharban) Nowshirwan Irani** v. **Emperor**[39], for instance, a police officer observed Nowshirwan, a young shopkeeper, engaged in homosexual acts with a young man, Ratansi, through a keyhole in Nowshirwan's house. The Prosecution argued that the acts were non-consensual, but could not prove coercion.[40] The High Court of Sindh ultimately set aside the conviction based on insufficient evidence. Nevertheless, what should have been an intimate act between two consenting parties in their bedroom became a public scandal and the subject of judicial scrutiny.[41]

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[38] Supra note 34.

[39] AIR 1934 Sind. 206.

[40] Arvind Narrain, "'That Despicable Specimen of Humanity': Policing of Homosexuality in India", in Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India (Kalpana Kannabiran and Ranbir Singh eds.), Sage (2008).

[41] Arvind Narrain, "A New Language of Morality: From the Trial of Nowshirwan to the Judgement in Naz Foundation", The Indian Journal of Constitutional Law, Vol. 4 (2010).

In **D P Minwalla** v. **Emperor**[42], Minawalla and Tajmahomed, were seen having anal intercourse in a lorry and were arrested, charged, and found guilty under Section 377. Tajmahomed was sentenced to four months rigorous imprisonment, and Minawalla, who was charged with abetment, was sentenced to a fine of Rs 100 and imprisonment until the rising of the Bench. Minawalla appealed the decision on the grounds that he was not a consenting partner, and submitted himself to a medical exam. The judge was unconvinced, however, and Minawalla's original sentence was upheld. The Court, convinced that the acts were consensual, found the men guilty under Section 377.[43]

In **Ratan Mia** v. **State of Assam**[44], the Court convicted two men (one aged fifteen and a half, the other twenty) under Section 377 and treated them as equally culpable, as he was unable to cast one of them as the perpetrator and the other as the victim or abettor. Both men were originally sentenced to imprisonment for six months and a fine of Rs 100. After Nur had spent six years in prison and appealed three times,[45] both men's sentences were

[42] AIR 1935 Sind. 78.
[43] Supra note 40.
[44] (1988) Cr.L.J. 980.
[45] Suparna Bhaskaran, "The Politics of Penetration: Section 377 of the Indian Penal Code" in Queering India: Same-Sex Love and Eroticism in Indian Culture and Society (Ruth Vanita ed.), Routledge (2002).

reduced to seven days rigorous imprisonment, in view of the fact that they were first time offenders under the age of twenty-one.[46]

Even though the government is not proactively enforcing a law that governs private activities, the psychological impact for homosexuals who are, for all practical purposes, felons in waiting, is damaging in its own right:

> "...The true impact of Section 377 on queer lives is felt outside the courtroom and must not be measured in terms of legal cases. Numerous studies, including both documented and anecdotal evidence, tell us that Section 377 is the basis for routine and continuous violence against sexual minorities by the police, the medical establishment, and the state. There are innumerable stories that can be cited – from the everyday violence faced by hijras [a distinct transgender category] and kothis [effeminate males] on the streets of Indian cities to the refusal of the National Human Rights Commission to hear the case of a young man who had been given electro-shock therapy for nearly two years. A recent report by the People's Union for Civil Liberties (Karnataka), showed that Section 377 was used by the police to justify practices such as illegal detention, sexual abuse and harassment, extortion and outing of queer people to their families."[47]

Before the end of the 19th century, gay rights movements were few and far between. Indeed, when Alfred Douglas, Oscar Wilde's lover, wrote in his 1890s poem entitled "Two Loves" of "the love that dare not speak its name", he was alluding to society's moral disapprobation of homosexuality.[48] The 20th

[46] Ibid.

[47] Douglas, supra note 9, at page 21; "Introduction" to Because I Have a Voice: Queer Politics in India, (Gautam Bhan and Arvind Narrain eds), Yoda Press (2005) at pages 7, 8.

[48] Melba Cuddy-Keane, Adam Hammond and Alexandra Peat, "Q" in Modernism: Keywords, Wiley-Blackwell (2014).

century, however, saw the LGBTIQ community emerge from the shadows worldwide, poised to agitate and demand equal civil rights. LGBTIQ movements focused on issues of intersectionality, the interplay of oppressions arising from being both queer and lower class, coloured, disabled, and so on. Despite the movement making numerous strides forward in the fight for equal rights, incidents of homosexual arrests were nevertheless extant at the turn of the 21st century.

In many cases of unfulfilled civil rights, there is a tendency to operate under the philosophy articulated by Dr. Martin Luther King, that "the arc of the moral universe is long, but it bends towards justice." It is likely that those who subscribe to this philosophy believe that homosexuals should practice the virtue of patience, and wait for society to understand and accept their way of life. What those who purport this philosophy fail to recognize is that Dr King himself argued against the doctrine of "wait":

> "For years now I have heard the word "wait." It rings in the ear of every Negro with a piercing familiarity. This "wait" has almost always meant "never." It has been a tranquilizing thalidomide, relieving the emotional stress for a moment, only to give birth to an ill-formed infant of frustration. We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied." We have waited for more than three hundred and forty years for our God-given and constitutional rights . . . when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never knowing what to expect next, and plagued with inner fears and outer resentments;

> when you are forever fighting a degenerating sense of "nobodyness" -- then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over and men are no longer willing to be plunged into an abyss of injustice where they experience the bleakness of corroding despair. I hope, sirs, you can understand our legitimate and unavoidable impatience." (Letter from a Birmingham Jail)[49]

24 Indian citizens belonging to sexual minorities have waited. They have waited and watched as their fellow citizens were freed from the British yoke while their fundamental freedoms remained restrained under an antiquated and anachronistic colonial-era law – forcing them to live in hiding, in fear, and as second-class citizens. In seeking an adjudication of the validity of Section 377, these citizens urge that the acts which the provision makes culpable should be decriminalised. But this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship. Above all, our decision will speak to the transformative power of the Constitution. For it is in the transformation of society that the Constitution seeks to assure the values of a just, humane and compassionate existence to all her citizens.

[49] Martin Luther King Jr., "Letter from a Birmingham Jail" (1963).

D An equal love

"**Through Love's Great Power**

Through love's great power to be made whole
In mind and body, heart and soul –
Through freedom to find joy, or be
By dint of joy itself set free
In love and in companionhood:
This is the true and natural good.
To undo justice, and to seek
To quash the rights that guard the weak -
To sneer at love, and wrench apart
The bonds of body, mind and heart
With specious reason and no rhyme:
This is the true unnatural crime."[50]

Article 14 is our fundamental charter of equality:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." (Emphasis supplied)

25 In **Naz**, the Delhi High Court held that Section 377 violates Article 14 of the Constitution since the classification on which it is based does not bear any nexus to the object which the provision seeks to achieve.[51] In **Koushal**, this Court rejected the **Naz** formulation on the ground that "those who indulge in carnal intercourse in the ordinary course and those who ... [do so] against the order of nature constitute different classes."[52] **Koushal** held on that logic that

[50] Vikram Seth wrote this poem the morning after the Supreme Court refused to review its decision in Koushal**.**
[51] Naz Foundation, at para 91.
[52] Koushal, at para 65.

Section 377 does not suffer from arbitrariness or from an irrational classification.

26 A litany of our decisions – to refer to them individually would be a parade of the familiar – indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation.[53] There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.[54]

27 Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism

[53] State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75.
[54] Deepak Sibal v**.** Punjab University, (1989) 2 SCC 145.

buries the life-giving forces of the Constitution under a mere *mantra*. What it ignores is that Article 14 contains a powerful statement of values – of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in state action. As our constitutional jurisprudence has evolved towards recognizing the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that *avatar,* it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavor and in every facet of human existence.

In **E P Royappa** v. **State of Tamil Nadu**[55], the validity of state action was made subject to the test of arbitrariness:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14…"

[55] (1974) 4 SCC 3

Four decades later, the test has been refined in **Shayara Bano** v. **Union of India**[56]:

> "The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

28 The wording of Section 377 does not precisely map on to a distinction between homosexuals and heterosexuals but a precise interpretation would mean that it penalizes some forms of sexual expression among heterosexuals while necessarily criminalizing every form of sexual expression and intimacy between homosexuals.[57] For Section 377 to withstand the scrutiny of Article 14, it was necessary for the Court in **Koushal** to establish the difference between 'ordinary intercourse' and 'intercourse against the order of nature', the legitimate objective being pursued and the rational nexus between the goal and the classification. However, the **Koushal** approach has been criticised on the ground that while dealing with Article 14, it fell "short of the minimum standards of judicial reasoning that may be expected from the Supreme Court."[58] On a review of the prosecutions under Section 377, **Koushal** conceded that "no uniform test [could] be culled out to classify acts

[56] (2017) 9 SCC 1
[57] Gautam Bhatia, "Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution", Indian Law Review, Vol. 1 (2017), at pages 115-144.
[58] Shubhankar Dam, "Suresh Kumar Koushal and Another v. NAZ Foundation and Others (Civil Appeal No. 10972 of 2013)" Public Law, International Survey Section (2014).

as 'carnal intercourse against the order of nature.'"[59] Yet **Koushal** upheld the classification of sexual acts in Section 377 without explaining the difference between the classes, or the justification for treating the classes differently.

This lack of reasoning and analysis by the Court has been critiqued in scholarly research on the subject. The following extract sums up the criticism with telling effect:

> "The Court says – without an iota of evidence – that there are two classes of persons – those who engage in sexual intercourse in the "ordinary course", and those who don't. What is ordinary course? Presumably, heterosexuality. Why is this ordinary course? Perhaps because there are more heterosexuals than homosexuals around, although the Court gives no evidence for that. Well, there are also more black-haired people in India than brown-haired people. Is sex with a brown-haired person against the order of nature because it happens less often?... *Where is the rational nexus? What is the legitimate governmental objective?* Even if we accept that there is an intelligible differentia here, *on what basis do you criminalize – and thus deny equal protection of laws – to one class of persons?* The Court gives no answer. Alternatively, "ordinary sex" is penal-vaginal, and every other kind of sex is "against the ordinary course of nature". Again, no evidence to back *that* claim up apart from the say-so of the judge."[60]

At the very outset, we must understand the problem with the usage of the term 'order of nature'. What is 'natural' and what is 'unnatural'? And who decides the categorization into these two ostensibly distinct and water-tight compartments? Do we allow the state to draw the boundaries between

[59] Koushal, at para 60.
[60] Gautam Bhatia, **"**The Unbearable Wrongness of Koushal vs Naz Foundation", Indian Constitutional Law and Philosophy (2013).

permissible and impermissible intimacies between consenting adults? Homosexuality has been documented in almost 1500 species, who "unfortunately are not blessed with rational capabilities (and the propensity to 'nurture' same sex thoughts) as are found in mankind."[61] An interesting article in this regard notes that, "no species has been found in which homosexual behaviour has not been shown to exist, with the exception of species that never have sex at all, such as sea urchins and aphis."[62]

29 In an incisive article,[63] Ambrosino discusses the shift from reproductive instinct to erotic desire and how crucial this shift is to understanding modern notions of sexuality. He analyses how the lines between homosexuality and heterosexuality are blurred, and perhaps even an outdated myth or invention when we understand the fluidity of sexual identities today:[64]

> ""No one knows exactly why heterosexuals and homosexuals ought to be different," wrote Wendell Ricketts, author of the 1984 study Biological Research on Homosexuality. The best answer we've got is something of a tautology: "heterosexuals and homosexuals are considered different because they can be divided into two groups on the basis of the belief that they can be divided into two groups."
>
> Though the hetero/homo divide seems like an eternal, indestructible fact of nature, it simply isn't. It's merely one recent grammar humans have invented to talk about what sex means to us."

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61 Shamnad Basheer, Sroyon Mukherjee and Karthy Nair, "Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law", NUJS Law Review, Vol, 2 (2009).

62 Bruce Bagemihl, Biological Exuberance: Animal Homosexuality and Natural Diversity, Stonewall Inn Editions (2000).

63 Brandon Ambrosino, "The Invention of Heterosexuality", British Broadcasting Company, 26 March, 2017.

64 Ibid.

He questions the elevated status of 'normalcy' in the following words:

> "Normal" is a loaded word, of course, and it has been misused throughout history. Hierarchical ordering leading to slavery was at one time accepted as normal, as was a geocentric cosmology. It was only by questioning the foundations of the consensus view that "normal" phenomena were dethroned from their privileged positions."

There are obvious shortcomings of the human element in the judgment of natural and unnatural:

> "Why judge what is natural and ethical to a human being by his or her animal nature? Many of the things human beings value, such as medicine and art, are egregiously unnatural. At the same time, humans detest many things that actually are eminently natural, like disease and death. If we consider some naturally occurring phenomena ethical and others unethical, that means our minds (the things looking) are determining what to make of nature (the things being looked at). Nature doesn't exist somewhere "out there," independently of us – we're always already interpreting it from the inside."

It has been argued that "the 'naturalness' and omnipresence of heterosexuality is manufactured by an elimination of historical specificities about the organisation, regulation and deployment of sexuality across time and space."[65] It is thus this "closeting of history" that produces the "hegemonic heterosexual" - the ideological construction of a particular alignment of sex, gender and desire that posits itself as natural, inevitable and eternal.[66] Heterosexuality becomes the site where the male sexed masculine man's desire for the female sexed feminine woman is privileged over all other forms

[65] Zaid Al Baset, "Section 377 and the Myth of Heterosexuality", Jindal Global Law Review, Vol. 4 (2012).
[66] Ibid.

of sexual desire and becomes a pervasive norm that structures all societal structures.[67]

The expression ‘carnal’ is susceptible to a wide range of meanings. Among them are:

“sexual, sensual, erotic, lustful, lascivious, libidinous, lecherous, licentious, lewd, prurient, salacious, coarse, gross, lubricious, venereal.”

That’s not all. The word incorporates meanings such as: “physical, bodily, corporeal and of the flesh.” The late Middle English origin of ‘carnal’ derives from Christian Latin ‘carnalis’, from caro, carn – ‘flesh’. At one end of the spectrum ‘carnal’ embodies something which relates to the physical feelings and desires of the body. In another sense, the word implies ‘a relation to the body or flesh as the state of basic physical appetites’. In a pejorative sense, it conveys grossness or lewdness. The simple question which we need to ask ourselves is whether liberty and equality can be made to depend on such vagueness of expression and indeterminacy of content. Section 377 is based on a moral notion that intercourse which is **lustful** is to be frowned upon. It finds the sole purpose of intercourse in procreation. In doing so, it imposes criminal sanctions upon basic human urges, by targeting

[67] Ibid.

some of them as against the order of nature. It does so, on the basis of a social hypocrisy which the law embraces as its own. It would have human beings lead sanitized lives, in which physical relationships are conditioned by a moral notion of what nature does or does not ordain. It would have human beings accept a way of life in which sexual contact without procreation is an aberration and worse still, penal. It would ask of a section of our citizens that while love, they may, the physical manifestation of their love is criminal. This is manifest arbitrariness writ large.

If it is difficult to locate any intelligible differentia between indeterminate terms such as ‘natural’ and ‘unnatural’, then it is even more problematic to say that a classification between individuals who supposedly engage in ‘natural’ intercourse and those who engage in ‘carnal intercourse against the order of nature’ can be legally valid.

In addition to the problem regarding the indeterminacy of the terms, there is a logical fallacy in ascribing legality or illegality to the ostensibly universal meanings of ‘natural’ and ‘unnatural’ as is pointed out in a scholarly article.[68] Basheer, *et al* make this point effectively:

> “From the fact that something occurs naturally, it does not necessarily follow that it is socially desirable. Similarly, acts that are commonly perceived to be ‘unnatural’ may not necessarily deserve legal sanction. Illustratively, consider a

[68] Supra note 61.

> person who walks on his hands all the time. Although this may be unnatural, it is certainly not deserving of legal censure.
>
> …In fact, several activities that might be seen to contravene the order of nature (heart transplants, for example) are beneficial and desirable. Even if an unnatural act is harmful to the extent that it justifies criminal sanctions being imposed against it, the reason for proscribing such an act would be that the act is harmful, and not that it is unnatural."

Indeed, there is no cogent reasoning to support the idea that behaviour that may be uncommon on the basis of mere statistical probability is necessarily abnormal and must be deemed ethically or morally wrong.[69] Even behaviour that may be considered wrong or unnatural cannot be criminalised without sufficient justification given the penal consequences that follow. Section 377 becomes a blanket offence that covers supposedly all types of non-procreative 'natural' sexual activity without any consideration given to the notions of consent and harm.

30 The meaning of 'natural' as understood in cases such as **Khanu** v. **Emperor**[70], which interpreted natural sex to mean only sex that would lead to procreation, would lead to absurd consequences. Some of the consequences have been pointed out thus:

> "The position of the court was thus that 'natural' sexual intercourse is restricted not only to heterosexual coitus, but further only to acts that might possibly result in conception.

[69] Sex, Morality and the Law, (Lori Gruen and George Panichas eds.), Routledge (1996).
[70] AIR (1925) Sind. 286

> Such a formulation of the concept of 'natural' sex excludes not only the use of contraception, which is likely to have fallen outside the hegemonic view of normative sexuality at the time, but also heterosexual coitus where one or both partners are infertile, or during the 'safe' period of a woman's menstrual cycle. It is perhaps unnecessary to state that the formulation also excludes oral sex between heterosexual partners and any homosexual act whatsoever."[71]

The indeterminacy and vagueness of the terms 'carnal intercourse' and 'order of nature' renders Section 377 constitutionally infirm as violating the equality clause in Article 14.

While it is evident that the classification is invalid, it is useful to understand its purported goal by looking at the legislative history of Section 377. In Macaulay's first draft of the Penal Code, the predecessor to present day Section 377 was Clause 361[72] which provided a severe punishment for touching another for the purpose of 'unnatural' lust. Macaulay abhorred the idea of any debate or discussion on this 'heinous crime'. India's anti-sodomy law was conceived, legislated and enforced by the British without any kind of public discussion.[73] So abhorrent was homosexuality to the moral notions which he espoused, that Macaulay believed that the idea of a discussion was

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[71] Andrew Davis, "The Framing of Sex: Evaluating Judicial Discourse on the 'Unnatural Offences'", Alternative Law Journal, Vol. 5 (2006).

[72] Clause 361 stated "Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine."

[73] Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals" The Economic and Political Weekly, Vol. 41 (2006).

repulsive. Section 377 reveals only the hatred, revulsion and disgust of the draftsmen towards certain intimate choices of fellow human beings. The criminalization of acts in Section 377 is not based on a legally valid distinction, "but on broad moral proclamations that certain kinds of people, singled out by their private choices, are less than citizens – or less than human."[74]

31 The **Naz** judgement has been criticised on the ground that even though it removed private acts between consenting adults from the purview of Section 377, it still retained the section along with its problematic terminology regarding the 'order of nature':[75]

> "…even though the acts would not be criminal, they would still be categorized as "unnatural" in the law. This is not an idle terminological issue. As Durkheim noted over a hundred years ago, the law also works as a tool that *expresses* social relations.[76] Hence, this expression itself is problematic from a dignitarian standpoint, otherwise so eloquently referred to by the judgement."

At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of rape in Section 375 of the Indian Penal Code, which now goes beyond penile–vaginal penetrative

[74] Supra note 25.
[75] John Sebastian, "The opposite of unnatural intercourse: understanding Section 377 through Section 375, Indian Law Review, Vol. 1 (2018).
[76] Emile Durkheim, The Division of Labour in Society, Macmillan (1984).

intercourse.[77] It has been argued that if 'sexual intercourse' now includes many acts which were covered under Section 377, those acts are clearly not 'against the order of nature' anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of Section 377 has not only been rendered redundant but that the very word 'unnatural' cannot have the meaning that was attributed to it before the 2013 amendment.[78] Section 375 defines the expression rape in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand

[77] 375. A man is said to commit "rape" if he- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.—Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent. Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora. Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.—A medical procedure or intervention shall not constitute rape. Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

[78] Supra note 75, at pages 232-249.

excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the 'order of nature', in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14.

Nivedita Menon opposes the idea that 'normal' sexuality springs from nature and argues that this idea of 'normal' sexuality is a cultural and social construct:[79]

> "Consider the possibility that rules of sexual conduct are as arbitrary as traffic rules, created by human societies to maintain a certain sort of order, and which could differ from place to place -- for example, you drive on the left in India and on the right in the USA. Further, let us say you question the sort of social order that traffic rules keep in place. Say you believe that traffic rules in Delhi are the product of a model of urban planning that privileges the rich and penalizes the poor, that this order encourages petrol-consuming private vehicles and discourages forms of transport that are energy-saving -- cycles, public transport, pedestrians. You would then question that model of the city that forces large numbers of inhabitants to travel long distances every day simply to get to school andwork. You could debate the merits of traffic rules and urban planning on the grounds of convenience, equity and sustainability of natural resources -- at least, nobody could seriously argue that any set of traffic rules is natural."

32 The struggle of citizens belonging to sexual minorities is located within the larger history of the struggles against various forms of social subordination

[79] Nivedita Menon, "How Natural is Normal? Feminism and Compulsory Heterosexuality", In Because I have a Voice, Queer Politics in India, (Narrain and Bhan eds.) Yoda Press (2005).

in India. The order of nature that Section 377 speaks of is not just about non-procreative sex but is about forms of intimacy which the social order finds "disturbing".[80] This includes various forms of transgression such as inter-caste and inter-community relationships which are sought to be curbed by society. What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority.[81] Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all.[82]

E Beyond physicality: sex, identity and stereotypes

> "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."[83]

[80] Supra note 7.
[81] Ibid.
[82] Supra note 7.
[83] The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, 1999 (1) SA 6 (CC), Sachs J., concurring.

33 The Petitioners contend that (i) Section 377 discriminates on the basis of sex and violates Articles 15 and 16; and (ii) Discrimination on the ground of sexual orientation is in fact, discrimination on the ground of sex. The intervenors argue that (i) Section 377 criminalizes acts and not people; (ii) It is not discriminatory because the prohibition on anal and oral sex applies equally to both heterosexual and homosexual couples; and (iii) Article 15 prohibits discrimination on the ground of 'sex' which cannot be interpreted so broadly as to include 'sexual orientation'.

34 When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the infringement of fundamental rights.[84] This affords the guaranteed freedoms their true potential against a claim by the state that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while

[84] Re. the Kerala Education Bill, AIR 1958 SC 956 at para 26; Sakal Papers v Union of India, AIR 1962 SC 305 at para 42; R.C. Cooper v Union of India, (1970) 1 SCC 248 at paras 43, 49; Bennett Coleman v. Union of India, AIR (1972) 2 SCC 788 at para 39; Maneka Gandhi v Union of India, (1978) 1 SCC 248 at para 19.

assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.

Article 15 of the Constitution reads thus:

> "15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." (Emphasis supplied)

Article 15 prohibits the State from discriminating on grounds only of sex. Early judicial pronouncements adjudged whether discrimination aimed only at sex is covered by Article 15 or whether the guarantee is attracted even to a discrimination on the basis of sex and some other grounds ('Sex plus'). The argument was that since Article 15 prohibited discrimination on only specified grounds, discrimination resulting from a specified ground coupled with other considerations is not prohibited. The view was that if the discrimination is justified on the grounds of sex and another factor, it would not be covered by the prohibition in Article 15.

35 One of the earliest cases decided in 1951 was by the Calcutta High Court in **Sri Sri Mahadev Jiew** v. **Dr. B B Sen**[85]. Under Order XXV, R. 1 of the Code of Civil Procedure, men could be made liable for paying a security

[85] AIR (1951) Cal. 563.

cost if they did not possess sufficient movable property in India only if they were residing outside India. However, women were responsible for paying such security, regardless of whether or not they were residing in India. In other words, the law drew a distinction between resident males who did not have sufficient immovable property, and resident females who did not have sufficient immovable property. Upholding the provision, the Calcutta High Court held:

> "31. Article 15(1) of the Constitution pro-vides, inter alia, -- The State shall not discriminate against any citizen on grounds only of sex. The word 'only' in this Article is of great importance and significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. **If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution.**" (Emphasis supplied)

This interpretation was upheld by this Court in **Air India** v. **Nergesh Meerza** ("Nergesh Meerza").[86] Regulations 46 and 47 of the Air India Employees' Service Regulations were challenged for causing a disparity between the pay and promotional opportunities of men and women in-flight cabin crew. Under Regulation 46, while the retirement age for male Flight Pursers was fifty eight, Air Hostesses were required to retire at thirty five, or on marriage (if they married within four years of joining service), or on their first pregnancy, whichever occurred earlier. This period could be extended in the

[86] (1981) 4 SCC 335

absolute discretion of the Managing Director. Even though the two cadres were constituted on the grounds of sex, the Court upheld the Regulations in part and opined:

> "68. **Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations**." (Emphasis supplied)

36 This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground ('Sex plus') and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex *and* height. Such

a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.

37 A divergent note was struck by this Court in **Anuj Garg** v. **Hotel Association of India**[87]. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of women (and men under 25 years) in premises where liquor or other intoxicating drugs were consumed by the public. Striking down the law as suffering from "incurable fixations of stereotype morality and conception of sexual role", the Court held:

> "42… **one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart**..."
>
> "43…It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow**. Any other policy inference (such as the one embodied under section 30) from societal conditions would be oppressive on the women and against the privacy rights**." (Emphasis supplied)

The Court recognized that traditional cultural norms stereotype gender roles. These stereotypes are premised on assumptions about socially ascribed roles of gender which discriminate against women. The Court held that "insofar as governmental policy is based on the aforesaid cultural norms, it is

[87](2008) 3 SCC 1

constitutionally invalid." In the same line, the Court also cited with approval, the judgments of the US Supreme Court in **Frontiero** v. **Richardson**[88], and **United States** v. **Virginia**[89], and **Justice Marshall's dissent in Dothard** v. **Rawlinson**[90], The Court grounded the anti-stereotyping principle as firmly rooted in the prohibition under Article 15.

In **National Legal Services Authority** v. **Union of India** ("NALSA")[91], while dealing with the rights of transgender persons under the Constitution, this Court opined:

> "66. **Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.** Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' Under

[88] 411 U.S. 677 (1973). The case concerned a statute that allowed service-members to claim additional benefits if their spouse was dependent on them. A male claimant would automatically be entitled to such benefits while a female claimant would have to prove that her spouse was dependent on her for more than half his support. The Court struck down this statute stating that the legislation violated the equal protection clause of the American Constitution.

[89] 518 U.S. 515 (1996). The case concerned the Virginia Military Institute (VMI), which had a stated objected of producing "citizen-soldiers." However, it did not admit women. The Court held that such a provision was unconstitutional and that there were no "*fixed notions concerning the roles and abilities of males and females.*"

[90] 433 U.S. 321 (1977).The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall's dissent held that prohibition of women in 'contact positions' violated the Title VII guarantee.

[91] (2014) 5 SCC 438

> Articles 15 and 16, therefore, includes discrimination on the ground of gender identity." (Emphasis supplied)

This approach, in my view, is correct.

In **Nergesh Meerza**, this Court held that where persons of a particular class, in view of the "special attributes, qualities" are treated differently in 'public interest', such a classification would not be discriminatory. The Court opined that since the modes of recruitment, promotional avenues and other matters were different for Air Hostesses, they constituted a class separate from male Flight Pursers. This, despite noting that "a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind."

38 The Court did not embark on the preliminary enquiry as to whether the initial classification between the two cadres, being grounded in sex, was violative of the constitutional guarantee against discrimination. Referring specifically to the three significant disabilities that the Regulations imposed on Air Hostesses, the Court held that "there can be no doubt that these peculiar conditions do form part of the Regulations governing Air Hostesses but once we have held that Air Hostesses form a separate category with different and

separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground."

39 The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The very constitution of the cadre was based on sex. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory.

The Court went a step ahead and opined:

> "80…Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. **Apart from improving the health of the employee, it helps a good in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan**." (Emphasis supplied)

40 A strong stereotype underlines the judgment. The Court did not recognize that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman. In dealing with the provision for termination of service on the first pregnancy, the Court opined that a substituted provision for termination on the third pregnancy would be in the "larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children." Here again, the Court's view rested on a stereotype. The patronizing attitude towards the role of women compounds the difficulty in accepting the logic of **Nergesh Meerza**. This approach, in my view, is patently incorrect.

41 A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish

a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

The approach adopted the Court in **Nergesh Meerza**, is incorrect.

A provision challenged as being *ultra vires* the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.

E.I Facial neutrality: through the looking glass

42 The moral belief which underlies Section 377 is that sexual activities which do not result in procreation are against the 'order of nature' and ought

to be criminalized under Section 377. The intervenors submit that Section 377, criminalizes anal and oral sex by heterosexual couples as well. Hence, it is urged that Section 377 applies equally to all conduct against the 'order of nature', irrespective of sexual orientation. This submission is incorrect. In **NALSA** this Court held that Section 377, though associated with specific sexual acts, highlights certain identities. In **Naz**, the Delhi High Court demonstrated effectively how Section 377 though facially neutral in its application to certain acts, targets specific communities in terms of its impact:

> "**Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class**. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. **They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on itself**."[92] (Emphasis supplied)

To this end, it chronicled the experiences of the victims of Section 377, relying on the extensive records and affidavits submitted by the Petitioners that brought to fore instances of custodial rape and torture, social boycott, degrading and inhuman treatment and incarceration. The court concluded that while Section 377 criminalized conduct, it created a systemic pattern of

[92] Naz, at para 94.

disadvantage, exclusion and indignity for the LGBT community, and for individuals who indulge in non-heterosexual conduct.

43 Jurisprudence across national frontiers supports the principle that facially neutral action by the State may have a disproportionate impact upon a particular class. In Europe, **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006** defines 'indirect discrimination' as: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

In **Griggs** v **Duke Power Co.**[93], the US Supreme Court, whilst recognizing that African-Americans received sub-standard education due to segregated schools, opined that the requirement of an aptitude/intelligence test disproportionately affected African-American candidates. The Court held that "The Civil Rights Act" proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

[93] 401 U.S. 424 (1971)

In **Bilka-Kaufhaus GmbH** v. **Karin Weber von Hartz**[94], the European Court of Justice held that denying pensions to part-time employees is more likely to affect women, as women were more likely to take up part-time jobs. The Court noted:

> "Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, **where that exclusion affects a far greater number of women than men**, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex." (Emphasis supplied)

The Canadian Supreme Court endorsed the notion of a disparate impact where an action has a disproportionate impact on a class of persons. In **Andrews** v. **Law Society of British Columbia**[95], the Court noted:

> "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. **Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination**, while those based on an individual's merits and capacities will rarely be so classed." (Emphasis supplied)

Thus, when an action has "the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which

[94] (1986) ECR 1607
[95] (1989) 1 SCR 143

withholds or limits access to opportunities, benefits, and advantages available to other members of society",[96] it would be suspect.

In **City Council of Pretoria** v. **Walker**[97], the Constitutional Court of South Africa observed:

> "**The concept of indirect discrimination, … was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.**
>
> **In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken**." (Emphasis supplied)

E.2 Deconstructing the polarities of binary genders

44 Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles.

[96] Ibid.
[97] (1998) 3 BCLR 257

The notion that the nature of relationships is fixed and within the 'order of nature' is perpetuated by gender roles, thus excluding homosexuality from the narrative. The effect is described as follows:

> "Cultural homophobia thus discourages social behavior that appears to threaten the stability of heterosexual gender roles. These dual normative standards of social and sexual behavior construct the image of a gay man as abnormal because he deviates from the masculine gender role by subjecting himself in the sexual act to another man."[98]

If individuals as well as society hold strong beliefs about gender roles – that men (to be characteristically reductive) are unemotional, socially dominant, breadwinners that are attracted to women and women are emotional, socially submissive, caretakers that are attracted to men – it is unlikely that such persons or society at large will accept that the idea that two men or two women could maintain a relationship. If such a denial is further grounded in a law, such as Article 377 the effect is to entrench the belief that homosexuality is an aberration that falls outside the 'normal way of life.'

45 An instructive article by Zachary A. Kramer,[99] notes that a heterosexist society both expects and requires men and women to engage in only opposite-sex sexual relationships. The existence of same-sex relationships is,

[98] Elvia R. Arriola, "Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory", Berkeley Women's Law Journal, Vol. 9 (1994), at pages 103-143.

[99] Zachary A. Kramer, "The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII", University of Illinois Law Review (2004), at page 490.

therefore, repugnant to heterosexist societal expectations. Kramer argues that:

> "Discrimination against gays and lesbians reinforces traditional sex roles. The primary thrust of such discrimination is the gender-based stigmatization of gays and lesbians, deriving from the idea that homosexuality departs from traditional gender roles and that "real" men and women should not be attracted to a member of the same sex. This portrayal relies heavily on what Bennett Capers calls the "binary gender system."[100]

46 Bennett Capers defines the binary gender system as based in "heterosexism," which he defines as the "institutionalized valorization of heterosexual activity." Capers, in fact suggests that:

> "The sanctioning of discrimination based on sexual orientation perpetuates the subordination not only of lesbians and gays but of women as well.
>
> Heterosexism, then, in its reliance on a bipolar system of sex and gender, reinforces sexism in two ways. First, by penalizing persons who do not conform to a bipolar gender system and rewarding men and women who do, the heterosexist hegemony perpetuates a schema that valorizes passive, dependent women, thus contributing to sexism. Second, heterosexism reinforces sexism because it subordinates the female sex through its hierarchical polarity. Because heterosexism perpetuates sexism, the extension of substantial rights to lesbians and gays, who by definition challenge heterosexism and the concept of a binary gender system, would result in a challenge to sexism and to male power." [101]

[100] Ibid.

[101] Bennett Capers, "Note, Sexual Orientation and Title VII", Columbia Law Review (1991), at pages 1159, 1160, 1163.

In other words, one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles. Taking this further, Andrew Koppelman argues that:

> "Similarly, sodomy laws discriminate on the basis of sex-for example, permitting men, but not women, to have sex with women-in order to impose traditional sex roles. The Court has deemed this purpose impermissible in other contexts because it perpetuates the subordination of women. The same concern applies with special force to the sodomy laws, because their function is to maintain the polarities of gender on which the subordination of women depends."[102]

Koppelman thus suggests that the taboo against homosexuals "polices the boundaries that separate the dominant from the dominated in a social hierarchy."[103] He expands on this idea, using the analogy of miscegenation, or the interbreeding of races:

> "Do statutes that outlaw homosexual sex impose traditional sex roles? One possible answer is that of *McLaughlin* [*McLaughlin v. Florida*]: The crime is by definition one of engaging in activity inappropriate to one's sex. But these statutes' inconsistency with the Constitution's command of equality is deeper. Like the miscegenation statutes, the sodomy statutes reflect and reinforce the morality of a hierarchy based on birth. Just as the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, so the prohibition of sodomy preserves the polarities of gender on which rests the subordination of women."[104]

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[102] Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination", Yale Law Journal, Vol. 98 (1988), at page 147.

[103] Andrew Koppelman, "Why Discrimination against Lesbians and Gay Men is Sex Discrimination", New York University Law Review, Vol. 69 (1994).

[104] Supra note 102, at page 148.

Statutes like Section 377 give people ammunition to say “this is what a man is” by giving them a law which says “this is what a man is not.” Thus, laws that affect non-heterosexuals rest upon a normative stereotype: “the bald conviction that certain behavior-for example, sex with women-is appropriate for members of one sex, but not for members of the other sex.”[105]

What this shows us is that LGBT individuals as well as those who do not conform to societal expectations of sexual behaviour defy gender stereotypes.

> “The construction of gender stereotypes ultimately rests on the assumption that there are two opposite and mutually exclusive biological sexes. The assumption of heterosexuality is central to this gender binary. In a patriarchal context, some of the most serious transgressors are thus: a woman who renounces a man sexual partner or an individual assigned female at birth who renounces womanhood, thereby rejecting the patriarchal system and all other forms of male supervision and control, and an individual assigned male at birth who embraces womanhood, thereby abandoning privilege in favor of that which is deemed subservient, femininity.”[106]

Prohibition of sex discrimination is meant to change traditional practices which legally, and often socially and economically, disadvantage persons on the basis of gender. The case for gay rights undoubtedly seeks justice for gays. But it goes well beyond the concern for the gay community. The effort to end

[105] Ibid.

[106] The Relationship between Homophobia, Transphobia, and Women’s Access to Justice for the Forthcoming CEDAW General Recommendation on Women’s Access to Justice. Submitted to the United Nations Committee for the Elimination of All Forms of Discrimination against Women (2013).

discrimination against gays should be understood as a necessary part of the larger effort to end the inequality of the sexes.

> "To be a lesbian is to be perceived (labelled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males. A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism."[107]

Commenting on its link with the essence of Article 15, Tarunabh Khaitan writes:

> "But the salience of a case on discrimination against a politically disempowered minority, based purely on the prejudices of a majority, goes beyond the issue of LGBTQ rights. Indian constitutional democracy is at a crossroads…Inclusiveness and pluralism lie at the heart of Article 15, which can be our surest vehicle for the Court to lend its institutional authority to the salience of these ideas in our constitutional identity."[108]

47 Relationships that tend to undermine the male/female divide are inherently required for the maintenance of a socially imposed gender inequality. Relationships which question the divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and

[107] Suzanne Pharr, Homophobia: A weapon of Sexism, Chardon Press (1988), at page18.
[108] Tarunabh Khaitan, "Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are", Indian Constitutional Law and Philosophy (2018).

relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function. For members of the community, hostility and exclusion aimed at them, drive them into hiding, away from public expression and view. It is this discrimination faced by the members of the community, which results in silence, and consequently invisibility, creating barriers, systemic and deliberate, that effect their participation in the work force and thus undermines substantive equality. In the sense that the prohibition of miscegenation was aimed to preserve and perpetuate the polarities of race to protect white supremacy, the prohibition of homosexuality serves to ensure a larger system of social control based on gender and sex.

48 A report prepared by the International Commission of Jurists[109] has documented the persecution faced by the affected community due to the operation of Section 377. The report documents numerous violations inflicted on people under the authority of Section 377. According to the National Crime Records Bureau, 1279 persons in 2014 and 1491 in 2015 were arrested under Section 377.[110]

[109] International Commission of Jurists, "Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (2017).
[110] Ibid, at page 16.

The report documents instances of abuse from law enforcement agencies and how the possibility of persecution under Section 377 prevents redress.[111] Even though acts such as blackmail, assault, and bodily crimes are punishable under penal laws, such methods of seeking redressal are not accessed by those communities given the fear of retaliation or prosecution.

49 The petitioners in the present batch of cases have real life narrations of suffering discrimination, prejudice and hate. In **Anwesh Pokkuluri** v. **UOI**[112], with which this case is connected, the Petitioners are a group of persons belonging to the LGBTQ community, each of whom has excelled in their fields but suffer immensely due to the operation of Section 377. To cope with the growing isolation among the community, these Petitioners, all alumni of Indian Institutes of Technology across the country, created a closed group called "Pravritti". The group consists of persons from the LGBTQ community. They are faculty members, students, alumni and anyone who has ever stayed on the campus of any IIT in the country. The group was formed in 2012 to help members cope with loneliness and difficulties faced while accepting their identity along with holding open discussions on awareness.

[111] Ibid, at pages 16 – 18.
[112] Writ Petition (Criminal) No. 121 of 2018.

50 Out of twenty Petitioners, sixteen are gay, two are bisexual women and one is a bisexual man. One among the Petitioners is a transwoman. Three of the Petitioners explain that they suffered immense mental agony due to which they were on the verge of committing suicide. Another two stated that speaking about their sexual identity has been difficult, especially since they did not have the support of their families, who, upon learning of their sexual orientation, took them for psychiatric treatment to cure the so-called "disease." The families of three Petitioners ignored their sexual identity. One of them qualified to become an Indian Administrative Services officer in an examination which more than 4,00,000 people write each year. But he chose to forgo his dream because of the fear that he would be discriminated against on the ground of his sexuality. Some of them have experienced depression; others faced problems focusing on their studies while growing up; one among them was forced to drop out of high school as she was residing in a girl's hostel where the authorities questioned her identity. The parents of one of them brushed his sexuality under the carpet and suggested that he marry a woman. Some doubted whether or not they should continue their relationships given the atmosphere created by Section 377. Several work in organisations that have policies protecting the LGBT community in place. Having faced so much pain in their personal lives, the Petitioners submit that with the continued operation of Section 377, such treatment will be unabated.

51 In **Navtej Johar** v. **Union of India**[113], with which this case is concerned, the Petitioners have set out multiple instances of discrimination and expulsion. The following is a realistic account:

> "While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police…Without the existence of this section, the social prejudice and shame that I have faced would have been considerably lessened…the fact that gay people, like me, are recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve.[114]

Apart from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture. The stereotypes fostered by section 377 have an impact on how other individuals and non-state institutions treat the community. While this behaviour is not sanctioned by Section 377, the existence of the provision nonetheless facilitates it by perpetuating homophobic attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces. This results in a denial of the self. Identities are obliterated, denying the entitlement to equal participation and dignity under the Constitution. Section 377 deprives them of an equal citizenship. Referring to the effect of Foucault's panopticon in

[113] Writ Petition (Criminal) No. 76 of 2016.
[114] Written Submission on Behalf of the Voices Against 377, in W.P. (CRL.) No. 76/2016 at page 18.

inducing "a state of conscious and permanent visibility that assures the automatic functioning of power",[115] Ryan Goodman writes:

> "The state's relationship to lesbian and gay individuals under a regime of sodomy laws constructs a similar, yet dispersed, structure of observation and surveillance. **The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants. Admittedly certain individuals, namely those who are certified with various levels of state authority, are more directly linked to the extension of law's power. Yet the social effects of sodomy laws are not tied to these specialized agents alone. On the ground level, private individuals also perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself**."[116] (Emphasis supplied)

The effect of Section 377, thus, is not merely to criminalize an act, but to criminalize a specific set of identities. Though facially neutral, the effect of the provision is to efface specific identities. These identities are the soul of the LGBT community.

52 The Constitution envisaged a transformation in the order of relations not just between the state and the individual, but also between individuals: in a constitutional order characterized by the Rule of Law, the constitutional commitment to egalitarianism and an anti-discriminatory ethos permeates and infuses these relations. In **K S Puttaswamy** v. **Union of India**

[115] Michel Foucault, Discipline And Punish: the Birth of the Prison, Pantheon Books (1977) at page 201.
[116] Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics", California Law Review, Vol. 89 (2001), at page 688.

("Puttaswamy")[117], this Court affirmed the individual as the bearer of the constitutional guarantee of rights. Such rights are devoid of their guarantee when despite legal recognition, the social, economic and political context enables an atmosphere of continued discrimination. The Constitution enjoins upon every individual a commitment to a constitutional democracy characterized by the principles of equality and inclusion. In a constitutional democracy committed to the protection of individual dignity and autonomy, the state and every individual has a duty to act in a manner that advances and promotes the constitutional order of values.

By criminalizing consensual sexual conduct between two homosexual adults, Section 377 has become the basis not just of prosecutions but of the persecution of members of the affected community. Section 377 leads to the perpetuation of a culture of silence and stigmatization. Section 377 perpetuates notions of morality which prohibit certain relationships as being against the 'order of nature.' A criminal provision has sanctioned discrimination grounded on stereotypes imposed on an entire class of persons on grounds prohibited by Article 15(1). This constitutes discrimination on the grounds only of sex and violates the guarantee of non-discrimination in Article 15(1)

[117](2017) 10 SCC 1

53 History has been witness to a systematic stigmatization and exclusion of those who do not conform to societal standards of what is expected of them. Section 377 rests on deep rooted gender stereotypes. In the quest to assert their liberties, people criminalized by the operation of the provision, challenge not only its existence, but also a gamut of beliefs that are strongly rooted in majoritarian standards of what is 'normal'. In this quest, the attack on the validity of Section 377 is a challenge to a long history of societal discrimination and persecution of people based on their identities. They have been subjugated to a culture of silence and into leading their lives in closeted invisibility. There must come a time when the constitutional guarantee of equality and inclusion will end the decades of discrimination practiced, based on a majoritarian impulse of ascribed gender roles. That time is now.

F Confronting the closet

54 The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are integral to the right to life under Article 21 of the Constitution. A meaningful life is a life of freedom and self-respect and nurtured in the ability to decide the course of living. In the nine judge Bench decision in **Puttaswamy**, this Court conceived of the right to privacy as natural and inalienable. The judgment delivered on behalf of four judges holds:

> "Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights…"[118]

Justice Bobde, in his exposition on the form of the 'right to privacy' held thus:

> "Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man."[119]

Justice Nariman has written about the inalienable nature of the right to privacy:

> "…Fundamental rights, on the other hand, are contained in the Constitution so that there would be rights that the citizens of this country may enjoy despite the governments that they may elect. This is all the more so when a particular fundamental right like privacy of the individual is an "inalienable" right which inheres in the individual because he is a human being. The recognition of such right in the fundamental rights chapter of the Constitution is only a recognition that such right exists notwithstanding the shifting sands of majority governments…"[120]

Justice Sapre, in his opinion, has also sanctified 'privacy' as a natural right:

> "In my considered opinion, "right to privacy of any individual" is essentially a natural right, which inheres in every human being by birth... It is indeed inseparable and inalienable…it is born with the human being…"[121]

[118] Puttaswamy, at para 42.
[119] Puttaswamy, at para 392.
[120] Puttaswamy, at para 490.
[121] Puttaswamy at para 557.

These opinions establish that the right to privacy is a natural right. The judgment of four judges in **Puttaswamy** held that the right to sexual orientation is an intrinsic part of the right to privacy. To define the scope of the right, it is useful to examine the discussion on the right to sexual orientation in judicial precedents of this Court.

55 Speaking for a two judge Bench in **NALSA**, Justice K S Radhakrishnan elucidated upon the term 'sexual orientation' as differentiable from an individual's 'gender identity', noting that:

> "Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bysexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom…"[122]

Puttaswamy rejected the "test of popular acceptance" employed by this Court in **Koushal** and affirmed that sexual orientation is a constitutionally guaranteed freedom:

> "…The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular

[122] NALSA, at para 22.

> minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life do not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."[123]

Rejecting the notion that the rights of the LGBT community can be construed as illusory, the court held that the right to privacy claimed by sexual minorities is a constitutionally entrenched right:

> "…The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination."[124]

Justice Kaul, concurring with the recognition of sexual orientation as an aspect of privacy, noted that:

> "…The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 144 to 146 of his judgment, states that the right of privacy

[123] Puttaswamy, at para 144.
[124] Puttaswamy, at para 145.

> cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy…"[125]

With these observations by five of the nine judges in **Puttaswamy**, the basis on which **Koushal** upheld the validity of Section 377 stands eroded and even disapproved.

56 We must now consider the impact of Section 377 on the exercise of the right to privacy by sexual minorities. Legislation does not exist in a vacuum. The social ramifications of Section 377 are enormous. While facially Section 377 only criminalizes certain "acts", and not relationships, it alters the prism through which a member of the LGBTQ is viewed. Conduct and identity are conflated.[126] The impact of criminalising non-conforming sexual relations is that individuals who fall outside the spectrum of heteronormative[127] sexual identity are perceived as criminals.[128]

57 World over, sexual minorities have struggled to find acceptance in the heteronormative structure that is imposed by society. In her book titled

[125] Puttaswamy, at para 647.
[126] Supra note 116, at page 689.
[127] The expression heteronormative is used to denote or relate to a world view that promotes heterosexuality as the normal or preferred sexual orientation.
[128] Supra note 116, at page 689.

'Epistemology of the Closet',[129] Eve Sedgwick states that "the closet is the defining structure for gay oppression in this century." The closet is symbolic of the exclusion faced by them:

> "Closets exist and they hide social information. They hide certain socially proscribed sexual desires, certain unnamable sexual acts deemed 'unnatural' by the cultural context and law, certain identities which dare not speak their name and certain forms of behaviour which can make an individual susceptible to stigma and oppression. The closet does not simply hide this susceptibility; it hides stigma and oppression itself. It marks the silencing of different voices, a silence which is achieved by a gross violation of lives that inhabit the closet, through both violence and pain inflicted by significant others both within and without the closet and instances of self-inflicted pain and violence. The closet also hides pleasure, myriad sexual expressions and furtive encounters that gratify the self. The closet also conceals the possibility of disease and death."[130]

The existing heteronormative framework – which recognises only sexual relations that conform to social norms – is legitimized by the taint of 'unnaturalness' that Section 377 lends to sexual relations outside this framework. The notion of 'unnatural acts', viewed in myopic terms of a "fixed procreational model of sexual functioning", is improperly applied to sexual relations between consenting adults.[131] Sexual activity between adults and based on consent must be viewed as a "natural expression" of human sexual competences and sensitivities.[132] The refusal to accept these acts amounts to

[129] Eve Kosofsky Sedgwick, Epistemology of the Closet, University of California Press (1990).
[130] Supra note 65, at page 102.
[131] David A. J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution", Hastings Law Journal, Vol. 30, at page 786.
[132] Ibid.

a denial of the distinctive human capacities for sensual experience outside of the realm of procreative sex.[133]

58 To deny the members of the LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution. The denial of the right to sexual orientation is also a denial of the right to privacy. The application of Section 377 causes a deprivation of the fundamental right to privacy which inheres in every citizen. This Court is entrusted with the duty to act as a safeguard against such violations of human rights. Justice Chelameswar, in his judgement in **Puttaswamy**, held that:

> "To sanctify an argument that whatever is not found in the text of the Constitution cannot become a part of the Constitution would be too primitive an understanding of the Constitution and contrary to settled cannons of constitutional interpretation. Such an approach regarding the rights and liberties of citizens would be an affront to the collective wisdom of our people and the wisdom of the members of the Constituent Assembly..."[134]

59 The exercise of the natural and inalienable right to privacy entails allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to 'sexual privacy' to protect the rights of sexual minorities. Emanating from the

[133] Ibid.
[134] Puttaswamy, at Para 350.

inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.

60 Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to 'confront the closet' and, as a necessary consequence, confront 'compulsory heterosexuality.'[135] Confronting the closet would entail "reclaiming markers of all desires, identities and acts which challenge it."[136] It would also entail ensuring that individuals belonging to sexual minorities, have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms.

61 In conceptualising a right to sexual privacy, it is important to consider how the delineation of 'public' and 'private' spaces affects the lives of the LGBTIQ community. Members of the community have argued that to base

[135] Supra note 65, at page 103.
[136] Ibid.

their claims on a right to privacy is of no utility to individuals who do not possess the privilege of a private space.[137] In fact, even for individuals who have access to private spaces the conflation of 'private' with home and family may be misplaced.[138] The home is often reduced to a public space as heteronormativity within the family can force the individual to remain inside the closet.[139] Thus, even the conception of a private space for certain individuals is utopian.[140]

62 Privacy creates "tiers of 'reputable' and 'disreputable' sex", only granting protection to acts behind closed doors.[141] Thus, it is imperative that the protection granted for consensual acts in private must also be available in situations where sexual minorities are vulnerable in public spaces on account of their sexuality and appearance.[142] If one accepts the proposition that public places are heteronormative, and same-sex sexual acts partially closeted, relegating 'homosexual' acts into the private sphere, would in effect reiterate the "ambient heterosexism of the public space."[143] It must be acknowledged that members belonging to sexual minorities are often subjected to

[137] Danish Sheikh, "Queer Rights and the Puttaswamy Judgement", Economic and Political Weekly, Vol. 52 (2017), at page 51.
[138] Supra note 65, at page 101.
[139] Ibid.
[140] Ibid.
[141] Supra note 137, at page 51.
[142] Saptarshi Mandal, "'Right To Privacy' In Naz Foundation: A Counter-Heteronormative Critique", NUJS Law Review, Vol. 2 (2009), at page 533.
[143] Supra note 65, at page 100.

harassment in public spaces.[144] The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference.

F.I Sexual privacy and autonomy- deconstructing the heteronormative framework

63 In the absence of a protected zone of privacy, individuals are forced to conform to societal stereotypes. **Puttaswamy** has characterised the right to privacy as a shield against forced homogeneity and as an essential attribute to achieve personhood:

> "…Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her

[144] Supra note 137, at page 53.

> life. Privacy attaches to the person and not to the place where it is associated."[145]

This Court has recognized the right of an individual to break free from the demands of society and the need to foster a plural and inclusive culture. The judgment of four judges in **Puttaswamy**, for instance, held that:

> "Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture."[146]

64 In **Santosh Singh** v **Union of India**[147], a two-judge Bench of this Court dismissed a petition under Article 32 seeking a direction to the Central Board of Secondary Education to include moral science as a compulsory subject in the school syllabus in order to inculcate moral values. One of us (Chandrachud J) underscored the importance of accepting a plurality of ideas and tolerance of radically different views:

> "Morality is one and, however important it may sound to some, it still is only one element in the composition of values that a just society must pursue. There are other equally significant values which a democratic society may wish for education to impart to its young. Among those is the acceptance of a plurality and diversity of ideas, images and faiths which unfortunately faces global threats. Then again, equally important is the need to foster tolerance of those who hold radically differing views, empathy for those whom the economic and social milieu has cast away to the margins, a

[145] Puttaswamy, at para 297.
[146] Puttaswamy, at para 297.
[147] (2016) 8 SCC 253

> sense of compassion and a realisation of the innate humanity which dwells in each human being. Value based education must enable our young to be aware of the horrible consequences of prejudice, hate and discrimination that continue to threaten people and societies the world over…"[148]

The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them.[149] As noted by Richards, this moral right emerges from the autonomy to which the individual is entitled:

> "Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption that persons as such have a range of capacities that enables them to develop, and act upon plans of action that take as their object one's life and the way it is lived. The consequence of these capacities of autonomy is that humans can make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will define and pursue as needs and aspirations. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from birth, the central developmental task of becoming a person."[150]

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[148] Ibid at para 22.

[149] Supra note 131, at pages 1000-1001.

[150] Supra note 131, at pages 964-965; M. Mahler, "The Psychological Birth of The Human Infant: Symbiosis And Individuation" (1975); L. Kaplan, Oneness And Separateness: From Infant To Individual (1978).

65 In **Common Cause (A Registered Society)** v. **Union of India** ("**Common Cause**")[151], a Constitution Bench of this Court held that the right to die with dignity is integral to the right to life recognised by the Constitution and an individual possessing competent mental faculties is entitled to express his or her autonomy by the issuance of an advance medical directive:

> "The protective mantle of privacy covers certain decisions that fundamentally affect the human life cycle. It protects the most personal and intimate decisions of individuals that affect their life and development. Thus, choices and decisions on matters such as procreation, contraception and marriage have been held to be protected. While death is an inevitable end in the trajectory of the cycle of human life individuals are often faced with choices and decisions relating to death. Decisions relating to death, like those relating to birth, sex, and marriage, are protected by the Constitution by virtue of the right of privacy…"[152]

Autonomy and privacy are inextricably linked. Each requires the other for its full realization. Their interrelationship has been recognised in **Puttaswamy**:

> "…Privacy postulates the reservation of a private space for the individual, described as the right to be left alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy..."[153]

[151] (2018) 5 SCC 1
[152] Ibid, at para 441.
[153] Puttaswamy, at para 297.

In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance."[154] Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society.[155] The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be.[156] These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect.[157] Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy.[158] Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.[159]

66 An individual's sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her own desires and proclivities. The self-

[154] Thomas M. Jr. Scanlon, Rawls' Theory of Justice, University of Pennsylvania Law Review (1973) at 1022.
[155] Ibid at 1023.
[156] Ibid at 1023.
[157] Ibid at 1023.
[158] Supra note 131, at page 971.
[159] Ibid at page 972.

determination of sexual orientation is an exercise of autonomy. Accepting the role of human sexuality as an independent force in the development of personhood is an acknowledgement of the crucial role of sexual autonomy in the idea of a free individual.[160] Such an interpretation of autonomy has implications for the widening application of human rights to sexuality.[161] Sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex.[162] Sexuality must be construed as a fundamental experience through which individuals define the meaning of their lives.[163] Human sexuality cannot be reduced to a binary formulation. Nor can it be defined narrowly in terms of its function as a means to procreation. To confine it to closed categories would result in denuding human liberty of its full content as a constitutional right. The Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.

F.2 A right to intimacy- celebration of sexual agency

67 By criminalising consensual acts between individuals who wish to exercise their constitutionally-protected right to sexual orientation, the State is

[160] Supra note 131, at page 1003.
[161] Ibid.
[162] Ibid.
[163] Ibid.

denying its citizens the right to intimacy. The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.

In **Shakti Vahini** v. **Union of India**[164], a three judge Bench of this Court issued directives to prevent honour killings at the behest of Khap Panchayats and protect persons who enter into marriages that do not have the approval of the Panchayats. The Court recognised the right to choose a life partner as a fundamental right under Articles 19 and 21 of the Constitution. The learned Chief Justice held:

> "…when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy."[165]

In **Shafin Jahan** v. **Asokan**[166], this Court set aside a Kerala High Court judgement which annulled the marriage of a twenty-four year old woman with a man of her choice in a habeas corpus petition instituted by her father. The

[164] (2018) SCC OnLine SC 275
[165] Ibid, at para 44.
[166] (2018) SCC OnLine SC 343

Court upheld her right to choose of a life partner as well as her autonomy in the sphere of "intimate personal decisions." The Chief Justice held thus:

> "…expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. **The social values and morals have their space but they are not above the constitutionally guaranteed freedom** …"[167]
> (Emphasis supplied)

One of us (Chandrachud J) recognised the right to choose a partner as an important facet of autonomy:

> "…The choice of a partner whether **within or outside marriage** lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith...Social approval for intimate personal decisions is not the basis for recognising them..."[168] (Emphasis supplied)

The judgement in **Shafin Jahan** delineates a space where an individual enjoys the autonomy of making intimate personal decisions:

> "The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."[169]

In furtherance of the Rawlsian notion of self-respect as a primary good, individuals must not be denied the freedom to form relationships based on sexual intimacy. Consensual sexual relationships between adults, based on

[167] Ibid, at para 54.
[168] Ibid, at para 88.
[169] Ibid, at para 93.

the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect.[170] Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships.[171] The law provides the legitimacy for social institutions. In a democratic framework governed by the rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy. It cannot be allowed to become a yoke on the full expression of the human personality. By penalising sexual conduct between consenting adults, Section 377 imposes moral notions which are anachronistic to a constitutional order. While ostensibly penalising 'acts', it impacts upon the identity of the LGBT community and denies them the benefits of a full and equal citizenship. Section 377 is based on a stereotype about sex. Our Constitution which protects sexual orientation must

[170] David A. J. Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory", Fordham Law Review, Vol. 45 (1977), at pages 1130-1311.
[171] Ibid at 1311.

outlaw any law which lends the authority of the state to obstructing its fulfilment.

G Section 377 and the right to health

> "Should medicine ever fulfil its great ends, it must enter into the larger political and social life of our time; it must indicate the barriers which obstruct the normal completion of the life cycle and remove them."
>
> - Virchow Rudolf

68 In the evolution of its jurisprudence on the constitutional right to life under Article 21, this Court has consistently held that the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right to health.[172] The right to health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right to emergency medical care and the right to the maintenance and improvement of public health.[173]

It would be useful to refer to judgments of this Court which have recognised the right to health.

[172] Dipika Jain and Kimberly Rhoten, "The Heteronormative State and the Right to Health in India", NUJS Law Review, Vol. 6 (2013).

[173] C.E.S.C. Limited v. Subhash Chandra Bose, (1992) 1 SCC 441; Consumer Education and Research Centre v. UOI, (1995) 3 SCC 42; Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37; Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1; Devika Biswas v. Union of India & Ors., (2016) 10 SCC 726; Common Cause v. Union of India & Ors., (2018) 5 SCC 1.

In **Bandhua Mukti Morcha** v. **Union of India**[174], a three-judge Bench identified the right to health within the right to life and dignity. In doing so, this Court drew on the Directive Principles of State Policy:

> "It is the fundamental right of every one in this country … to live with human dignity, free from exploitation. **This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.** These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials." (Emphasis supplied)

In **Consumer Education & Research Centre** v. **Union of India** ("CERC")[175], a Bench of three judges dealt with the right to health of workers in asbestos industries. While laying down mandatory guidelines to be followed for the well-being of workers, the Court held that:

> "The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood...**Therefore, it must be held that the right to health and medical care is a fundamental right under**

[174] (1984) 3 SCC 161
[175] (1995) 3 SCC 42

> **Article 21 read with Articles 39(c), 41 and 43 of the Constitution and makes the life of the workman meaningful and purposeful with dignity of person.** Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity." (Emphasis supplied)

In a dissenting judgment in **C.E.S.C. Limited** v. **Subhash Chandra Bose**[176], K Ramaswamy J observed that:

> "**Health is thus a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. In the light of Articles. 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our constitution, right to health is a fundamental human right to workmen.** The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors" (Emphasis supplied)

In **Kirloskar Brothers Ltd.** V. **Employees' State Insurance Corporation**[177], a three-judge Bench of this Court considered the applicability of the Employees' State Insurance Act, 1948 to the regional offices of the Appellant, observing that:

> "Health is thus a state of complete physical, mental and social well-being. Right to health, therefore, is a fundamental and human right to the workmen. The maintenance of health is the most imperative constitutional goal whose realisation requires interaction of many social and economic factors."

[176] (1992) 1 SCC 441
[177] (1996) 2 SCC 682

In **State of Punjab** v. **Ram Lubhaya Bagga**[178], a three-judge Bench of this Court considered a challenge to the State of Punjab's medical reimbursement policy. A.P. Mishra J, speaking for the Bench, observed that:

> "Pith and substance of life is the health, which is the nucleus of all activities of life including that of an employee or other viz. the physical, social, spiritual or any conceivable human activities. If this is denied, it is said everything crumbles.
>
> This Court has time and again emphasised to the Government and other authorities for focussing and giving priority and other authorities for focussing and giving priority to the health of its, citizen, which not only makes one's life meaningful, improves one's efficiency, but in turn gives optimum out put."

In **Smt M Vijaya** v. **The Chairman and Managing Director Singareni Collieries Co. Ltd.**[179], a five judge Bench of the Andhra Pradesh High Court considered a case where a girl was infected with HIV due to the negligence of hospital authorities. The Court observed that:

> "Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. By reason of numerous judgments of the Apex Court the horizons of Article 21 of the Constitution have been expanded recognising various rights of the citizens i.e...right to health...
>
> It is well settled that right to life guaranteed under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life."

[178] (1998) 4 SCC 117
[179] (2001) 5 ALD 522

In **Devika Biswas** v. **Union of India**[180], while hearing a public interest petition concerning several deaths that had taken place due to unsanitary conditions in sterilization camps across the country, a two judge Bench of this Court held that:

> "It is well established that the right to life under Article 21 of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right...That the right to health is an integral part of the right to life does not need any repetition."

In his concurring judgment in **Common Cause** v. **Union of India**, Sikri J, noted the inextricable link between the right to health and dignity:

> "There is a related, but interesting, aspect of this dignity which needs to be emphasised. **Right to health is a part of Article 21 of the Constitution.** At the same time, it is also a harsh reality that everybody is not able to enjoy that right because of poverty etc. The State is not in a position to translate into reality this right to health for all citizens. Thus, when citizens are not guaranteed the right to health, can they be denied right to die in dignity?" (Emphasis supplied)

In addition to the constitutional recognition granted to the right to health, the right to health is also recognised in international treaties, covenants, and agreements which India has ratified, including the International Covenant on Economic, Social and Cultural Rights, 1966 ("ICESCR") and the Universal

[180] (2016) 10 SCC 726

Declaration of Human Rights, 1948 (“UDHR”). Article 25 of the UDHR recognizes the right to health:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."

69 Article 12 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) recognizes the right of all persons to the enjoyment of the highest attainable standard of physical and mental health:

> “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

Article 12.2 requires States Parties to take specific steps to improve the health of their citizens, including creating conditions to ensure equal and timely access to medical services. In its General Comment No. 14,[181] the UN Economic and Social Council stated that States must take measures to respect, protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health-related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalized populations.

[181] UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2004 (2000).

Pursuant to General Comment No. 14, India is required to provide marginalized populations, including members of the LGBTIQ community, goods and services that are available (in sufficient quantity), accessible (physically, geographically, economically and in a non-discriminatory manner), acceptable (respectful of culture and medical ethics) and of quality (scientifically and medically appropriate and of good quality).

70 As early as 1948, the World Health Organization ("WHO") defined the term 'health' broadly to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[182] Even today, for a significant number of Indian citizens this standard of health remains an elusive aspiration. Of relevance to the present case, a particular class of citizens is denied the benefits of this constitutional enunciation of the right to health because of their most intimate sexual choices.

71 Sexuality is a natural and precious aspect of life, an essential and fundamental part of our humanity.[183] Sexual rights are entitlements related to sexuality and emanate from the rights to freedom, equality, privacy, autonomy, and dignity of all people.[184] For people to attain the highest

[182]Definition contained in the Preamble to the WHO Constitution (1948).
[183] Sexual Rights, International Planned Parenthood Federation (2008).
[184] Ibid.

standard of health, they must also have the right to exercise choice in their sexual lives and feel safe in expressing their sexual identity. However, for some citizens, discrimination, stigma, fear and violence prevent them from attaining basic sexual rights and health.

72 Individuals belonging to sexual and gender minorities experience discrimination, stigmatization, and, in some cases, denial of care on account of their sexual orientation and gender identity.[185] However, it is important to note that 'sexual and gender minorities' do not constitute a homogenous group, and experiences of social exclusion, marginalization, and discrimination, as well as specific health needs, vary considerably.[186] Nevertheless, these individuals are united by one factor - that their exclusion, discrimination and marginalization is rooted in societal heteronormativity and society's pervasive bias towards gender binary and opposite-gender relationships, which marginalizes and excludes all non-heteronormative sexual and gender identities.[187] This, in turn, has important implications for individuals' health-seeking behaviour, how health services are provided, and the extent to which sexual health can be achieved.[188]

[185] Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa", Health and Human Rights (2016) at pages 195–208.
[186] Institute of Medicine, "The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding", National Academies Press (2011).
[187] Supra note 185, at pages 195–208.
[188] Ibid.

73 The term ‘sexual health’ was first defined in a 1975 WHO Technical Report series as “the integration of the somatic, emotional, intellectual and social aspects of sexual being, in ways that are positively enriching and that enhance personality, communication and love.”[189] The WHO’s current working definition of sexual health is as follows:

> “…a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.”

The WHO further states that “sexual health cannot be defined, understood or made operational without a broad consideration of sexuality, which underlies important behaviours and outcomes related to sexual health.” It defines sexuality thus:

> “…a central aspect of being human throughout life encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors.”

[189] World Health Organization, “Gender and human rights: Defining sexual health”, (2002).

74 A report entitled "Sexual Health, Human Rights and the Law",[190] published by the WHO in 2015 explores the relationship between these concepts. The report notes that "human sexuality includes many different forms of behaviour and expression, and that the recognition of the diversity of sexual behaviour and expression contributes to people's overall sense of health and well-being."[191] It emphasizes the importance of sexual health by stating that not only is it essential to the physical and emotional well-being of individuals, couples and families, but it is also fundamental to the social and economic development of communities and countries.[192] The ability of individuals to progress towards sexual health and well-being depends on various factors, including "access to comprehensive information about sexuality, knowledge about the risks they face and their vulnerability to the adverse consequences of sexual activity; access to good quality sexual health care, and an environment that affirms and promotes sexual health."

75 The International Women's Health Coalition has located the right to sexual health within 'sexual rights', defined as follows:[193]

> "Sexual rights embrace certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. They rest on the recognition that all individuals have the right—free of

[190] World Health Organisation, "Sexual Health, Human Rights and the Law" (2015).
[191] Ibid.
[192] Ibid.
[193] International Women's Health Coalition, "Sexual Rights are Human Rights" (2014).

> coercion, violence, and discrimination of any kind—to the highest attainable standard of sexual health; to pursue a satisfying, safe, and pleasurable sexual life; to have control over and decide freely, and with due regard for the rights of others, on matters related to their sexuality, reproduction, sexual orientation, bodily integrity, choice of partner, and gender identity; and to the services, education, and information, including comprehensive sexuality education, necessary to do so."

The discussion of 'sexual rights' (as they pertain to sexuality and sexual orientation) within the framework of the right to health is a relatively new phenomenon:[194]

> "..Before the 1993 World Conference on Human Rights in Vienna, and the subsequent 1994 International Conference on Population and Development in Cairo, sexuality, sexual rights, and sexual diversity had not formed part of the international health and human rights discourse. **These newly emerged "sexual rights" were founded on the principles of bodily integrity, personhood, equality, and diversity**."[195] (Emphasis supplied)

76 The operation of Section 377 denies consenting adults the full realization of their right to health, as well as their sexual rights. It forces consensual sex between adults into a realm of fear and shame, as persons who engage in anal and oral intercourse risk criminal sanctions if they seek health advice. This lowers the standard of health enjoyed by them and particularly by members of sexual and gender minorities, in relation to the rest of society.

[194] Supra note 185, at pages 195–208.
[195] Supra note 185, at pages 195–208.

77 The right to health is not simply the right not to be unwell, but rather the right to be well. It encompasses not just the absence of disease or infirmity, but "complete physical, mental and social well being",[196] and includes both freedoms such as the right to control one's health and body and to be free from interference (for instance, from non-consensual medical treatment and experimentation), and entitlements such as the right to a system of healthcare that gives everyone an equal opportunity to enjoy the highest attainable level of health.

78 The jurisprudence of this Court, in recognizing the right to health and access to medical care, demonstrates the crucial distinction between negative and positive obligations. Article 21 does not impose upon the State only negative obligations not to act in such a way as to interfere with the right to health. This Court also has the power to impose positive obligations upon the State to take measures to provide adequate resources or access to treatment facilities to secure effective enjoyment of the right to health.[197]

79 A study of sexuality and its relationship to the right to health in South Africa points to several other studies that suggest a negative correlation between sexual orientation-based discrimination and the right to health:

[196] Preamble to the Constitution of the World Health Organisation.
[197] Jayna Kothari, "Social Rights and the Indian Constitution", Law, Social Justice and Global Development Journal (2004).

> "For example, in a Canadian study, Brotman and colleagues found that being open about their sexual orientation in health care settings contributed to experiences of discrimination for lesbian, gay, and bisexual people."[198]
>
> "Lane and colleagues interviewed men who have sex with men in Soweto, and revealed that all men who disclosed their sexual orientation at public health facilities had experienced some form of discrimination. Such discrimination ['ranging from verbal abuse to denial of care'[199]], and also the anticipation thereof, leads to delays when seeking sexual health services such as HIV counseling and testing."[200]

80 Alexandra Muller describes the story of two individuals who experienced such discrimination. T, a gay man, broke both his arms while fleeing from a group of people that attacked him because of his sexuality. At the hospital, the staff learned about T's sexual orientation, and pejoratively discussed it in his presence. He also had to endure "a local prayer group that visited the ward daily to provide spiritual support to patients" which "prayed at his bedside to rectify his "devious" sexuality. When he requested that they leave, or that he be transferred to another ward, the nurses did not intervene, and the prayer group visited regularly to continue to recite their homophobic prayers. T did not file an official complaint, fearing future ramifications in accessing care. Following his discharge, he decided not to return for follow up appointments and had his casts removed at another facility.[201]

[198] Supra note 185, at pages 195–208.
[199] Ibid.
[200] Ibid.
[201] Ibid.

Another woman, P, who had been with her female partner for three years, wanted to get tested for HIV. The nurse at the hospital asked certain questions to discern potential risk behaviours. When asked why she did not use condoms or contraception, P revealed that she did not need to on account of her sexuality. The nurse immediately exclaimed that P was not at risk for HIV, and that she should "go home and not waste her time any longer." P has not attempted to have another HIV test since.[202]

These examples are illustrative of a wider issue: individuals across the world are denied access to equal healthcare on the basis of their sexual orientation. That people are intimidated or blatantly denied healthcare access on a discriminatory basis around the world proves that this issue is not simply an ideological tussle playing out in classrooms and courtrooms, but an issue detrimentally affecting individuals on the ground level and violating their rights including the right to health.

81 The right to health is one of the major rights at stake in the struggle for equality amongst gender and sexual minorities:[203]

> "The right to physical and mental health is at conflict with discriminatory policies and practices, some physicians' homophobia, the lack of adequate training for health care

[202] Ibid.
[203] Study Guide: Sexual Orientation and Human Rights, University of Minnesota Human RIghts Library (2003).

> personnel regarding sexual orientation issues or the general assumption that patients are heterosexuals."[204]

While the enumeration of the right to equal healthcare is crucial, an individual's sexual health is also equally significant to holistic well-being. A healthy sex life is integral to an individual's physical and mental health, regardless of whom an individual is attracted to. Criminalising certain sexual acts, thereby shunning them from the mainstream discourse, would invariably lead to situations of unsafe sex, coercion, and a lack of sound medical advice and sexual education, if any at all.

82 A report by the Francois-Xavier Bagnoud Center for Health and Human Rights at Harvard School of Public Health defines the term 'sexual health' as follows:

> "A state of physical, emotional, mental, and social well-being in relation to sexuality. Like health generally, it is not merely the absence of disease, but encompasses positive and complex experiences of sexuality as well as freedom to determine sexual relationships, as well as the possibility of having pleasurable sexual experiences, free of coercion, discrimination and violence."[205]

83 Laws that criminalize same-sex intercourse create social barriers to accessing healthcare, and curb the effective prevention and treatment of

[204] Ibid.
[205] Center for Health and Human Rights and Open Society Foundations. "Health and Human Rights Resource Guide (2013).

HIV/AIDS.[206] Criminal laws are the strongest expression of the State's power to punish certain acts and behaviour, and it is therefore incumbent upon the State to ensure full protection for all persons, including the specific needs of sexual minorities. The equal protection of law mandates the state to fulfill this constitutional obligation. Indeed, the state is duty bound to revisit its laws and executive decisions to ensure that they do not deny equality before the law and the equal protection of laws. That the law must not discriminate is one aspect of equality. But there is more. The law must take affirmative steps to achieve equal protection of law to all its citizens, irrespective of sexual orientation.

In regard to sexuality and health, it is important to distinguish between behaviour that is harmful to others, such as rape and coerced sex, and that which is not, such as consensual same-sex conduct between adults, conduct related to gender-expression such as cross-dressing, as well as seeking or providing sexual and reproductive health information and services. The use of criminal laws in relation to an expanding range of otherwise consensual sexual conduct has been found to be discriminatory by international and

[206] Supra note 172.

domestic courts, often together with violations of other human rights, such as the rights to privacy, self-determination, human dignity and health.[207]

G.I Section 377 and HIV prevention efforts

84 Section 377 has a significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV – men who have sex with men ("MSM")[208] and transgender persons.[209] The Global Commission on HIV and the Law has noted the impact of Section 377 on the right of health of persons afflicted with or vulnerable to contracting HIV:

> "The law and its institutions can protect the dignity of all people living with HIV, and in so doing fortify those most vulnerable to HIV, so-called "key populations", such as sex workers, MSM, transgender people, prisoners and migrants. The law can open the doors to justice when these people's rights are trampled…. But the law can also do grave harm to the bodies and spirits of people living with HIV. It can perpetuate discrimination and isolate the people most vulnerable to HIV from the programmes that would help them to avoid or cope with the virus. By dividing people into criminals and victims or sinful and innocent, the legal environment can destroy the social, political, and economic

[207] Eszter Kismodi, Jane Cottingham, Sofia Gruskin & Alice M. Miller, "Advancing sexual health through human rights: The role of the law", Taylor and Francis, (2015), at pages 252-267.

[208] The term "men who have sex with men" (MSM) denotes all men who have sex with men, regardless of their sexual identity, sexual orientation and whether or not they also have sex with females. MSM is an epidemiological term which focuses on sexual behaviours for the purpose of HIV and STI surveillance. The assumption is that behaviour, not sexual identity, places people at risk for HIV. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).

[209] Transgender people continue to be included under the umbrella term "MSM". However, it has increasingly been recognized that Transgender people have unique needs and concerns, and it would be more useful to view them as a separate group. See Regional Office for South-East Asia, World Health Organization, "HIV/AIDS among men who have sex with men and transgender populations in South-East Asia: the current situation and national responses" (2010).

> solidarity that is necessary to overcome this global epidemic."[210]

85 Mr Anand Grover, learned Senior Counsel in his submissions, highlighted the vulnerability of MSM and transgender persons. According to a study published by the Global Commission on HIV and the Law, MSM were found to be 19 times more susceptible to be infected with HIV than other adult men.[211]

86 The UN Human Rights Committee has recognized the impact of the criminalization of homosexuality on the spread of HIV/AIDS. In **Toonen** v **Australia**[212], a homosexual man from Tasmania, where homosexual sex was criminalized, argued that criminalization of same-sex activities between consenting adults was an infringement of his right to privacy under Article 17 of the International Covenant on Civil and Political Rights ("ICCPR"). The Committee rejected the argument of the Tasmanian authorities that the law was justified on grounds of public health and morality as it was enacted to prevent the spread of HIV/AIDS in Tasmania. The Committee observed that:

> "... the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV …

[210] United Nations Development Programme, "Global Commission on HIV and the Law: Risks, Rights and Health" (2012), at pages 11-12.
[211] Ibid at page 45; HIV prevalence amongst MSM is 4.3% and amongst transgender persons it is 7.5% as opposed to the overall adult HIV prevalence of 0.26%.
[212] Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), decision dated 31/03/1994.

> Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus."

In response to the Committee's decision, a law was enacted to overcome the Tasmanian law criminalizing homosexual sex.

87 Section 377 has had far-reaching consequences for this "key population", pushing them out of the public health system. MSM and transgender persons may not approach State health care providers for fear of being prosecuted for engaging in criminalized intercourse. Studies show that it is the stigma attached to these individuals that contributes to increased sexual risk behaviour and/or decreased use of HIV prevention services.[213]

88 The silence and secrecy that accompanies institutional discrimination may foster conditions which encourage escalation of the incidence of HIV/AIDS.[214] The key population is stigmatized by health providers, employers and other service providers.[215] As a result, there exist serious obstacles to effective HIV prevention and treatment as discrimination and

[213] Beena Thomas, Matthew J. Mimiaga, Senthil Kumar, Soumya Swaminathan, Steven A. Safren, and Kenneth H. Mayer, "HIV in Indian MSM: Reasons for a concentrated epidemic & strategies for prevention", Indian Journal Medical Research (2011), at pages 920–929.
[214] Ibid.
[215] Ibid.

harassment can hinder access to HIV and sexual health services and prevention programmes.[216]

89 An incisive article, based on extensive empirical research carried out in various countries, has concluded that there is a demonstrable relationship between "laws which criminalize same-sex conduct and adverse health effects on HIV-AIDs rates as well as other health indicators for the MSM community" due to poor access to key HIV prevention tools and outreach programmes.[217] According to a report published by the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), in Caribbean countries where same-sex relations are criminalised, almost one in four MSMs is infected with HIV.[218] In the absence of such criminal provisions, the prevalence of HIV is one in fifteen among MSMs.[219]

90 Closer to home, the UNAIDS project found that in the four years following the judgement in **Naz**, there had been an increase of more than 50% in the number of healthcare centers providing HIV services to MSM and transgender persons in India.[220] If same-sex relations remain criminalised, it is

[216] Ibid.
[217] Supra note 172, at page 636.
[218] Supra note 210, at page 45.
[219] Ibid.
[220] UNAIDS, "UNAIDS Calls on India and All Countries to Repeal Laws That Criminalize Adult Consensual Same Sex Sexual Conduct" (2013).

likely that HIV interventions for MSMs will continue to be inadequate, MSMs will continue to be marginalised from health services, and the prevalence of HIV will exacerbate.[221]

91 To safeguard the health of persons who are at the greatest risk of HIV infection, it is imperative that access is granted to effective HIV prevention and treatment services and commodities such as clean needles, syringes, condoms and lubricants.[222] A needle or a condom can only be considered a concrete representation of the entitlements of vulnerable groups: the fundamental human rights of dignity, autonomy and freedom from ill-treatment, along with the right to the highest attainable standard of physical and mental health, without regard to sexuality or legal status.[223] This is the mandate of the Directive Principles contained in Part IV of the Constitution.

92 In 2017, Parliament enacted the HIV (Prevention and Control) Act, to provide for the prevention and control of the spread of HIV/AIDS and for the protection of the human rights of persons affected. Parliament recognized the importance of prevention interventions for vulnerable groups including MSMs. Section 22 of this Act provides for protection against criminal sanctions as well as any civil liability arising out of promoting actions or practices or “any

[221] UNAIDS, “Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law” (2013) at page 165.
[222] Supra note 210, at page 26.
[223] Ibid, at page 26.

strategy or mechanism or technique" undertaken for reducing the risk of HIV transmission. Illustrations (a) and (b) to Section 22 read as follows:

> "(a) A supplies condoms to B who is a sex worker or to C, who is a client of B. Neither A nor B nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the strategy.
> (b) M carries on an intervention project on HIV or AIDS and sexual health information, education and counselling for men, who have sex with men, provides safer sex information, material and condoms to N, who has sex with other men. Neither M nor N can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention."

Persons who engage in anal or oral intercourse face significant sexual health risks due to the operation of Section 377. Prevalence rates of HIV are high, particularly among men who have sex with men. Discrimination, stigma and a lack of knowledge on the part of many healthcare providers means that these individuals often cannot and do not access the health care they need. In order to promote sexual health and reduce HIV transmission among LGBT individuals, it is imperative that the availability, effectiveness, and quality of health services to the LGBT community be significantly improved.

Under our constitutional scheme, no minority group must suffer deprivation of a constitutional right because they do not adhere to the majoritarian way of life. By the application of Section 377 of the Indian Penal Code, MSM and transgender persons are excluded from access to healthcare due to the

societal stigma attached to their sexual identity. Being particularly vulnerable to contraction of HIV, this deprivation can only be described as cruel and debilitating. The indignity suffered by the sexual minority cannot, by any means, stand the test of constitutional validity.

G.2 Mental health

93 The treatment of homosexuality as a disorder has serious consequences on the mental health and well-being of LGBT persons. The mental health of citizens "growing up in a culture that devalues and silences same-sex desire" is severely impacted.[224] Global psychiatric expert Dinesh Bhugra has emphasised that radical solutions are needed to combat the high levels of mental illness among the LGBT population stating there is a "clear correlation between political and social environments" and how persecutory laws against LGBT individuals are leading to greater levels of depression, anxiety, self-harm, and suicide. Even in Britain, gay people are at greater risk of a range of mental health problems, and, it is believed, are more likely to take their own lives.

> "A number of studies this year have highlighted the disproportionate levels of mental illness among LGBT people. In Britain, one of the world's most legally equal countries for this community, research in the last few months has revealed that LGBT people are nearly **twice as likely** to have

[224] Ketki Ranade, "Process of Sexual Identity Development for Young People with Same Sex Desires: Experiences of Exclusion", Psychological Foundations - The Journal (2008).

> attempted suicide or harmed themselves, gay men are more than **twice as likely** to have a mental illness than heterosexual men, and 4 in 5 **transgender people** have suffered depression in the last five years."[225]
> (Emphasis supplied)

He discusses studies from various countries which indicate that in countries where laws continue to discriminate against LGBT individuals, there are high rates of mental illness. Similarly he states that there have been a series of studies showing that in America, rates of psychiatric disorders have dropped when state policies have recognised the equal rights of LGBT individuals.

94 Mr Chander Uday Singh, learned Senior Counsel appearing on behalf of an intervenor, a psychiatrist, has brought to our notice how even the mental health sector has often reflected the societal prejudice regarding homosexuality as a pathological condition.

95 Medical and scientific authority has now established that consensual same sex conduct is not against the order of nature and that homosexuality is natural and a normal variant of sexuality. Parliament has provided legislative acknowledgment of this global consensus through the enactment of the Mental Healthcare Act, 2017. Section 3 of the Act mandates that mental illness is to be determined in accordance with 'nationally' or 'internationally'

[225] Dinesh Bhugra, globally renowned psychiatrist (article annexed in compilation provided by Mr. Chander Uday Singh, learned Senior Counsel).

accepted medical standards. The International Classification of Diseases (ICD-10) by the World Health Organisation is listed as an internationally accepted medical standard and does not consider non-peno-vaginal sex between consenting adults either a mental disorder or an illness. The Act through Section 18(2)[226] and Section 21[227] provides for protection against discrimination on the grounds of sexual orientation.

The repercussions of prejudice, stigma and discrimination continue to impact the psychological well-being of individuals impacted by Section 377. Mental health professionals can take this change in the law as an opportunity to re-examine their own views of homosexuality.

96 Counselling practices will have to focus on providing support to homosexual clients to become comfortable with who they are and get on with their lives, rather than motivating them for change. Instead of trying to cure something that isn't even a disease or illness, the counsellors have to adopt a more progressive view that reflects the changed medical position and

[226] Section 18. **Right to access mental healthcare**.—(1) Every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government. (2) The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.

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

changing societal values. There is not only a need for special skills of counsellors but also heightened sensitivity and understanding of LGBT lives. The medical practice must share the responsibility to help individuals, families, workplaces and educational and other institutions to understand sexuality completely in order to facilitate the creation of a society free from discrimination[228] where LGBT individuals like all other citizens are treated with equal standards of respect and value for human rights.

H Judicial review

97 The Constitution entrusts the function of making laws to Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. Parliament and the State Legislatures are empowered to create offences against laws with respect to the heads of legislation, falling within the purview of their legislative authority. (See Entry 93 of List I and Entry 64 of List II of the Seventh Schedule). Criminal law is a subject which falls within the Concurrent List. Entry I of List III provides thus:

> "1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power."

[228] Vinay Chandran, "From judgement to practice: Section 377 and the medical sector", Indian Journal of Medical Ethics, Vol. 4 (2009).

The power to enact legislation in the field of criminal law has been entrusted to Parliament and, subject to its authority, to the State Legislatures. Both Parliament and the State Legislatures can enact laws providing for offences arising out of legislation falling within their legislative domains. The authority to enact law, however, is subject to the validity of the law being scrutinised on the touchstone of constitutional safeguards. A citizen, or, as in the present case, a community of citizens, having addressed a challenge to the validity of a law which creates an offence, the authority to determine that question is entrusted to the judicial branch in the exercise of the power of judicial review. The Court will not, as it does not, in the exercise of judicial review, second guess a value judgment made by the legislature on the need for or the efficacy of legislation. But where a law creating an offence is found to be offensive to fundamental rights, such a law is not immune to challenge. The constitutional authority which is entrusted to the legislatures to create offences is subject to the mandate of a written Constitution. Where the validity of the law is called into question, judicial review will extend to scrutinising whether the law is manifestly arbitrary in its encroachment on fundamental liberties. If a law discriminates against a group or a community of citizens by denying them full and equal participation as citizens, in the rights and liberties granted by the Constitution, it would be for the Court to adjudicate upon validity of such a law.

I India's commitments at International Law

98 International human rights treaties and jurisprudence impose obligations upon States to protect all individuals from violations of their human rights, including on the basis of their sexual orientation.[229] Nevertheless, laws criminalizing same-sex relations between consenting adults remain on the statute books in more than seventy countries. Many of them, including so-called "sodomy laws", are vestiges of colonial-era legislation that prohibits either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex.[230] In some cases, the language used refers to vague and indeterminate concepts, such as 'crimes against the order of nature', 'morality', or 'debauchery'.[231] There is a familiar ring to it in India, both in terms of history and text.

99 International law today has evolved towards establishing that the criminalization of consensual sexual acts between same-sex adults in private contravenes the rights to equality, privacy, and freedom from discrimination. These rights are recognised in international treaties, covenants, and

[229] Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law", Human Rights Law Review, Vol. 16 (2016).
[230] UN Human Rights Council, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity" (2011).
[231] UN Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development" (2008).

agreements which India has ratified, including the UDHR, ICCPR, and the ICESCR. India has a constitutional duty to honour these internationally recognized rules and principles.[232] Article 51 of the Constitution, which forms part of the Directive Principles of State Policy, requires the State to endeavour to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another."

100 The human rights treaties that India has ratified require States Parties to guarantee the rights to equality before the law, equal protection of the law and freedom from discrimination. For example, Article 2 of the ICESCR requires states to ensure that:

> "The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

101 The Committee on Economic, Social and Cultural Rights - the body mandated by the ICESCR to monitor States Parties' implementation of the treaty – has stated that "other status" in article 2 (2) includes sexual orientation, and reaffirmed that "gender identity is recognized as among the

[232] Vishaka v State of Rajasthan, (1997) 6 SCC 241.

prohibited grounds of discrimination", as "persons who are transgender, transsexual or intersex often face serious human rights violations."[233]

102 The prohibition against discrimination in the ICCPR is contained in Article 26, which guarantees equality before the law:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

India is also required to protect the right to privacy, which includes within its ambit the right to engage in consensual same-sex sexual relations.[234] Article 12 of the UDHR recognises the right to privacy:

> "Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[233] Committee on Economic, Social and Cultural Rights, "General Comment 20: Non-discrimination in economic, social and cultural rights" (2009), at para 32.
[234] Toonen.

Similarly, Article 17 of the ICCPR, which India ratified on 11 December 1977, provides that:

> "The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right."

In its General Comment No. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[235]

In their general comments, concluding observations and views on communications, human rights treaty bodies have affirmed that States are obliged to protect individuals from discrimination on grounds of sexual orientation and/or gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights to which they are entitled.[236]

103 In **NALSA**, while dealing with the rights of transgender persons, this Court recognized the 'Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity' – which

[235] Supra note 230, at page 6.
[236] Ibid.

outline the rights that sexual minorities enjoy as human persons under the protection of international law – and held that they should be applied as a part of Indian law. Principle 33 provides thus:

> "Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics."

While the Yogyakarta Principles are not legally binding, **NALSA** nevertheless signifies an affirmation of the right to non-discrimination on the grounds of gender identity, as well as the relevance of international human rights norms in addressing violations of these rights.

104 There is a contradiction between India's international obligations and Section 377 of the Indian Penal Code, insofar as it criminalizes consensual sexual acts between same-sex adults in private. In adjudicating the validity of this provision, the Indian Penal Code must be brought into conformity with both the Indian Constitution and the rules and principles of international law that India has recognized. Both make a crucial contribution towards recognizing the human rights of sexual and gender minorities.

J Transcending borders - comparative law

105 Over the past several decades, international and domestic courts have developed a strong body of jurisprudence against discrimination based on sexual orientation. This section analyses the evolution of the perspective of the law towards sexual orientation from a comparative law perspective, and looks at how sodomy laws have been construed in various jurisdictions based on their histories.

106 In 1967, England and Wales decriminalized same-sex intercourse between consenting adult males in private, and in 1980, Scotland followed suit. The law in Northern Ireland only changed in 1982 with the decision of the ECtHR in **Dudgeon** v **The United Kingdom** ("Dudgeon").[237] The Petitioners challenged the Offences against the Person Act, 1861, the Criminal Law Amendment Act, 1885 and a sodomy law that made buggery and "gross indecency" a criminal offense, irrespective of consent. Although the law did not specifically define these terms, the Court interpreted 'buggery' to mean anal intercourse by a man with a man or woman and gross indecency to mean any act "involving sexual indecency between male persons." Regarding acts prohibited by these provisions, the ECtHR observed that:

[237] App No 7525/76, (1981) ECHR 5.

> "Although it is not homosexuality itself which is prohibited but the particular acts of gross indecency between males and buggery, there can be no doubt but that male homosexual practices whose prohibition is the subject of the applicant's complaints come within the scope of the offences punishable under the impugned legislation."

The ECtHR concluded that Dudgeon had suffered and continued to suffer an unjustified interference with his right to respect for his private life. Hence, the Court struck down the laws under challenge as violative of Article 8 of the European Convention on Human Rights, in so far as they criminalised "private homosexual relations between adult males capable of valid consent." In observing that these laws were not proportionate to their purported need, the Court observed:

> "On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[238]

The ECtHR thus concluded:

> "To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible

[238] Ibid, at para 60.

> penalties provided for, disproportionate to the aims sought to be achieved."[239]

Later, in **Norris** v **Ireland**[240], the Applicant challenged Ireland's criminalization of certain homosexual acts between consenting adult men as being violative of Article 8 of the European Convention on Human Rights, which protected the right to respect for private and family life. The ECtHR held that the law violated Article 8, regardless of whether it was actively enforced:

> "A law which remains on the statute books even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example, there is a change of policy. The applicant can therefore be said to 'run the risk of being directly affected' by the legislation in question."

This decision was affirmed in **Modinos** v **Cyprus**[241], where the Criminal Code of Cyprus, which penalized homosexual conduct, was alleged to constitute an unjustified interference with the Applicant's private life.

107 Five years after **Dudgeon**, the United States Supreme Court, in **Bowers** v. **Hardwick** ("Bowers")[242], held that "sodomy" laws had been a significant part of American history and did not violate the Constitution. The Supreme Court's reasoning in **Bowers** is a clear departure from that of the

[239] Ibid, at para 61.
[240] Application No. 10581/83, (1988) ECHR 22.
[241] Application No. 15070/89,16 EHRR 485.
[242] 478 U.S. 186 (1986).

ECtHR in **Dudgeon**. In **Bowers**, the Supreme Court declined to accept that the question concerned the right to privacy. Instead, it stated that the issue was about "a fundamental right upon homosexuals to engage in sodomy",[243] which was held not to be protected by the US Constitution.

Seventeen years later, the United States Supreme Court laid the constitutional foundation for LGBT rights in the country with its judgment in **Lawrence** v **Texas** ("Lawrence").[244] In **Lawrence**, the Petitioner had been arrested under a Texas statute, which prohibited same-sex persons from engaging in sexual conduct, regardless of consent. The validity of the statute was considered.

Relying on **Dudgeon**, the U S Supreme Court struck down the statute as violative of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Overruling the judgment in **Bowers**, Justice Kennedy, writing for the majority, upheld Justice Stevens' dissent in **Bowers** – who was also part of the majority in **Lawrence** – to note that:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual

[243] Bowers, at para 190.
[244] 539 U.S. 558 (2003).

> decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[245]

He also noted that the case concerned the private, personal relationships of consenting adults, and that the laws challenged did not further any legitimate state interest:

> "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter [eg, a right to marry or to register a 'civil union']. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual...."

108 Justice Kennedy also identified the harm caused by the operation of the criminal law:

> "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to

[245] Bowers, at para 216.

> subject homosexual persons to discrimination both in the public and in the private spheres."

The Court thus struck down the Texas law banning "deviate sexual intercourse" between persons of the same sex (and similar laws in 13 other US states and Puerto Rico), holding that:

> "The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. **Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home**. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." (Emphasis supplied)

109 In **Toonen**, the UN Human Rights Committee held that laws used to criminalize private, adult, consensual same-sex sexual relations violate the right to privacy and the right to non-discrimination. Mr Toonen – a member of the Tasmanian Gay Law Reform Group – had complained to the Committee about a Tasmanian law that criminalized 'unnatural sexual intercourse', 'intercourse against nature' and 'indecent practice between male persons'. The law allowed police officers to investigate intimate aspects of his private life and to detain him if they had reason to believe that he was involved in sexual activities with his long-term partner in the privacy of their home. Mr

Toonen challenged these laws as violative of Article 2(1)[246], Article 17[247] and Article 26[248] of the ICCPR, on the ground that:

> "[The provisions] have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights."[249]

The Committee rejected the argument that criminalization may be justified as "reasonable" on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate:[250]

> "As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV."

[246] Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[247] Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

[248] Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[249] Toonen, at para 2.4.

[250] Toonen, at para. 8.5.

The Court concluded that the legislation was violative of Article 7 of the ICCPR, holding that:

> "… It is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws."[251]

110 In **X** v. **Colombia**[252], the Committee clarified that there is no "Global South exception" to **Toonen**.[253] The Egyptian and Tunisian members of the Committee, who dissented from the majority's decision requiring equal treatment of unmarried same-sex and different-sex couples, concurred with the principle laid down in **Toonen**:

> "[T]here is no doubt that [A]rticle 17…is violated by discrimination on grounds of sexual orientation. The Committee…has rightly and repeatedly found that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults."

111 The Constitutional Tribunal of Ecuador was the first Constitutional Court in the Global South to decriminalise sodomy laws.[254] The constitutionality of Article 516 of the Penal Code, which penalised "cases of homosexualism, that do not constitute rape", was challenged before the Tribunal. The Tribunal's

[251] Toonen, at para 8.2.
[252] Communication No. 1361/2005.
[253] Robert Wintemute, "Same-Sex Love and Indian Penal Code §377: An Important Human Rights Issue for India" National University of Juridical Sciences Law Review, (2011).
[254] Case No. 111-97-TC (27 November 1997).

reasoning was that "this abnormal behaviour should be the object of medical treatment ... imprisonment in jails, creates a suitable environment for the development of this dysfunction." The Tribunal's line of reasoning – referring to homosexual activity as 'abnormal behaviour', requiring medical treatment – is seriously problematic.[255] That assumption is unfounded in fact and is an incorrect doctrine for a constitutional court which protects liberty and dignity. However ultimately, the Tribunal struck down the first paragraph of Article 516 of the Penal Code, holding that:

> "Homosexuals are above all holders of all the rights of the human person and therefore, have the right to exercise them in conditions of full equality ... that is to say that their rights enjoy legal protection, as long as in the exteriorisation of their behaviour they do not harm the rights of others, as is the case with all other persons."

112 The adverse impact of sodomy laws on the lives of homosexual adults was also considered by the Constitutional Court of South Africa in **National Coalition for Gay and Lesbian Equality** v. **Minister of Justice** ("National Coalition")[256], in which the constitutionality of the common law offence of sodomy and other legislations which penalised unnatural sexual acts between men was at issue. The Constitutional Court unanimously found that the sodomy laws, all of which purported to proscribe sexual intimacy between

[255] The Tribunal's decision was criticized by LGBT rights activists for its description of homosexuality as "abnormal conduct." However, a year after this decision, Ecuador became the third country in the world to include sexual orientation as a constitutionally protected category against discrimination.
[256] 1999 (1) SA 6 (CC).

homosexual adult men, violated their right to equality and discriminated against them on the basis of their sexual orientation.

Justice Ackerman, concurring with the ECtHR's observation in **Norris**, noted that:

> "The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives."[257]

Justice Ackerman quoted from Edwin Cameron's "Sexual Orientation and the Constitution: A Test Case for Human Rights"[258]:

> "Even when these provisions are not enforced, they reduce gay men… to what one author has referred to as '**unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation**."[259] (Emphasis supplied)

Commenting on the violation of individuals' rights to privacy and dignity, the Court held that:

> "Gay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences criminalise private conduct

[257] National Coalition, at para 23.
[258] (1993) 110 SALJ 450.
[259] National Coalition, at para 23.

> between consenting adults which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy. The fact that the offences, which lie at the heart of the discrimination, also violate the rights to privacy and dignity strengthens the conclusion that the discrimination against gay men is unfair."

In its conclusion, the Court held that all persons have a right to a "sphere of private intimacy and autonomy that allows [them] to establish and nurture human relationships without interference from the outside community."[260]

113 In 2005, the High Court of Fiji, in **Dhirendra Nadan Thomas McCoskar** v. **State**[261], struck down provisions of the Fijian Penal Code, which punished any person who permits a male person to have "carnal knowledge" of him, as well as acts of "gross indecency" between male persons. The High Court read down the provisions to the extent that they were inconsistent with the Constitution of Fiji, drawing a clear distinction between consensual and non-consensual sexual behavior:

> "What the constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality…**A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties**

[260] National Coalition, at para 32.
[261] [2005] FJHC 500.

> **of keeping sexual expression in check by protecting the vulnerable and penalizing the predator**." (Emphasis supplied)

In recent years, the Caribbean States of Belize and Trinidad and Tobago have also decriminalized consensual sexual acts between adults in private. In **Caleb Orozco** v. **The Attorney General of Belize** ("Caleb Orozco")[262], provisions of the Belize Criminal Code which penalized "every person who has intercourse against the order of nature with any person…" were challenged before the Supreme Court. Commenting on the concept of dignity, Justice Benjamin borrowed from the Canadian Supreme Court's observations and noted that:[263]

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

Relying on the judgments in **Dudgeons**, **National Coalition**, **McCoskar**, **Toonen**, and **Lawrence**, the Supreme Court struck down the provision as violative of the claimant's constitutional rights to privacy, dignity, and equality. Justice Benjamin held thus:

[262] Claim No. 668 of 2010.
[263] Law v Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497.

> "However, from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral…There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the real likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution."[264]

114 In **Jason Jones** v. **The Attorney General of Trinidad and Tobago** ("Jones")[265], an expatriate gay rights activist living in the United Kingdom challenged the provisions of Trinidad and Tobago's Sexual Offences Act, which criminalized 'buggery' and 'serious indecency' before the High Court of Justice at Trinidad and Tobago. The central issue before the Court was whether the provisions were 'saved' under Section 6 of the Constitution, which protects laws that were in existence before the Constitution came into force and were only marginally changed since, from being struck down for breach of fundamental rights.

The High Court struck down the provisions as unconstitutional, observing that the right to choose a partner and to have a family is intrinsic to an individual's personal autonomy and dignity:

> "To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any

[264] Caleb Orozco, at para 81.
[265] Claim no. CV2017-00720.

> unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with who to make a family."[266]

The High Court also held that the existence of such laws deliberately undermined the lives of homosexuals:

> "A citizen should not have to live under the constant threat, the proverbial "Sword of Damocles," that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded, that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed to be of a lesser value than anyone else…The Parliament has taken the deliberate decision to criminalise the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallised in an act which is statutorily unlawful, whether or not enforced."[267] (Emphasis supplied)

The High Court compared the impugned provisions to racial segregation, the Holocaust, and apartheid, observing that:

> "To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority, based on the genuinely held beliefs of some."[268]

[266] Jones, at para 91.
[267] Ibid.
[268] Jones, at para 171.

115 In **Leung TC William Roy** v. **Secretary for Justice**[269], the High Court of Hong Kong considered the constitutional validity of provisions that prescribed different ages of consent for buggery and regular sexual intercourse. The court held that these provisions violated the petitioner's rights to privacy and equality:

> "Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation."[270]

The Court concluded that the difference in the ages of consent was unjustifiable, noting that:

> "No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument."[271]

Courts around the world have not stopped at decriminalizing sodomy laws; they have gone a step further and developed a catena of broader rights and protections for homosexuals. These rights go beyond the mere freedom to

[269] Civil Appeal No. 317 of 2005.
[270] Ibid, at para 48.
[271] Ibid, at para 51.

engage in consensual sexual activity in private, and include the right to full citizenship, the right to form unions and the right to family life.

116 Israel was one of the first countries to recognize the rights of homosexuals against discrimination in matters of employment. In **El-Al Israel Airlines Ltd** v. **Jonathan Danielwitz** ("El-Al Israel Airlines")[272], the Supreme Court of Israel considered an airline company's policy of giving discounted tickets to their employees and a 'companion recognized as the husband/wife of the employee'. This benefit was also given to a partner with whom the employee was living together like husband and wife, but not married. However, the airline refused to give the discounted tickets to the Respondent and his male partner.

The Supreme Court of Israel observed thus:

> "The principle of equality demands that the existence of a rule that treats people differently is justified by the nature and substance of the issue…therefore, a particular law will create discrimination when two individuals who are different from one another (factual inequality), are treated differently by the law, **even though the factual difference between them does not justify different treatment in the circumstances**."[273] (Emphasis supplied)

[272] HCJ 721/94.
[273] El-A Israel Airlines, at para 14.

The Supreme Court held that giving a benefit to an employee who has a spouse of the opposite sex and denying the same benefit to an employee whose spouse is of the same sex amounts to discrimination based on sexual orientation. This violated the Petitioner's right to equality and created an unjustifiable distinction in the context of employee benefits.

117 In **Vriend** v **Alberta**[274], the appellant, a homosexual college employee, was terminated from his job. He alleged that his employer had discriminated against him because of his sexual orientation, but that he could not make a complaint under Canada's anti-discrimination statute – the Individual's Rights Protection Act ("IRPA") – because it did not include sexual orientation as a protected ground. The Supreme Court of Canada held that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of the right to equality under the Canadian Charter of Rights and Freedoms.

118 The Supreme Court held that the State had failed to provide a rational justification for the omission of sexual orientation as a protected ground under the IRPA. Commenting on the domino effect that such discriminatory measures have on the lives of homosexuals, the Supreme Court noted thus:

[274] (1998) 1 S.C.R. 493.

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."

The next breakthrough for LGBTQ rights came from the Supreme Court of Nepal, in **Sunil Babu Pant** v. **Nepal Government**[275]. Sunil Pant – the first openly gay Asian national leader – filed a PIL before the Supreme Court of Nepal praying for the recognition of the rights of lesbians, gays, and third gender persons. The Supreme Court located the rights of LGBTQ persons to their sexuality within the right to privacy, holding that:

> "The right to privacy is a fundamental right of any individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural."

The Court held that all individuals have an inherent right to marriage, regardless of their sexual orientation:

[275] Writ Petition No. 917 of 2007.

> "Looking at the issue of same sex marriage, we hold that it is an inherent right of an adult to have marital relation with another adult with his/her free consent and according to her/his will."

In concluding, the Court directed the Nepalese government to enact new legislation or amend existing legislation to ensure that persons of all sexual orientations and gender identities could enjoy equal rights.

119 In 2015, in **Oliari** v **Italy** ("Oliari")[276], the Applicants before the ECtHR argued that the absence of legislation in Italy permitting same-sex marriage or any other type of civil union constituted discrimination on the basis of sexual orientation, in violation of Articles 8, 12, and 14 of the European Convention on Human Rights. In line with its previous case law, the Court affirmed that same-sex couples "are in need of legal recognition and protection of their relationship."[277] The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as heterosexual couples.[278]

120 The ECtHR examined the domestic context in Italy, and noted a clear gap between the "social reality of the applicants",[279] who openly live their

[276] [2015] ECHR 716
[277] Oliari, at para 165.
[278] Ibid.
[279] Oliari, at para. 173.

relationship, and the law, which fails to formally recognize same-sex partnerships. The Court held that in the absence of any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[280]

121 In 2013, in **United States** v. **Windsor**[281], US Supreme Court considered the constitutionality of the Defense of Marriage Act ("DOMA") which states that, for the purposes of federal law, the words 'marriage' and 'spouse' refer to legal unions between one man and one woman. Windsor, who had inherited the estate of her same-sex partner, was barred from claiming the federal estate tax exemption for surviving spouses since her marriage was not recognized by federal law.[282] Justice Kennedy writing for the majority, held that restricting the federal interpretation of 'marriage' and 'spouse' to apply only to opposite-sex unions was unconstitutional under the Due Process Clause of the Fifth Amendment:

> "Its [the DOMA's] unusual deviation from the tradition of recognizing and accepting state definitions of marriage

[280] Oliari, at para 185.
[281] 570 U.S. 744 (2013).
[282] Section 3, Defense of Marriage Act.

> operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law. DOMA's avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."

Two years later, in **Obergefell** v. **Hodges** ("Obergefell"),[283] while analysing precedent and decisions of other US courts recognizing same-sex marriage, Justice Kennedy observed that:

> "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy… Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."[284]

122 Justice Kennedy expressed the need to go beyond the narrow holding in **Lawrence**, towards a more expansive view of the rights of homosexuals:

> "Lawrence invalidated laws that made same- sex intimacy a criminal act... **But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty**." (Emphasis supplied)

[283] 576 U.S. ___ (2015).
[284] Obergefell, at page 12.

By a 5-4 majority, the US Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution. Commenting on the right to marriage, Justice Kennedy noted:

> "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. … It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

123 The recent case of **Masterpiece Cakeshop** v. **Colorado Civil Rights Commission** ("Masterpiece Cakeshop")[285] concerned a Christian baker who was accused of violating an anti-discrimination ordinance for refusing to make a wedding cake for a same-sex couple based on his religious beliefs. The Colorado Civil Rights Commission ("CCRC") decided against the baker, and, on appeal, the Supreme Court ruled 7-2 that the CCRC violated the baker's rights under the First Amendment, which guarantees freedom of expression.

Writing for the majority, Justice Kennedy said the CCRC showed "hostility" to the baker's religious beliefs:

[285] 584 U.S. ____ (2018).

> "It must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside."

The majority held that while the Constitution allows gay persons to exercise their civil rights, "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression." The Supreme Court found merit in the baker's First Amendment claim, noting that his dilemma was understandable, especially given that the cause of action arose in 2012, before the enactment of Colorado's anti-discrimination law and the **Obergefell** judgment that legalised same-sex marriage.

The court buttressed its position by noting that in several other cases, bakers had declined to decorate cakes with messages that were derogatory towards gay persons and the State Civil Rights Division had held that the bakers were within their rights to have done so. According to the majority in **Masterpiece Cakeshop**, the owner was similarly entitled to decline the order, and his case should have been treated no differently.

124 Justice Ginsburg's dissenting opinion, which was supported by Justice Sotomayor, distinguished the baker in **Masterpiece Cakeshop** from the other three bakers. Justice Ginsburg noted that while the other bakers would have refused the said cake decorations to *all* customers, Phillips refused to bake a wedding cake (which he baked for other customers), specifically for the couple. She observed that:

> "Phillips declined to make a cake he found offensive where the **offensiveness of the product was determined solely by the identity of the customer requesting it.** The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display." (Emphasis supplied)
>
> "When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied."

Justice Ginsburg concluded that a proper application of the Colorado Anti-Discrimination Act would require upholding the lower courts' rulings.

125 **Masterpiece Cakeshop** is also distinguishable from a similar case, **Lee** v. **Ashers Bakery Co. Ltd**.[286], which is currently on appeal to the United Kingdom Supreme Court. In that case, a bakery in Northern Ireland offered a

[286] [2015] NICty 2.

service whereby customers could provide messages, pictures or graphics that would be iced on a cake. Lee – a member of an LGBT organisation – ordered a cake with the words “support gay marriage” on it. The Christian owners refused, stating that preparing such an order would conflict with their religious beliefs. Lee claimed that in refusing his order, the bakery discriminated against him on grounds of sexual orientation. Both the County Court and the Court of Appeal ruled in favour of Lee, on the ground that the respondent’s refusal on the ground of his religious beliefs was contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment Order 1998.

From an analysis of comparative jurisprudence from across the world, the following principles emerge:

1. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;
2. Intimacy between consenting adults of the same-sex is beyond the legitimate interests of the state;
3. Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;

4. Such a law perpetrates stereotypes, lends authority of the state to societal stereotypes and has a chilling effect on the exercise of freedom;
5. The right to love and to a partner, to find fulfillment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;
6. Sexual orientation implicates negative and positive obligations on the state. It not only requires the state not to discriminate, but also calls for the state to recognise rights which bring true fulfillment to same-sex relationships; and
7. The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships. It must also take positive steps to achieve equal protection.

The past two decades have witnessed several decisions by constitutional and international courts, recognizing both the decriminalization of same-sex intercourse in private, as well as broader rights recognizing sexual orientation equality. In 1996, South Africa became the first country in the world to

constitutionally prohibit discrimination based on sexual orientation.[287] As on the date of this judgment, ten countries constitutionally prohibit discrimination on grounds of sexual orientation.[288] The United Kingdom, Bolivia, Ecuador, Fiji, and Malta specifically prohibit discrimination on the basis of gender identity, either constitutionally or through enacted laws.[289] According the International Lesbian, Gay, Bisexual, Trans and Intersex Association, 74 countries (including India) criminalize same-sex sexual conduct, as of 2017.[290] Most of these countries lie in the Sub-Saharan and Middle East region. Some of them prescribe death penalty for homosexuality.[291]

126 We are aware that socio-historical contexts differ from one jurisdiction to another and that we must therefore look at comparative law-making allowances for them. However, the overwhelming weight of international opinion and the dramatic increase in the pace of recognition of fundamental rights for same-sex couples reflects a growing consensus towards sexual orientation equality. We feel inclined to concur with the accumulated wisdom reflected in these judgments, not to determine the meaning of the guarantees

[287] Amy Raub, "Protections Of Equal Rights Across Sexual Orientation And Gender Identity: An Analysis Of 193 National Constitutions", Yale Journal of Law and Feminism, Vol. 28 (2017).
[288] Ibid. Of these, three are in the Americas (Bolivia, Ecuador, and Mexico), four are in Europe and Central Asia (Malta, Portugal, Sweden, and the United Kingdom), two are in East Asia and the Pacific (Fiji and New Zealand), and one is in Sub-Saharan Africa (South Africa).
[289] Ibid.
[290] The International Lesbian, Gay, Bisexual, Trans And Intersex Association, "Sexual Orientation Laws of the World", (2017).
[291] Ibid.

contained within the Indian Constitution, but to provide a sound and appreciable confirmation of our conclusions about those guarantees.

This evolution has enabled societies governed by liberal constitutional values – such as liberty, dignity, privacy, equality and individual autonomy – to move beyond decriminalisation of offences involving consensual same-sex relationships. Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements. The Indian Constitution is based on an abiding faith in those constitutional values. In the march of civilizations across the spectrum of a compassionate global order, India cannot be left behind.

K Crime, morality and the Constitution

127 The question of what qualifies as a punishable offence under the law has played a central role in legal theory. Attempts have been made by legal scholars and jurists alike, to define a crime. **Halsbury's Laws of England** defines a crime as "an unlawful act or default which is an offence against the

public and renders the person guilty of the act or default liable to legal punishment."[292] As Glanville Williams observes:

> "A crime is an act capable of being followed by criminal proceedings, having a criminal outcome…criminal law is that branch of law which deals with conduct…by prosecution in the criminal courts."[293]

Henry Hart, in his essay titled "The Aims of Criminal Law", [294] comments on the difficulty of a definition in this branch of law. A crime is a crime because it is called a crime:

> "If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name."[295]

However, Hart confesses that such a simplistic definition would be "a betrayal of intellectual bankruptcy."[296] Roscoe Pound articulates the dilemma in defining what constitutes an offence:

> "A final answer to the question 'what is a crime?', is impossible, because law is a living, changing thing, which may at one time be uniform, and at another time give much room for judicial discretion, which may at one time be more

[292] Halsbury's Laws of England. 3rd edition, Vol. 3, Butterworths (1953) at page. 271.
[293] Glanville Williams, 'The Definition of Crime', Current Legal Problems, Vol. 8 (1955).
[294] Henry M. Hart, "The Aims of the Criminal Law", Law and Contemporary Problems, Vol. 23 (1958), at pages 401–441.
[295] Ibid.
[296] Ibid.

> specific in its prescription and at another time much more general."[297]

Early philosophers sought to define crime by distinguishing it from a civil wrong. In his study of rhetoric, Aristotle observed that:

> "Justice in relation to the person is defined in two ways. For it is defined either in relation to the community or to one of its members what one should or should not do. Accordingly, it is possible to perform just and unjust acts in two ways, either towards a defined individual or towards the community."[298]

Kant, in the Metaphysics of Morals,[299] observed that:

> "A transgression of public law that makes someone who commits it unfit to be a citizen is called a *crime* simply (crimen) but is also called a *public crime* (crimen publicum); so the first (private crime) is brought before a civil court, the latter before a criminal court."[300]

Another method of defining crime is from the nature of injury caused, "of being public, as opposed to private, wrongs."[301] This distinction was brought out by Blackstone and later by Duff, in their theories on criminal law. Blackstone, in his "Commentaries on the Laws of England" put forth the idea that only

297 Roscoe Pound, Interpretation of Legal History, Harvard University Press (1946).
298 H.C. Lawson-Tancred, The Art of Rhetoric/ Aristotle, Penguin (2004).
299 Immanuel Kant: The Metaphysics of Morals (Mary Gregor ed.), Cambridge University Press (1996).
300 Ibid, at pages 353, 331.
301 Grant Lamond, "What is a Crime?", Oxford Journal of Legal Studies, Vol.27 (2007).

actions which constitute a 'public wrong' will be classified as a crime.[302] He characterised public wrongs as "a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[303] Duff adds to the idea of public wrong by arguing that "[w]e should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, i.e. the polity as a whole."[304]

Nozick and Becker also support the theory that crime is conduct that harms the public. Nozick argues that the harm caused by a crime, unlike other private law wrongs, extends beyond the immediate victim to all those who view themselves as potential victims of the crime.[305] When such an act is done on purpose, it spreads fear in the general community, and it is *due to this additional harm to the community* [of causing fear and insecurity], that such actions are classified as crimes and pursued by the state.[306] Becker preferred to describe crime as something which disrupts social stability and has "the potential for destructive disturbance of fundamental social structures."[307]

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[302] Sir William Blackstone, Commentaries on the Laws of England, Book IV, Ch. 1 & 2.
[303] Ibid.
[304] Antony Duff and Sandra Marshall, "Criminalization and Sharing Wrongs", Canadian Journal of Law and Jurisprudence, Vol. 11, (1998) at pages 7-22.
[305] Robert Nozick, Anarchy, State and Utopia, Basic Books (1974) ,at page 65.
[306] Supra note 301.
[307] Lawrence C. Becker, "Criminal Attempts and the Theory of the Law of Crimes", Philosophy & Public Affairs, Vol 3 (1974), at page 273.

However, Hart questioned the theory of simply defining crime as a public wrong, for all wrongs affect society in some way or the other:

> "Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfilment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation." [308]

128 Hart preferred to define crime in terms of the methodology of criminal law and the characteristics of this method. He described criminal law as possessing the following features:

> "1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do…
>
> 2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words…
>
> 3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce…
>
> 4. **What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition**."[309] (Numbering and emphasis supplied)

[308] Supra note 294.
[309] Ibid.

According to Hart, the first three characteristics above are common to both civil and criminal law.[310] However, the key differentiating factor between criminal and civil law, he observed, is the "community condemnation." [311] Thus, he attempted to define crime as:

> "Conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." [312]

Perhaps it is difficult to carve out a single definition of crime due to the multi-dimensional nature of criminal law. The process of deconstructing the criminalisation of consensual sexual acts by adults will be facilitated by examining some criminal theories and their interplay with Section 377.

Criminal Law Theories

Bentham's Utilitarian Theory

129 Utilitarianism has provided some of the most powerful critiques of existing laws. Bentham was one of the earliest supporters for reform in sodomy laws. In his essay, "Offences Against One's Self",[313] Bentham rebutted all the justifications given by the state for enacting laws on

[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Jeremy Bentham, "Offences Against One's Self" (Louis Crompton Ed.), Columbia University.

sodomy.[314] According to Bentham, homosexuality, if viewed outside the realms of morality and religion, is neutral behaviour which gives the participants pleasure and does not cause pain to anyone else.[315] Therefore, he concluded that such an act cannot constitute an offence, and there is "no reason for punishing it at all."[316]

130 Bentham tested sodomy laws on three main principles: (i) whether they produce any primary mischief, i.e., direct harm to another person; (ii) whether they produce any secondary mischief, i.e., harm to the stability and security of society; and (iii) whether they cause any danger to society.[317] He argued that sodomy laws do not satisfy any of the above tests, and hence, should be repealed. On the first principle of primary mischief, Bentham said:

> "As to any primary mischief, it is evident that it produces no pain in anyone. On the contrary it produces pleasure, and that a pleasure which, by their perverted taste, is by this supposition preferred to that pleasure which is in general reputed the greatest. The partners are both willing. If either of them be unwilling, the act is not that which we have here in view: it is an offence totally different in its nature of effects: it is a personal injury; it is a kind of rape." [318]

[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.

Thus, Bentham argued that consensual homosexual acts do not harm anyone else. Instead, they are a source of pleasure to adults who choose to engage in them. Bentham was clear about the distinction between 'willing' partners and 'unwilling' partners, and the latter according to him, would not fall under his defence.

Bentham's second argument was that there was no secondary mischief, which he described as something which may "produce any alarm in the community." On this, Bentham argued:

> "As to any secondary mischief, it produces not any pain of apprehension. For what is there in it for any body to be afraid of? By the supposition, those only are the objects of it who choose to be so, who find a pleasure, for so it seems they do, in being so."[319]

Bentham's explanation was that only those adults who *choose* will be the objects of homosexual sexual acts. It does not involve any activity which will create anxiety among the rest of the society. Therefore, homosexuality does not cause secondary harm either.

Lastly, Bentham tested sodomy laws on whether they cause danger to society. The only danger that Bentham could apprehend was the supposed

[319] Ibid.

danger of encouraging others to engage in homosexual practices. However, Bentham argues that since homosexual activities in themselves do not cause any harm, there is no danger even if they have a domino effect on other individuals:

> "As to any danger exclusive of pain, the danger, if any, must consist in the tendency of the example. But what is the tendency of this example? To dispose others to engage in the same practises: but this practise for anything that has yet appeared produces not pain of any kind to anyone." [320]

Thus, according to Bentham, sodomy laws fail on all three grounds- they neither cause primary mischief, nor secondary mischief, nor any danger to society.

Bentham also critiqued criminal laws by analysing the utility of the punishment prescribed by them. He succinctly described the objective of law through the principles of utility- "The general object which all laws have, or ought to have…is to augment the total happiness of the community; [and] to exclude…everything that tends to subtract from that happiness."[321] According to Bentham, "all punishment in itself is evil"[322] because it reduces the level of happiness in society, and should be prescribed only if it "excludes some

[320] Ibid.
[321] Ibid.
[322] Ibid.

greater evil."[323] Bentham stipulated four kinds of situations where it is not utilitarian to inflict punishment:

> "1. Where it is *groundless:* where there is no mischief for it to prevent; the act not being mischievous upon the whole.
> 2. Where it must be *inefficacious:* where it cannot act so as to prevent the mischief.
> 3. Where it is *unprofitable,* or too *expensive:* where the mischief it would produce would be greater than what it prevented.
> 4. Where it is *needless:* where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate."[324]

The Harm Principle

131 John Stuart Mill, in his treatise "On Liberty," makes a powerful case to preclude governments from interfering in those areas of an individual's life which are private. Mill's theory, which came to be called the "harm principle", suggests that the state can intrude into private life by way of sanction only if harm is caused to others or if the conduct is "other-affecting."[325] In Mill's words:

> "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the

[323] Ibid.
[324] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, The Library of Economics and Liberty (1823).
[325] John Stuart Mill, On Liberty, (Elizabeth Rapaport ed), Hackett Publishing Co, Inc (1978).

> opinions of others, to do so would be wise, or even right… The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. **Over himself, over his own body and mind, the individual is sovereign**." [326] (Emphasis supplied)

Mill created a dichotomy between "self-regarding" actions (those which affect the individual himself and have no significant effect on society at large) and "other-regarding" actions (those which affect the society).[327] He was aware that in a way, all actions of an individual are likely to affect "those nearly connected with him and, in a minor degree, society at large."[328] However, he argued that as long as an action does not "violate a distinct and assignable obligation to any other person or persons", it may not be taken out of the self-regarding class of actions.[329] Thus, Mill proposed that "all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation" should be free from state interference.[330] He further added that the state and society are not justified in interfering in the self-regarding sphere, merely because they believe certain conduct to be "foolish, perverse, or wrong."[331]

[326] Ibid.
[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Ibid.

Essentially, Mill created a taxonomy on types of conduct – (a) self-regarding actions should not be the subject of sanctions either from the state or society; (b) actions which may hurt others but do not violate any legal rights may only be the subject of public condemnation but not state sanction; (c) only action which violate the legal rights of others should be the subject of legal sanction (and public condemnation).[332] The harm principle thus, operated as a negative or limiting principle, with the main objective of restricting criminal law from penalising conduct merely on the basis of its perceived immorality or unacceptability when the same is not harmful.[333]

While Mill's theory was not propounded in relation to LGBTQ rights, his understanding of criminal law is well-suited to argue that sodomy laws criminalise 'self-regarding' actions which fall under the first category of conduct, and should not be subjected to sanctions either by the state or the society.

132 A jurisprudential debate on the interplay between criminal law and morality was set off when Lord Devlin delivered the 1959 Maccabean Lecture,

[332] Mark Strasser, "Lawrence, Mill, and Same Sex Relationships: On Values, Valuing and the Constitution", Southern California Interdisciplinary Law Journal, Vol. 15 (2006).

[333] Joseph Raz, 'Autonomy, Toleration and the Harm Principle', in Issues in Contemporary Legal Philosophy: The Influence of HLA Hart (R. Gavison ed.), Oxford University Press (1987).

titled "The Enforcement of Morals."[334] Lord Devlin's lecture was an attack against the Report of the Wolfenden Committee on Homosexual Offences and Prostitution ("Wolfenden Report"), which had recommended the decriminalisation of sodomy laws in England.[335] The Wolfenden Committee, headed by Sir John Wolfenden, Vice-Chancellor of Reading University, was set up in 1954 to consider the criminalisation of homosexuality and prostitution, in the wake of increased arrests and convictions in the UK for homosexuality between men.[336] Among those prosecuted for 'gross indecency' under the Buggery Act of 1553 and Sexual Offences Act of 1967 were eminent persons like Oscar Wilde, Alan Turing and Lord Montagu of Beaulieu.[337] After conducting a three-year long inquiry, carrying out empirical research, and interviewing three gay men, the Wolfenden Committee released its Report in 1957.[338] The Wolfenden Report recommended that:

> "Homosexual behaviour between consenting adults should no longer be a criminal offence... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[339]

[334] Graham Hughes, "Morals and the Criminal Law", The Yale Law Journal, Vol.71 (1962).
[335] Supra note 29.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Supra note 29, at paras 61 and 62.

The Wolfenden Report stated that "it is not the purpose of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour…"[340] The Wolfenden Report acknowledged that the law and public opinion have a close relationship with each other – the law ought to "follow behind public opinion" so that it garners the community support, while at the same time, the law must also fortify and lead public opinion.[341] However, it made out a strong case for divorcing morality from criminal law and stated that - "moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind."[342] Stating that homosexuality is not a mental illness, the Wolfenden Report clarified that homosexuality is "a sexual propensity for persons of one's own sex…[it] is a state or condition, and as such does not, and cannot, come within the purview of criminal law."[343]

133 Lord Devlin, perturbed by the Wolfenden Report's line of reasoning, framed questions on the issue of criminal law and morality:

> "1. Has society the right to pass judgments on all matters of morals?

[340] Ibid, at para 14.
[341] Ibid, at para 16.
[342] Ibid, at para 54.
[343] Ibid, at para 18.

> 2. If society has the right to pass judgment, has it also the right to use the weapon of the law to enforce it?"[344]

Devlin believed that society depends upon a common morality for its stability and existence.[345] On the basis of this belief, Devlin answered the above questions in the affirmative, stating that – society has the right to pass judgments on all matters of morality and also the right to use law to enforce such morality.[346] Devlin reasoned that society would disintegrate if a common morality was not observed. Therefore, society is justified in taking steps to preserve its morality as much as it preserves the government.[347] Devlin proposed that the common morality or "collective judgment of the society" should be ascertained taking into consideration the "reasonable man."[348] According to him, a reasonable man is an ordinary man whose judgment "may largely be a matter of feeling."[349] He added that if the reasonable man believed a practice to be immoral, and held this belief honestly and dispassionately, then for the purpose of law such practice should be considered immoral.[350]

[344] Sir Patrick Arthur Devlin, "The Enforcement Of Morals" Oxford University Press (1959) at page 9.
[345] Supra note 334, at page 662.
[346] Animesh Sharma, "Section 377: No Jurisprudential Basis." Economic and Political Weekly, Vol. 43 (2008) at pages 12-14.
[347] Supra note 344.
[348] Ibid.
[349] Ibid.
[350] Ibid.

134 Countering Devlin's theory, Hart argued that society is not held together by a common morality, for, after all, it is not a hive mind or a monolith, governed by a singular set of morals and principles.[351] Hart rebutted Devlin's argument in the following way:

> "…apart from one vague reference to 'history' showing the 'the loosening of moral bonds is often the first stage of disintegration,' no evidence is produced to show that deviation from accepted sexual morality, even by adults in private is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it…Lord Devlin's belief in it [that homosexuality is a cause of societal disintegration], and his apparent indifference to the question of evidence, are at points traceable to an undiscussed assumption. This is that all morality – sexual morality together with the morality that forbids acts injurious to others such as killing, stealing, and dishonesty -- forms a single seamless web, so that those who deviate from any part are likely to perhaps bound to deviate from the whole. It is of course clear (and one of the oldest insights of political theory) that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others. But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society."[352]

Despite countering Devlin, Hart was not completely opposed to a relationship between law and morality, and in fact, he emphasised that the two are closely related:

[351] Supra note 346, at pages 12-14.
[352] Hart, H. L. A, "The Changing Sense of Morality" In Political Thought (Michael Rosen and Jonathan Wolff eds.), Oxford University Press (1999) at pages 140-141.

> "The law of every modem state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process…The further ways in which law mirrors morality are myriad, and still insufficiently studied: statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fair- ness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility." [353]

However, unlike Devlin, Hart did not propose that morality is a necessary condition for the validity of law.[354] Hart argued, in summary, that "law is morally relevant," but "not morally conclusive."[355] Hart vehemently disagreed with Devlin's view that if laws are not based on some collective morality and enacted to buttress that morality, society will disintegrate.[356] Hart draws this distinction by conceding that certain sexual acts (including homosexual acts) were considered 'immoral' by mainstream Western society but adding that private sexual acts are an issue of "private morality" over which society has no interest and the law, no control.[357]

Hart further expounded his warning about the imposition of majoritarian morals, propounding that "[I]t is fatally easy to confuse the democratic

[353] H.L.A. Hart, Law, Liberty And Morality (1979).
[354] William Starr, "Law and Morality in H.L.A. Hart's Legal Philosophy", Marquette Law Review, Vol. 67 (1984).
[355] Ibid.
[356] Supra note 352.
[357] Peter August Bittlinger, "Government enforcement of morality: a critical analysis of the Devlin-Hart controversy", Doctoral Dissertations 1896-February 2014 (1975) at pages 69-70.

principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits"[358]:

> "Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an "overwhelming majority" or marked by widespread "intolerance, indignation, and disgust" that loyalty to democratic principles requires him to admit that its imposition on a minority is justified."[359]

In this way, Hart avoided the specious generalization that the law must be severely quarantined from morality but still made it clear that laws like Section 377, which impose a majoritarian view of right and wrong upon a minority in order to protect societal cohesion, are jurisprudentially and democratically impermissible.

Bentham had a different view on morality and weighed morality against utilitarian principles. Bentham argued that if the punishment is not utilitarian (i.e. does not serve as a deterrent, is unprofitable, or unnecessary), the 'immoral' action would have to go unpunished.[360] He opined that legislators should not be overly swayed by the society's morality:

[358] Ibid at page 91.
[359] Ibid at page 93.
[360] Supra note 334.

> "The strength of their prejudice is the measure of the indulgence which should be granted to it…The legislator ought to yield to the violence of a current which carries away everything that obstructs it.
>
> But ought the legislator to be a slave to the fancies of those whom he governs? No. Between an imprudent opposition and a servile compliance, there is a middle path, honourable and safe."[361]

In other words, it appears that Bentham argued that the morality of the people ought not be ignored in creating laws but also must not become their unchecked fount. And if prejudicial moralities arise from the people, they should not be unthinkingly and permanently cemented into the law, but rather addressed and conquered.

John Stuart Mill also made a strong argument against popular morality being codified into laws. He argued that 'disgust' cannot be classified as harm, and those "who consider as an injury to themselves any conduct which they have a distaste for", cannot dictate the actions of others merely because such actions contradict their own beliefs or views.[362] Mill believed that society is not the right judge when dealing with the question of when to interfere in conduct

[361] Ibid.
[362] Supra note 325.

that is purely personal, and that when society does interfere, "the odds are that it interferes wrongly and in the wrong place."[363]

135 Christopher R Leslie points out the dangers of letting morality creep into law:

> "Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children. Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. The underlying premises of ancient laws are rarely discussed, let alone scrutinized."[364]

Leslie further adds that "sodomy laws do not merely express societal disapproval; they go much further by creating a criminal class"[365]:

> "Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning… In short, the primary importance of sodomy laws today is the government's message to diminish the societal status of gay men and lesbians."[366]

136 A broad analysis of criminal theory points to the general conclusion that criminologists and legal philosophers have long been in agreement about one basic characteristic of crime: that it should injure a third person or the society.

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[363] Ibid.
[364] Christopher. R. Leslie, "Creating criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws", Harvard Civil Rights and Civil Liberties Law Review, Vol. 35 (2000).
[365] Ibid, at pages 103-181.
[366] Ibid.

An element of larger public interest emerges as the crux of crime. The conduct which Section 377 criminalises voluntary ‘carnal intercourse against the order of nature’ with a man or woman, *inter alia* – pertains solely to acts between consenting adults. Such conduct is purely private, or as Mill would call it, “self-regarding,” and is neither capable of causing injury to someone else nor does it pose a threat to the stability and security of society. Once the factor of consent is established, the question of such conduct causing *any* injury, does not arise.

Although Section 377 prima facie appears to criminalise certain acts or conduct, it creates a class of criminals, consisting of individuals who engage in consensual sexual activity. It typecasts LGBTQ individuals as sex-offenders, categorising their consensual conduct on par with sexual offences like rape and child molestation. Section 377 not only criminalises acts (consensual sexual conduct between adults) which should not constitute crime, but also stigmatises and condemns LGBTQ individuals in society.

137 We are aware of the perils of allowing morality to dictate the terms of criminal law. If a single, homogenous morality is carved out for a society, it will undoubtedly have the effect of hegemonizing or ‘othering’ the morality of minorities. The LGBTQ community has been a victim of the pre-dominant

(Victorian) morality which prevailed at the time when the Indian Penal Code was drafted and enacted. Therefore, we are inclined to observe that it is constitutional morality, and not mainstream views about sexual morality, which should be the driving factor in determining the validity of Section 377.

L Constitutional morality

138 With the attainment of independence on 15 August 1947, Indians were finally free to shape their own destiny.[367] The destiny was to be shaped through a written Constitution. Constitutions are scripts in which people inscribe the text of their professed collective destiny. They write down who they think they are, what they want to be, and the principles that will guide their interacting along that path in the future.[368] The Constitution of India was burdened with the challenge of "drawing a curtain on the past"[369] of social inequality and prejudices. Those who led India to freedom established into the Constitution the ideals and vision of a vibrant equitable society. The framing of India's Constitution was a medium of liberating the society by initiating the process of establishing and promoting the shared values of liberty, equality

[367] Jawaharlal Nehru, "Tryst with Destiny", address to the Constituent Assembly of India, delivered on 14-15 August 1947.
[368] Uday S. Mehta, "Constitutionalism", In The Oxford Companion to Politics in India (Niraja Gopal Jayal and Pratap Bhanu Mehta eds.), Oxford University Press (2010), at page 15.
[369] Ibid, at page 16.

and fraternity. Throughout history, socio-cultural revolts, anti-discrimination assertions, movements, literature and leaders have worked at socializing people away from supremacist thought and towards an egalitarian existence. The Indian Constitution is an expression of these assertions. It was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society. All citizens were to be free from coercion or restriction by the state, or by society privately.[370] Liberty was no longer to remain the privilege of the few. The judgment in **Puttaswamy** highlights the commitment of the constitution makers, thus:

> "The vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere."

139 Understanding the vision of India at a time when there was little else older than that vision, is of paramount importance for the reason that though the people may not have played any role in the actual framing of the Constitution, the Preamble professes that the Constitution has been adopted by the people themselves. Constitutional historian Granville Austin has said that the Indian Constitution is essentially a social document.[371] The Indian Constitution does not provide merely a framework of governance. It embodies a vision. It is goal-oriented and its purpose is to bring about a social

[370] Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1966), at page 65.
[371] Ibid, at page 63.

transformation in the country. It represents the aspirations of its framers. The democratic Constitution of India embodies provisions which are value-based.

140 During the framing of the Constitution, it was realized by the members of the Constituent Assembly that there was a wide gap between constitutional precept and reality. The draftspersons were clear that the imbibing of new constitutional values by the population at large would take some time. Society was not going to change overnight. Dr Ambedkar remarked in the Constituent Assembly:

> "Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."

141 The values of a democracy require years of practice, effort, and experience to make the society work with those values. Similar is the position of non-discrimination, equality, fraternity and secularism. While the Constitution guarantees equality before the law and equal protection of the law, it was felt that the realization of the constitutional vision requires the existence of a commitment to that vision. Dr Ambedkar described this commitment to be the presence of constitutional morality among the members of the society. The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of

society is determined by popular perceptions existent in society. The continuance of certain symbols, labels, names or body shapes determine the notions, sentiments and mental attitudes of the people towards individuals and things.[372] Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society. It assumes that citizens would respect the vision of the framers of the Constitution and would conduct themselves in a way which furthers that vision. Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures. For this reason, constitutional morality has to be imbibed by the citizens consistently and continuously. Society must always bear in mind what Dr Ambedkar observed before the Constituent Assembly:

> "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it."

[372] Babasaheb.R. Ambedkar, Annihilation of Caste, Navayana Publishing (2014); See also Martha C. Nussbaum, "Disgust or Equality? Sexual Orientation and Indian Law", Journal of Indian Law and Society, Vol. 6 (2010).

142 In the decision in **Government of NCT of Delhi** v. **Union of India**[373], the Constitution Bench of this Court dealt with the constitutive elements of constitutional morality which govern the working of a democratic system and representative form of government. Constitutional morality was described as founded on a "constitutional culture", which requires the "existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain." This Court held thus:

> "If the moral values of our .Constitution were not upheld at every stage, the text of the Constitution may not be enough to protect its democratic values."

This Court held that constitutional morality acts a check against the "tyranny of the majority" and as a "threshold against an upsurge in mob rule." It was held to be a balance against popular public morality.

143 Constitutional morality requires in a democracy the assurance of certain minimum rights, which are essential for free existence to every member of society. The Preamble to the Constitution recognises these rights as "Liberty of thought, expression, belief, faith and worship" and "Equality of status and of opportunity." Constitutional morality is the guarantee which seeks that all inequality is eliminated from the social structure and each individual is

[373] 2018 (8) SCALE 72

assured of the means for the enforcement of the rights guaranteed. Constitutional morality leans towards making Indian democracy vibrant by infusing a spirit of brotherhood amongst a heterogeneous population, belonging to different classes, races, religions, cultures, castes and sections. Constitutional morality cannot, however, be nurtured unless, as recognised by the Preamble, there exists fraternity, which assures and maintains the dignity of each individual. In his famous, yet undelivered speech titled "Annihilation of Caste" (which has been later published as a book), Dr Ambedkar described 'fraternity' as "primarily a mode of associated living, of conjoint communicated experience" and "essentially an attitude of respect and reverence towards fellow men."[374] He remarked:

> "An ideal society should be mobile, should be full of channels for conveying a change taking place in one part to other parts. In an ideal society there should be many interests consciously communicated and shared. There should be varied and free points of contact with other modes of association. In other words there must be social endosmosis. This is fraternity, which is only another name for democracy."

In his last address to the Constituent Assembly, he defined fraternity as "a sense of common brotherhood of all Indians." As on the social and economic plane, Indian society was based on graded inequality, Dr Ambedkar had warned in clear terms:

> "Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to

[374] Supra note 372, at para 14.2.

> enforce them… Without fraternity equality and liberty will be no deeper than coats of paint."[375]

144 Constitutional morality requires that all the citizens need to have a closer look at, understand and imbibe the broad values of the Constitution, which are based on liberty, equality and fraternity. Constitutional morality is thus the guiding spirit to achieve the transformation which, above all, the Constitution seeks to achieve. This acknowledgement carries a necessary implication: the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so. Hence, constitutional courts are entrusted with the duty to act as external facilitators and to be a vigilant safeguard against excesses of state power and democratic concentration of power. This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish. Popular public morality cannot affect the decisions of this Court. Lord Neuberger (of the UK Supreme Court) has aptly observed:

> "[W]e must always remember that Parliament has democratic legitimacy – but that has disadvantages as well as advantages. The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an

[375] Constituent Assembly Debates (25 November 1949).

> independent body of people who do not have to worry about short term popularity."[376]

The flourishing of a constitutional order requires not only the institutional leadership of constitutional courts, but also the responsive participation of the citizenry.[377] Constitutional morality is a pursuit of this responsive participation. The Supreme Court cannot afford to denude itself of its leadership as an institution in expounding constitutional values. Any loss of its authority will imperil democracy itself.

145 The question of morality has been central to the concerns around homosexuality and the rights of LGBT individuals. Opponents – including those of the intervenors who launched a diatribe in the course of hearing – claim that homosexuality is against popular culture and is thus unacceptable in Indian society. While dealing with the constitutionality of Section 377 of the Indian Penal Code, the Delhi High Court in **Naz Foundation** had held:

> "Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality

[376] Lord Neuberger, "UK Supreme Court decisions on private and commercial law: The role of public policy and public interest", Centre for Commercial Law Studies Conference (2015).

[377] Marc Galanter, "Fifty Years on", in BN Kirpal et al, Supreme but Not Infallible: Essays in Honour of the Supreme Court of India, Oxford University Press (2000), at page 57.

> and not public morality… In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."

The invocation of constitutional morality must be seen as an extension of Dr Ambedkar's formulation of social reform and constitutional transformation. Highlighting the significance of individual rights in social transformation, he had observed:

> "The assertion by the individual of his own opinions and beliefs, his own independence and interest—over and against group standards, group authority, and group interests—is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion."[378]

After the enactment of the Constitution, every individual assertion of rights is to be governed by the principles of the Constitution, by its text and spirit. The Constitution assures to every individual the right to lead a dignified life. It prohibits discrimination within society. It is for this reason that constitutional morality requires this court to issue a declaration - which we now do - that LGBT individuals are equal citizens of India, that they cannot be discriminated against and that they have a right to express themselves through their intimate choices. In upholding constitutional morality, we affirm that the protection of the rights of LGBT individuals are not only about guaranteeing a

[378] Supra note 373, at para 12.1.

minority their rightful place in the constitutional scheme, but that we equally speak of the vision of the kind of country we want to live in and of what it means for the majority.[379] The nine-judge Bench of this Court in **Puttaswamy** had held in clear terms that discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. The Bench held:

> "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties."

Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will

[379] Supra note 41.

supersede any culture or tradition.

The interpretation of a right in a matter of decriminalisation and beyond must be determined by the norms of the Constitution.

146 LGBT individuals living under the threats of conformity grounded in cultural morality have been denied a basic human existence. They have been stereotyped and prejudiced. Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living. Constitutional morality requires that this Court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.[380] Constitutional morality must turn into a habit of citizens. By respecting the dignity of LGBT individuals, this Court is only fulfilling the foundational promises of our Constitution.

M In summation : transformative constitutionalism

147 This case has required a decision on whether Section 377 of the Penal Code fulfills constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such

[380] Ibid.

sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

148 Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

149 The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the state to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

150 Sexual and gender based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In de-criminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

151 The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

152 This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

153 Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks – as well – to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

154 A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

155 The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate

of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored.

156 We hold and declare that:

(i) Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

(ii) Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

(iii) The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

(iv) Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

(v) The decision in **Koushal** stands overruled.

Acknowledgment

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……..….....J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
September 06, 2018.