

THE SUPREME COURT OF INDIA'S VERDICT DECRIMINALIZING HOMOSEXUALITY: AN ANALYSIS OF CONSTITUTIONAL RIGHTS OF THE LGBT COMMUNITY

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Abstract:

Former Chief Justice and Chairman of Law Commission of India, Dr. P.B. Gajendragadkar delivering the valedictory address before the National Correctional Conference on Probation in October, 1971 said, "Law cannot be defined in decisive and finalist terms because law is a living institution, it is dynamic and changes from time to time.....The debate on the changing social and moral perception of homosexuality has been raging for a long time. The fifth Law Commission, had undertaken a comprehensive review of the more than a century, old IPC, and sought 'informed public opinion' on decriminalization of homosexuality and the punishment provided therefore, and decriminalization of consensual sexual act between adults in private for suggesting reforms in the provisions of section 377 of the Penal Code. The Supreme Court in its September 6, 2018 verdict ruled that its 2014 NALSA judgment granting legal recognition to transgender cannot be applied to lesbians, gays and bisexuals. The judgment of Supreme Court of India, however, declared that insofar as Section 377 criminalizes consensual sexual acts of adults in private, it is violative of Articles 14, 15, 19 and 21 of the Constitution. In the light of the Supreme Court's verdict of September 6, 2018 the present paper analyses the constitutional rights of the LGBT community in India.

1.1 Introduction:

The ancient Indian Codes were very strict on 'perverse' sexual practices including homosexuality. Male homosexuality (Maithunam purushashu) was strongly forbidden and so was lesbian behavior. Stringent punishments, according to *Manu Smriti*, were to be given for both the acts.¹

1. Ahmad Siddique, *Criminology Problems & perspectives*, 4th edn. (Lucknow: Eastern Book Company, 1997) at 412.

LGBT people are found since ancient times. Many of the ancient texts in India, dating back to the Vedic period refer to LGBT people. Several temples in India define the relationship of same sex. There are many stories in Hinduism which talks about Gods changing their gender; also they get involved in many such activities. For Example, In Mahabharat a girl Shikhandi, whose father Draupada train and raised her daughter like a Marand and made her marry to a female.²

Alfred C. Kinsey defines a homosexual as anyone who has more than six sexual experiences with a member of the same gender. According to the seven-point scale developed by Kinsey, both homosexual and heterosexual tendencies may be simultaneously present in an individual in varying degrees. The scale is as follows:

“‘0’ on the scale denotes exclusive heterosexuality; ‘1’ denotes predominant heterosexuality; ‘3’ an even balance of the two; ‘4’ greater tendency towards homosexuality; ‘5’ predominant homosexuality with only incidental heterosexual behavior; and ‘6’ exclusive homosexuality”.³

LGBT is abbreviation of Lesbian, Gay, Bisexual and Transgender respectively. According to dictionary of current English,⁴ ‘Lesbian’ means homosexual woman, ‘Gay’ means homosexual person and ‘homosexual’ means person sexually attracted only to the people of same sex as oneself. Clearly, the term homosexual denotes both the homosexual man and the homosexual woman. But, after the recognition of homosexual woman as lesbian in the beginning of the 19th century on the name of *Sappho* and her place of birth Greek Island ‘Lesbos’ where she wrote poems largely about her emotional relationship with young women,⁵ the term gay is generally used to refer to homosexual man. ‘Bisexual’ indicates two senses- (1) person, sexually attracted to both men and women and (2) person, having both male and female sexual organ. In the second sense, it is synonymous with word ‘hermaphrodite’ that means person or animal that has both male and female sexual organs and characteristics.⁶

2.D. Pattanaik, *The Goddess in India-The Five Face of the Eternal Feminine* (Library of Congress catalogue Publication, 2000).at 98-112.

3. Alfred C. Kinsey, *Sexual Behaviour in the Human Male*, (1948).

4. “Oxford Advanced Learner’s Dictionary”, 4th edn. (1989).

5. Harper Douglas, *Lesbian-Dictionary*, (2001).

6. Anil Kumar Dubey, “*Homosexuality in India: The Social-Legal Perspective and Judicial Approach*” (2016) Vol. XLIII (4) Indian Bar Review at 153-154.

The validity of Section 377 IPC, it infringes the fundamental rights of LBGT's peoples which guaranteed under Articles 14 (provides right to equality), 15 (provides non-discrimination), 19 (right to freedom of expression) and 21 (right to privacy and dignity) of the Constitution of India. However, in April 2014, the Supreme Court of India declared transgender to be a 'third gender' in Indian law. By virtue of Article 13 of the Constitution, any pre- Constitution as well as post-Constitution law that is inconsistent with any of the fundamental rights becomes unconstitutional and thereby void. In fact, clause (2) of article 13 of the Constitution mandates the 'state' not to 'make any law' which takes away or abridges the fundamental rights and makes a law contravening any of these rights unconstitutional and void.⁷ Therefore, Article 13 mandates the judiciary, especially the higher judiciary, as the guardian and protector of these fundamental rights, to ensure that no statute or statutory provision infringes any of the fundamental rights and to declare such a law or its provision unconstitutional and void.

Therefore, the Supreme Court's verdict of September 6, 2018, it is declared that insofar as Section 377 IPC, criminalizes consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19 and 21 of the Constitutions. The judgment in *Suresh K. Koushal & Anr. v. Naz Foundation & Ors.*⁸ is hereby also overruled for the reasons stated in paragraph 18.

1.2 Homosexuality under *Manusmrti*:

Under *Manusmrti*, homosexuality has been punished but it does not considered as heinous crime. The punishment provided as:⁹

- Girl having sex with girl uses to be punished with fine.
- Women having sex with a girl punished by shaving her head immediately, fingers cut off and making her ride on donkey.

7. Material part of art. 13 says, "(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, shall be void, (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void".

8. (2014) 1 SCC 1.

9. R. Das, *Crime and Punishment in Ancient India* (Kanchan Publication 1982). at 89-100.

- Man having sex with man-Painful heating.

- Man having sex with women instead of vagina-Painful heating.

1.3 Homosexuality under Indian Penal Code, 1860:¹⁰

Under Indian Penal Code, Section 377. Unnatural offence:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”.

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section deals with unnatural carnal intercourse against the order of nature. It consists of penetration *per anum*. Consent of the parties here is immaterial and the party consenting is equally liable as an abettor. The unnatural offences discussed under this section are: (1) Sodomy and (2) Bestiality.

The word ‘sodomy’ generally denotes intercourse *per anum* by a man with a man or with a woman or with an animal.¹¹ Sodomy may be either homosexual or heterosexual.¹² In case the parties are of same sex, it will be termed as homosexual and if the parties are of opposite sex it will be called as heterosexual. Consent unlike rape is not a defence to the charge. The person effecting the intercourse is known as the ‘agent’ and the other party as the “patient”.

Bestiality means the sexual intercourse either by a man or by a woman carried out in any way with a beast (animal) or bird.¹³ The section is wide enough to include a woman as well. Hence, a woman is also liable for committing unnatural offence under this section. However, the section is not attracted if the act is done either by a man or a woman with an inanimate object.

10. Act No.45 of 1860 received the assent of the Governor General on October 6, 1860.

11 Kennys *Outlines of Criminal Law*, 19th edn. Section-151, at 205.

12 Smith & Hogan, *Criminal Law*, 11th edn., (2005).

13. Smith & Hogan, *Criminal Law*, 9th edn. (1999). At 735. R. v. Ford, ALL ER 1129; R. v. Grey, 1982 Cr LJ 177 (CA).

The section requires proof of the following conditions to hold a person liable for the offence, viz., (1) The accused must have carnal intercourse with a man, or a woman or an animal;

- (2) The act was against the order of nature; (3) The act was done voluntarily by the accused; and
(4) There was proof of penetration.¹⁴

The section carries as severe a punishment as that of rape. The punishment may extend to imprisonment for life or imprisonment up to ten years and fine. A total of 489 cases of unnatural offences were reported, a total number of 493 victims of cases were registered and crime rate is 0.1% during 2016.¹⁵

In *Norshiwani v. Emperor*,¹⁶ it was held that the offence made punishable under section 377 IPC., requires the penetration, however little, it should be proved strictly. Where the accused in order to satisfy his lust by a carnal intercourse against the order of nature made preparation to satisfy the lust, but before he could thrust his organ in, he spent himself, he cannot be said to have done any act which might be construed as an attempt to commit an offence of sodomy under section 377, IPC.

1.4 Section 377 of Indian Penal Code is silent about the ‘age’ and ‘consent’ between the parties:

In this situation, to fix the liability regarding age, the courts have to rely on the relevant provision under the IPC and other laws dealing with age. In the absence of mention about consent, it is not a defence unlike the crime of rape under section 375. Most of cases decided on this Section refer non-consensual and coercive situations where women and children were victims.¹⁷

14. K. D. Gaur, *The Indian Penal Code*, 4th edn. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2011) at 684.

15. *Crime in India, Statistics*, Ministry of Home Affairs, National Crime Records Bureau, (2016).

16. 1935 Cr. LJ 718.

17. *Khanu v. Emperor*, AIR 1925 Sindh. 286; *Lohana Vasantlal Devchand v. The State* AIR 1968 Guj. 252; *State of Kerala v. Kundumkara Govindan* 1969 Cr. LJ 818; *Fazal Rab Chaudhari v. State of Bihar* (1982) 3 SCC 9; *Calvin Fancis v. State of Orissa*, 1992 (2) Crimes 455; *State v. Bachmiya Musamiya*, 1993 (3) Guj. LJ 2456; *Bhikari Charan Sahu v. State*, 1992 Cr. LJ 488.

In view of scheme of criminal law and social phenomena regarding sexuality, it becomes necessary to trace back the legislative history relating to consent covered under ‘general exceptions’ and Section 377 in order to find out the true implication of the provision.

Justifying the consent as general exception, the framers of the IPC 1860, observed as follows:

We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm... The reason on which the rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health and their own comfort..... It is difficult to conceive any law which should prevent a man from capriciously injuring his own health....¹⁸

In view of the aforesaid observation, it is clear that consent or lack of consent is relevant in determining criminal liability. Consent as general exception is outlined in Section 87-92 of the IPC, which is confined to certain offences falling under Chapter XVI “Of Offence Affecting Human Body”. Section 90 explains the term “consent”, while Section 87-89 and 91, 92 articulate proposition of law pertaining to consent as an extenuating factor.

Reasonably, the offence caused with consent under Section 377 exempts from criminal liability. The expression “voluntary” in Section 377 also indicates the willingness of one party and unwillingness of another party in carnal intercourse to constitute the offence under the section. If the stipulated act under this Section is committed at the will of another party, the act cannot be said committed voluntary that is one of the ingredients to constitute the offence. In other words, consensual carnal intercourse against the order of nature does not constitute the offence under Section 377. It also implies that the commission of act stipulated under this Section with a minor or with an animal is sufficient to constitute the offence, as a minor or an animal is considered not capable of giving consent.¹⁹

18. Syed Shamsul Huda, *The Principles of the Law of Crimes* (lucknow: EBC, Reprinted 2011) at xxxiii.

19. Anil Kumar Dubey, *supra* note 6 at 157-158.

1.5 Judicial Interpretation of homosexuality under Section 377, in India:

The essential ingredient required to constitute an offence under Section 377 is “carnal intercourse against the order of nature”, which is punishable with life imprisonment, or imprisonment of either description up ten years. Section 377 applies irrespective of gender, age, or consent. The expression ‘carnal intercourse’ used in Section 377 is distinct from ‘sexual intercourse’ which appears in Section 375 and 497 of the IPC. The phrase “carnal intercourse

against the order of nature” is not defined by Section 377, or in the Code. The term ‘carnal’ has been the subject matter of judicial interpretation in various decisions. According to the New International Webster’s Comprehensive Dictionary of the English Language, ²⁰ ‘carnal’ means:

- “Pertaining to the fleshly nature or to bodily appetites.
- Sensual; sexual
- Pertaining to the flesh or to the body; not spiritual; hence worldly.”²¹

The courts had earlier interpreted the term ‘carnal’ to refer to acts which fall outside penile-vaginal intercourse, and were not for the purpose of procreation. In *Khanu v. Emperor*, ²² the Sindh High Court was dealing with a case where the accused was found guilty of having committed Gomorrah *coitus per os* with a little child, and was convicted under Section 377. The Court held that the act of carnal intercourse was clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible. In Lahore High Court in *Khandu v. Emperor*, ²³ was dealing with a case wherein the accused had penetrated the nostril of a bullock with his penis. The Court, while relying on the decision of the Sindh High Court in *Khanu* case, held that the acts of the accused constituted *coitus per os*, were punishable under Section 377.

20. The New International Webster’s Comprehensive Dictionary of the English Language, (Deluxe Encyclopedic Edition, 1996).

21. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016; W.P. (C) No. 572/2016; W.P. (CRL.) No. 88/2018; W. P. (CRL.) No. 100/2018; W.P. (CRL.) No. 101/2018; W.P. (CRL.) No. 121/2018; Para: 12.1-3 at 9-10.

22. AIR 1925 Sind 286.

23. AIR 1934 Law 261: 1934 Cri LJ 1096.

In *Lohana Vasantlal Devchand & ors v. State*, ²⁴ the Gujarat High convicted two accused under Section 377 read with Section 511 of the IPC, on account of having carnal intercourse per anus and inserting the penis in the mouth of a young boy. It was held that:

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

Later this Court in *Fazal Rab Chaudhary v. State of Bihar*,²⁵ while reducing the sentence of the appellant who was convicted for having committed an offence on a young boy under Section 377 IPC, held that:

“...The offence is one under Section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking”.

The test for attracting penal provisions under Section 377 changed over the years from non-procreative sexual acts in *Khanu* case, to imitative sexual intercourse like oral sex in *I Lohana Vasantlal Devchand* case, to sexual perversity in *Fazal Rab* case. These cases referred to non-consensual sexual intercourse by coercion.²⁶

1.6 Constitutional rights of LGBT’s people in India:

The fundamentals of the Indian Constitution are contained in its Preamble which secures to its citizens, justice, social, economic and political; Liberty of thought, expression, faith and worship; Equality of status and opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation It was to give effect to these objectives that the Fundamental Rights and the Directive Principles of State Policy were enacted in Part-III and Part-IV of the Constitution and though them the dignity of the individual was sought to be achieved and maintained.²⁷

24. AIR 1968 Guj 252.

25. (1982) 3 SCC 9.

26. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 12.4 at 10-12.

27. V. N. Shukla’s, *Constitution of India* 11th edn. (Lucknow: EBC 2008) at A 44- 45.

Dr, B. R. Ambedkar in the Constituent Assembly on November 25, 1948, on the plea that:

“..There are many cases occurring now in international affairs where territories are handed over to other countries for the purposes of administration either under a mandate or trusteeship. ...It is desirable that there ought to be no discrimination so far as the citizens of India and the residents of those mandated or trusteeship territories are concerned in ‘Fundamental Rights’”.²⁸

The petitioners (*Navtej Singh Johar and Others*) have *inter alia* submits that sexual expression and intimacy between consenting adults of the same sex in private ought to receive

protection under Part-II of the Constitution, as sexuality lies at the core of human being's innate identity. Section 377 inasmuch as it criminalizes consensual relationship between same sex couples is violative of the fundamental rights guaranteed by Articles 21, 19, and 14, in Part-III of the Constitution. The principal contentions raised by the Petitioners during the course are:

- Fundamental rights are available to LGBT persons regardless of the fact that they constitute a minority.
- Section 377 is violative of Article 14 being wholly arbitrary, vague and has an unlawful objective.
- Section 377 penalizes a person on the basis of their sexual orientation and is hence discriminatory under Article-15.
- Section 377 violates the right to life and liberty guaranteed by Article 21 which encompasses all aspects of the right to live with dignity, the right to privacy, and the right to autonomy and self-determination with respect to the most intimate decisions of human being.²⁹

28 Constituent Assembly Debates, Vol. III, at 607.

29. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 4 at 2-3.

1.6.1 Right to equality under Article 14 and LGBT persons:

One of the main contentions raised by the Petitioners (Navtej Singh Johar and Others) to challenge the Constitutional validity of Section 377 is founded on Article 14 of the Constitution. Article 14 enshrines the principle of equality as a fundamental right, and mandates that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. It recognizes and guarantees the right of equal treatment to all persons in this country.

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

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

- (i) There should be a reasonable classification based on intelligible differentia; and
- (ii) This classification should have a rational nexus with the objective sought to be achieved.

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

The import and effect of Section 377 is that while a consensual heterosexual relationship is permissible, a consensual relationship between LGBT persons is considered to be ‘carnal’ and against the order of nature. Section 377 creates an artificial dichotomy. The natural or innate sexual orientation of a person cannot be a ground for discrimination. Where legislation discriminates on the basis of an intrinsic and core trait of an individual’s, it cannot form a reasonable classification based on an intelligible differentia.

In *National Legal Services Authority v. Union of India and Ors.*³⁰ this Court granted equal protection of laws to transgender person. There is therefore, no justification to deny the same to LGBT persons.³¹

1.6.2 Right to prohibition of discrimination under Article 15 and LGBT persons:

Article 15 applies the general principle of equality before the law embodied in Article 14 to specific situations. It prohibits certain classification which could be justified under Article 14 and expressly requires making of certain classifications which could impliedly be within the reach of Article 14.³²

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

The term 'sex' as it occurs in Article 15 has been given an expansive interpretation by the Court in *National Legal Services Authority v. Union of India* (referred to as the NALSA judgment) to include sexual identity. Paragraph 66 of the judgment reads thus:

“66...Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes includes one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 and 16, therefore includes discrimination on the ground of gender identity. The expression sex used in Article 15 and 16 are not just limited to biological sex of male and female, but intended to include people who consider themselves neither male nor female”.

30. (2014) 5 SCC 438.

31. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 4 at 2-3.

32. V. N. Shukla, supra note 27 at 82.

Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their “sexual identity and character”. The J. S. Verma Committee ³³, had recommended that 'sex' under Article 15 must include 'sexual orientation':

“65. We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further,

we are clear that Article 15 of the Constitution of 52 India uses the word ‘sex’ as including sexual orientation”.

The prohibition against discrimination under Article 15 on the ground of ‘sex’ should therefore encompass instances where such discrimination takes place on the basis of one’s sexual orientation.³⁴

1.6.3 Right to freedom of expression under Article 19 and LGBT persons:

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

LGBT persons express their sexual orientation in myriad ways. One such way is engagement in intimate sexual acts like those prescribed under Section 377.³⁵

Owing to the fear of harassment from law enforcement agencies and prosecution, LGBT persons tend to stay ‘in the closet’. They are forced not to disclose a central aspect of their personal identity i.e. their sexual orientation, both in their personal and professional spheres to avoid persecution in society and the opprobrium attached to homosexuality.

33. Report of the Committee on Amendments to Criminal Law (2013).

34. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 15 at 20-22.

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

Unlike heterosexual persons, they are inhibited from openly forming and nurturing fulfilling relationships, thereby restricting rights of full personhood and a dignified existence. It also has an impact on their mental well-being.

In National Legal Services Authority case, this court noted that gender identity is an important aspect of personal identity and is inherent to a person. It was held that transgender persons have the right to express their self-identified gender by way of speech, mannerism, behavior, presentation and clothing, etc.³⁶

The Court also noted that like gender identity, sexual orientation is integral to one’s personality, and is a basic aspect of self-determination, dignity and freedom. ((2014) 5 SCC 438

at para: 22.) The proposition that sexual orientation is integral to one's personality and identity was affirmed by the Constitution Bench in *K. S. Puttaswamy & Anr. v. Union of India & Ors.*³⁷

In this regard, it is instructive to refer to the decision of this Court in *S. Khushboo v. Kanniammal and Another*, ((2010) 5 SCC 600.) wherein the following observation was made in the context of the phrase "decency and morality" as it occurs in Article 19(2):

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

36. (2014) 5 SCC 438, at para: 69-72.

37. (2017) 10 SCC 1 para: at 144,145,647.

Therefore, Section 377 cannot be justified as a reasonable restriction under Article 19(2) on the basis of public or societal morality, since it is inherently subjective.³⁸

1.6.4 Right to life and personal liberty and LGBT persons:

Article 21, though couched in negative language, confers on every person the fundamental right to life and personal liberty which has become an inexhaustible source of many other rights.³⁹ These rights are as much available to foreigners as to citizens.⁴⁰ These rights have been given paramount position by our Courts.⁴¹

Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Such procedure established by law must be fair, just and reasonable.⁴²

The right to life and liberty affords protection to every citizen or non-citizen, irrespective of their identity or orientation, without discrimination. The Court has expansively interpreted the terms ‘life’ and ‘personal liberty’ to recognize a panoply of rights under Article 21 of the of the Constitution, so as to comprehend the true scope and contours of the right to life under Article 21. Article 21 is ‘the most precious human right and forms the ark of all other rights’ as held in Francis Coralie mullin v. Administrator v. Union Territory of Delhi and Ors,⁴³ wherein it was noted that the right to life could not be restricted to a mere animal existence, and provided for much more than only physical survival.⁴⁴ Bhagwati J. observed as under:

38. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 17 at 39-41.

39. Bhagwati, J. in Meneka Gandhi v. Union of India, (1978) 1 SCC 248; AIR 1978 SC 597 620.

40. National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742; Chairman Rly. Board v. Chandrima, (2000) 2 SCC465; AIR 2000 SC 988; Amir Hamza v. Union of India, (2003) 12 SCC 213; Noor Mohammad v. Union of India, (2003) 12 SCC 218.

41. Kehar Singh v. Union of India, (1989) 1 SCC 204; AIR 1989 SC 653.

42. Maneka Gandhi v. Union of India and Anr., (1978) 1 SCC 248.

43. (1981) 1 SCC 608.

44. (1981) 1 SCC 608 para: 7.

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

This was re-affirmed by the Constitution bench decision in K. S. Puttaswamy and Anr v. Union of India Ors.⁴⁵ and Common Cause v. Union of India and Anr.⁴⁶

Although dignity is an amorphous concept which is incapable of being defined, it is a core intrinsic value of every human being. Dignity is considered essential for a meaningful existence.⁴⁷

In National Legal Services case, this Court recognized the right of transgender persons to decide their self-identified gender. In the context of the legal rights of transgender persons, this Court held that sexual orientation and gender identity is an integral part of their personality.

The relevant excerpt from Radhakrishnan, J. view is extracted herein below:

“22... Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom...” Sexual orientation is innate to a human being. It is an important attribute of one’s personality and identity. Homosexuality and bisexuality are natural variants of human sexuality. LGBT persons, have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution.

45. (2017) 10 SCC1.

46. (2018) 5 SCC 1 at para: 156, 437,438,488 & 516.

47. Common Cause v. Union of India and Anr., (2018) 5 SCC 1 at para: 437 &438.

They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression.

The following excerpt from the decision of the Constitutional Court of South Africa in National Coalition for Gay and Lesbian Equality and Anr v. Minister of Justice and Ors,⁴⁸ is also instructive in this regard:

“While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or

imagined. It is not for the state to choose or arrange the choice of partner, but for the partners to choose themselves”.⁴⁹

The right to privacy has now been recognized to be an intrinsic part of the right to life and personal liberty under Article 21.⁵⁰

Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of fundamental Rights guaranteed by Articles 14, 15, and 21.⁵¹

The right to privacy is broad-based and pervasive under our Constitution scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and and preserves the sanctity of the private sphere of an individual.⁵²

48. [1998] ZACC 15.

49. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (CRL.) No.76 of 2016, Para: 16 at 25-29.

50. K. S. Puttaswamy and Anr. v. Union of India and Ors. (2017) 10 SCC 1.

51. Ibid. at para: 144, 145, 479 & 647.

52. Ibid. at para: 248, 250, 371 & 403.

The right to privacy is not simply the ‘right to be let alone’ and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice.⁵³ It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.

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

The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality and Anr.* case, noted as under:

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

Just like other fundamental rights, the right to privacy is not an absolute right and is subject to reasonable restrictions. Any restriction on the right to privacy must adhere to the requirements of legality, existence of a legitimate state interest, and proportionality.⁵⁴

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

53. *Ibid.*, at para: 248, 249, 371 & 521.

54. *Ibid.* at para: 325,638 & 645.

1.7 Conclusion:

The framers of the Code, obviously, relying upon the then prevailing sexual mores and the common law offence of buggery, decided to criminalize ‘carnal intercourse against the order of nature’ and to subject its perpetrators to imprisonment for life or for a term up to ten years with fine.⁵⁵ Rationale and propriety of ‘unnatural offences’, including buggery and bestiality, criminalized under section 377 of the Code has always been doubted. Gays and lesbians ‘rights activists have been vocal in assailing it, *inter alia*, on the ground that it unreasonably restricts their sexual autonomy and orientation, brings them stigma, social as well as legal, for their ‘choice’ and subjects them to social ignominy and contempt.⁵⁶

India is a largest democratic and developing country which consists of a minority of transgender people. The rights of the lesbian, gay, bisexual and transgender (LGBT) community, who comprise 7-8% of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed with a stigma.⁵⁷

The Supreme Court's verdict on 6th September 2018, has declared that 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. In penalizing such sexual conduct, the statutory provision violates the Constitutional guarantees of liberty and equality. It denudes members of

55. Section 377 IPC, 1860. The drafters even retained the caption (i.e., 'unnatural offence') of the common law offence for the offence created under section 377 of the Indian Penal Code.

56. K I Vibhute, "Consensual Homosexuality and the Indian Penal Code: Some Reflections on Interplay of Law and Morality (2009) Vol. 51 No.1 Journal of the Indian Law Institution (Jan.-Mar) at 3-4.

57. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (criminal) No. 76 of 2016 Para: 19 at 18.

the LGBT communities of their Constitutional rights to lead fulfilling lives. Section 377 of the Penal Code, in so far as it criminalizes consensual sexual conduct between adults of the same sex, is unconstitutional. Member of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution. Member of the LGBT community are also entitled to the benefit of an equal citizenship, without discrimination and to the equal protection of law.