

## Recognition Of LGBT Rights In India

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**Abstract:** LGBT is initialism that stands for Lesbian, Gay, Bisexual and Transgender. This term came into use as early as in 1990s. The word Lesbian refers to a homosexual woman. The word Gay refers to a homosexual male. The word Bisexual refers to a person who is sexually attracted not exclusively to people of one particular gender. Clauses 361 and 362 (the predecessor provisions to Sec 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said, we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision.

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**Keywords:** LGBT Right, Constitution, India.

### Introduction:

One of the great thinkers of Germany, Johann Wolfgang von Goethe had said, "I am what I am, so take me as I am". Also, Arthur Schopenhauer has stated, "No one can escape from their individuality".

The emphasis on unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. One defines oneself. It's the glorious form of individuality. Identity is pivotal to one's being. Identity is equivalent to divinity.

The cardinal four corners of our monumental constitution are:

1. The overarching ideals of individual autonomy and liberty,
2. Equality against discrimination of any kind,
3. Recognition of identity with dignity and
4. Privacy of human beings.

They form the concrete substratum of our fundamental rights that has eluded certain sections of our society who are still living in the bondage of social norms, prejudiced notions and rigid stereotypes. Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today and it is only when each and every individual is liberated from shackles of such bondage and is able to work towards the full development of his/her personality that we can call ourselves a truly free society.

The natural identity of a person should be treated to be absolutely essential to his being. What nature gives is natural. That part of the personality of a person has to be respected and not looked down upon. Non-acceptance of it by any societal norm or notion and punishment by law on some obsolete idea and

idealism affects the kernel of the identity of an individual.

In a landmark case National Legal Services Authority v. Union of India and Others<sup>1</sup> popularly, called as NALSA case while dwelling upon the status of identity of the transgender Radhakrishnan, J. observed that identity is one the most fundamental aspects of life. It refers to person's intrinsic sense of being male, female or transgender or transsexual person.

He further said, "Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance of functions by medical, surgical or other means and expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self identification as a man, woman, transgender or other identified category."

Also, Sikri J., in his concurring opinion, dwelling upon the rights of transgender, laid down that gender identification is an essential component which is required for enjoying civil rights by the community. It is only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to the said community more meaningfully viz. right to vote, the right to own property, right to marry, the right to claim a formal identity through a

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<sup>1</sup> National Legal Services Authority V. Union Of India And Others (2014) 5 Scc 438

passport and a ration card, a driver's license, right to education, health and so on.

This landmark judgment focuses on inalienable "gender identity" and correctly connects with human rights and constitutionally guaranteed right to life and liberty with dignity.

### **What Is Lgbt?**

LGBT is initialism that stands for Lesbian, Gay, Bisexual and Transgender. This term came into use as early as in 1990s. The word Lesbian refers to a homosexual woman. The word Gay refers to a homosexual male. The word Bisexual refers to a person who is sexually attracted not exclusively to people of one particular gender. The word Transgender refers to a person whose sense of personal identity and gender does not correspond with their birth sex. They exist in all classes, social groups, races, positions and countries regardless of their age or origin.

### **Discrimination Against Lgbt Community:**

History shows that the gay people have always been discriminated in the society whichever part of the world it is. In early times, homosexuals (people who are sexually attracted by other persons of same sex) were considered as criminals even if the sexual intercourse took place between the consenting individuals. Also, homosexuals are often harassed by fellow classmates, coworkers and even by their own family members just for being gay.

Due to this discrimination the homosexuals or LGBT community wanted the government to ban discrimination of people on the basis of their sexual preference. History has shown that even after World War II, there was no effective and powerful gay rights movement. This is because this community is an invisible minority and they don't reveal themselves because of in acceptance of these people by our society. Also, when AIDS became a worldwide problem homosexuals were targeted and were labeled as disease carriers.

### **Lgbt Community And Its Relation With Religion:**

A study of perspective from various religions has shown that all religions of the world are against homosexuality. All the countries which are governed by religious denominations or the society which is deep rooted in religious values will be more adamant & unacceptable of homosexuality.

We Indians have religion running in our blood. We love, hate, sacrifice, devote, give our heart and can also kill in name of religion. In the past, logic was a second parameter for people of India to judge a thing. Media is also playing an important role in awakening

people and bringing them out of the vicious circle of superstitions & blind faith.

Homosexuality is not a religious issue, it's a personal issue connected with a human being, who has a fundamental right to life, liberty, equality, and the pursuit of happiness being granted by our constitution of India and must be respected and upheld in all situations. Thus, as intellectual people we must be able to visualize and solve issue in human rights perspective.

### **Movement For Lgbt Rights In India:**

Clauses 361 and 362 (the predecessor provisions to Sec 377 of the IPC) relate to offences respecting which it is desirable that as little as possible be said, we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision.

In the case of *Fazal Rab Choudary v. State of Bihar*<sup>2</sup>, The court stated that 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.

In the case of *Naz Foundation v. Union of India and others*, the court stated that "In our view, Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual." The decision in *Naz Foundation v. Union of India (Supra)* marks the origin of a very important journey in Indian law. For the first time in Indian judicial history, LGBT persons were looked at not within the frame of criminality or pathology but rather from within the framework of dignity. The shift is itself remarkable one considering the history of the interpretation of Section 377 by the judiciary. But dejectedly, Supreme Court of India stroked down the Delhi High Court Judgment on 11th December, 2013 and restored sec.377 IPC in its original form. In the history of LGBT activism in India, both the judgments are imperative and hence, discussed in detail in this chapter. The aim of this chapter is to traces the evolution and codification of

<sup>2</sup> *Fazal Rab Choudary V. State Of Bihar (1982) 3 Sec 9.*

sodomy law and advocates for and against legalization of homosexuality in India.

### **The Origin Of Recognition Of Lgbt Rights In India:**

The battle begins with Naz Foundation;

In 2001 a petition challenging Section 377 of IPC was filed in Delhi High Court on behalf of the Naz Foundation by lawyers collective. The petition challenged the constitutional validity of section 377 of Indian Penal code and made an argument for section 377 to exclude the criminalization of same-sex activity between consenting adults in private.

The petition in technical terms asks for the statute to be 'read down' to exclude the criminalization of same-sex acts between consenting adults in private so as to limit the use of Section 377 to cases of child sexual abuse.

The petition itself though filed by a single NGO, gradually began to represent the entire community. This process of making 'public interest litigation' began by Lawyers Collective and Naz Foundation hosting a series of meetings on different stages of the petition. Over the next seven years, this process of continuous consultation with the community contributed towards making Section 377 a more politicized issue. The key stages of the petition included.

- the affidavit filed by the Union of India (Home Ministry) which indicated that the Government would stand by the law,
- the affidavit filed by the National AIDS Control Organization (NACO) which in effect said that Section 377 impedes HIV/AIDS efforts,
- the intervention of Joint Action Kannur (JACK, an organization which denied that HIV causes AIDS),
- The intervention of B.P. Singhal (a former BJP Member of Parliament, representing the opinion of the Hindu right wing that homosexuality was against Indian culture) into the petition.

This process of discussion fed back into the community, fuelling feelings of outrage and indignation, hope and despair, and anger and fear, as each stage of the petition unleashed a torrent of emotions. The periodic meetings were thus a way in which the activist community was kept deeply involved in developments and continued to respond to the changing scenario. What particularly tilted the balance was the intervention by B. P. Singhal into the petition. Suddenly the scales seemed to have tilted with Naz appearing increasingly isolated among the cacophony of voices opposing the petition. It seemed

that a range of forces were coming together to protect what the community saw as a patently unjust law.

In a meeting called by Lawyers Collective to discuss this development, it was proposed that some queer groups should also implead themselves within the petition so as to support the petitioner.

It was with the birth of this idea that Voices against 377 (A Delhi-based coalition of child rights, women's rights and LGBT groups) decided to impede themselves within the petition to support the petitioner. The key emphasis of Voices was the rights of LGBT persons while Naz, because of its status as an organization working on HIV/AIDS, would continue to emphasize on how Section 377 impeded HIV/AIDS interventions and hence the right to health of LGBT persons. There were enormous delays spanning a sum total of seven years when the case was initially dismissed by the Delhi High Court, appealed in the Supreme Court and finally sent back to the Delhi High Court.

Initially, the Delhi High Court dismissed the petition just as it was gathering steam on the ground that the petitioner Naz Foundation was not affected by Section 377 and hence had no 'locus standi' to challenge it. However when the dismissal was challenged before the Supreme Court, the Supreme Court sent the case back to the Delhi High Court to be heard expeditiously.

Ever since the petition was filed by Naz Foundation in 2001, it gathered greater public support both in terms of public opinion as well as within the sphere of the courtroom. It was in September 2008 that after a long wait, the matter was finally posted for final arguments before a Bench comprising Chief Justice Shah (C.J. Shah) and Justice Muralidhar (J. Muralidhar) of the Delhi High Court.

### **Final Arguments Before Delhi High Court:**

The petitioner's core argument centered on the right to health and how Section 377 impeded HIV/AIDS interventions. The arguments were substantiated by case studies particularly of Lucknow (2001)<sup>3</sup> when Section 377 was used to target a HIV/AIDS intervention with the men having sex with men (MSM) community. So, Section 377, far from being justified by a compelling state interest, actually was an impediment to achieving the right to health of a particularly vulnerable section of the population. The core argument of voices against 377 was that Section 377 is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the

<sup>3</sup> See: Human Rights Watch Report, 2002, 'Epidemic Of Abuse: Police Harassment Of Hiv/Aids Outreach In India', Vol.14, No. 5(C), P.19 .This Report Was Cited By The Petitioners In Their Written Arguments.

core of the identity of a person, sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away. Further, arguments include that morality is insufficient reason to retain the law in a case like this where you are criminalizing a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep. The core argument of the Government of India astonishingly was that if Section 377 was read down to exclude consenting sex acts between adults in private, it would affect the right to health of society. The Counsel representing the Union of India was the Additional Solicitor General, Mr. P. P. Malhotra. He cited various studies to show that homosexuality caused a very serious health problem. Citing one study he said:

'The sexual activity enjoyed by homosexual results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer.'

Referring to notions of decency and morality, the Additional Solicitor General noted: In our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.

B. P. Singhal made a strong submission that Section 377 was against Indian morality. In the words of his counsel, homosexuality was a perverted kind of sex in the name of thrill, enjoyment and fun, young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drug and disease are the natural concomitants of homosexual activity. He submitted that he 'was on morality, the joint family structure' and that 'we must not import evils from the west'. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.

JACK's counsel submitted that there was no scientific evidence that HIV causes AIDS, that a change in this provision would mean that all marriage laws would have to be changed, and that under Sections 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence.

Opposite counsel then asserted that Naz did not come to court with clean hands and was part of an international network which was using HIV/AIDS to push an agenda.

### **Popular Morality To Constitutional Morality:**

The question of morality has been a central concern around section 377 and was sought to be addressed by various parties in the Naz Foundation case. It was contended by supporters including the union government that abolition of section 377 would destroy society's morals.

The court introduced the concept of constitutional morality and quoted Dr. Ambedkar "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."<sup>4</sup>

They stated "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 subjective 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 and not public morality"<sup>5</sup>.

They added that moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.<sup>6</sup>

What the judges did by articulating the notion of constitutional morality was to change the terms within which homosexual expression had been thought of by the judiciary. The court held that held that 'personal autonomy is inherent in the grounds mentioned in Article 15.'<sup>7</sup>

Another constitutional innovation made by Naz judgment under Article 15 is the pronouncement by the high court that it provides protection from discrimination perpetuated not only by the state (vertical effect) but also by private bodies (horizontal effect). Article 15 (2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public places.

Article 15 (2) itself, which reads: "No citizen shall, on the ground only of religion, race, caste, sex or place of birth or any of them, be subject to any

<sup>4</sup> Naz Foundation V. Union Of India And Others Para 79.

<sup>5</sup> Naz Foundation V. Union Of India And Others Para 79.

<sup>6</sup> Naz Foundation V. Union Of India And Others Para 86.

<sup>7</sup> Naz Foundation V. Union Of India And Others Para 112.



disability, liability, restriction, or condition with regard to

(a) Access to shops, public restaurants, hotels and places of public entertainment; or

(b) The use of wells, tanks, bathing Ghats, roads, and places of public resort maintained wholly or partly by state funds or dedicated to the use of the general public.”<sup>8</sup>

Therefore, the theme of ‘constitutional morality’ thus brings about a paradigm shift in the way the law thinks about LGBT persons. Protecting the rights of LGBT persons is not only about guaranteeing a despised minority their rightful place in the constitutional shade, but it equally speaks to the vision of the kind of country we all want to live in and what it means for the majority. The Naz foundation judgment declaring unconstitutional the Indian penal code provision that penalizes same-sex relationships as ‘an offence against nature’ is inaugural in many ways. It marks at long last an end to what has been named as the ‘sodometrics’ of the Indian penal code and thus invalidates the enactment of Victorian sexual morality into Indian society, law and culture. It expands the frontiers of human liberties and rights. It reaffirms the truth that the promise of justice is best fulfilled when justice begin to listen to the voices of stigmatized persons and people.

It emphasis and understands that the creation and perpetuation of stigma by popular sanctions reinforced by legal ones, destroys many an individual life project and has deathly repercussions for the communities of continually discriminated and disadvantaged people.

Further, emphasizing on right to dignity and right to privacy as a dimension of fundamental right under Article 21 of the constitution held: “In the Indian Constitution, the right to live with dignity and right to privacy both are recognized as dimensions of article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality and this violates article 21 of the constitution. As it stands, section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under article 21 of the constitution.”<sup>9</sup> Court further held that “In our scheme of things, constitutional morality must outweigh the argument of public morality, even it be the majoritarian view”<sup>10</sup>

#### **Brief Substance Of Naz Foundation Case:**

- The Hon’ble court said that the rights to dignity & privacy are within the Right to Life &

<sup>8</sup> Article 15 Of The Constitution Of India

<sup>9</sup> Naz Foundation V. Union Of India And Others Para 48.

<sup>10</sup> Naz Foundation V. Union Of India And Others Para 86.

Personal liberty guaranteed by Article 21 of the Constitution and held that criminalization of consensual gay sex violates these rights.

- The court also held that S.377 is violative of right to equality enshrined in Article 14 of the constitution because it creates an unreasonable classification and targets homosexuals as a class.

- Also, Article 15 forbids discrimination based on certain characteristics including sex. The court said that the word “sex” includes not only biological sex but also sexual orientation & therefore discrimination on the ground of sexual orientation is not permissible under Article 15.

- The court also noted that the right to life under Article 21 includes the right to health and concluded that S.377 is an impediment to public health because it hinders HIV Prevention efforts.

- However, the court did not strike down S.377 as a whole. The section was declared unconstitutional in so far it criminalizes consensual sexual acts of adults in private. The judgment kept intact the provision in so far it applies to non consensual non-vaginal intercourse with minors.

- The court further held that the judgment would hold good until parliament choose to amend the Law.

#### **Re-Criminalization Of Section 377 By The Supreme Court:**

The relief that was given by the Delhi High Court to the LGBT community was short lived. In the case of Suresh Kumar Kaushal and Anr v. Naz Foundation and Ors<sup>11</sup>, Hon’ble Supreme Court of India gave a major setback to LGBT Activism in India, shaking the faith and confidence of many LGBT who are struggling hard for recognition of their identity in Indian legal and social system.

The court stated that though the High court and Supreme Court are empowered to review the constitutional validity of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution. The Court said further that after the adoption of IPC around more than 30 amendments have been passed, the most recent being in 2013 which specifically deals with the sexual offences, a category to which Section 377 IPC belongs.

The 172th Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, Legislature has chosen not to amend the law or revisit it. This shows that the Parliament, which is undoubtedly the representative body of the people of India, has not thought it proper to delete the provision.

<sup>11</sup> (2014) 1 Sc 1.

The court further stated that, “We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level.<sup>12</sup> The court thus held that “We hold that Section 377 of Indian Penal Code doesn’t suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court of Delhi is legally unsustainable.”<sup>13</sup> Court at last said that “While parting with the case, we would like to make it clear that this court has merely pronounced on the view taken by the Delhi High Court on the constitutionality of section 377 IPC and found that the said section doesn’t suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General”.<sup>14</sup>

#### **Recognition Of Lgbt Rights In By The Supreme Court:**

After the disappointing decision of the Supreme Court of India in Suresh Kumar Kaushal & Anr v. Naz Foundation & ors<sup>15</sup> on 11 December 2013, a writ petition was filed in 2016 for declaring right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of the Indian Penal Code to be unconstitutional. It was contended on behalf of petitioners that two-Judge Bench in Suresh Kaushal had been guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality. A contention was also advanced that the interpretation placed in Suresh Kumar (supra) upon Article 21 of the Constitution is extremely narrow and, in fact, the Court has been basically guided by Article 14 of the Constitution. Reliance was placed on the pronouncement in National Legal Services Authority v. Union of India<sup>16</sup> popularly called NALSA case wherein this Court had emphasized on gender identity and sexual orientation. Attention of the Court was also invited to a nine-Judge Bench decision in K.S. Puttaswamy and another v.

Union of India and others<sup>17</sup> wherein the majority, speaking through Chandrachud, J., has opined that sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour or acceptance. Kaul, J, in his concurring opinion, referred to the decision in Mosley v. News Group Newspapers Ltd.<sup>18</sup> to highlight that the emphasis for individual’s freedom to conduct his sex life and personal relationships as he wishes, subject to the permitted exceptions, countervails public interest. Appreciating the said submissions, the three-Judge Bench stated that certain other aspects need to be noted. Section 377 IPC uses the phraseology ‘carnal intercourse against the order of nature.’ The determination of order of nature is not a constant phenomenon. Social morality also changes from age to age. What is natural to one may not be natural to the other but the said natural orientation and choice cannot be allowed to cross the boundaries of law and as the confines of law cannot tamper or curtail the inherent right embedded in an individual under Article 21 of the Constitution. A section of people or individuals who exercise their choice should never remain in a state of fear.

It is necessary to note that the petitioners stated that do not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. The consent between two adults has to be the primary pre-condition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the aspects in a cumulative manner, the court was of view; the decision in Suresh Kumar Kaushal’s case requires re-consideration. The three-Judge Bench expressed the opinion that the issues raised should be answered by a larger Bench and, accordingly, the matter to the larger Bench. The 5 Judges Constitutional Bench discussed at length the various factors relating to the LGBT rights.

#### **The Constitution An Organic Charter Of Progressive Rights:**

The court stated that “A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by this Court in the case of Chief Justice of Andhra Pradesh and others v.

<sup>12</sup> Jagmohan Singh V. State Of U.P (1973) 1 Scc 20.

<sup>13</sup> Jagmohan Singh V. State Of U.P (1973) 1 Scc 20, Para 54.

<sup>14</sup> Jagmohan Singh V. State Of U.P (1973) 1 Scc 20, Para 56.

<sup>15</sup> Suresh Kumar Kaushal & Anr V. Naz Foundation & Ors (2014) 1 Scc 1.

<sup>16</sup> National Legal Services Authority V. Union Of India (2014) 5 Scc 438.

<sup>17</sup> K.S. Puttaswamy And Another V. Union Of India And Others (2017) 10 Scc.

<sup>18</sup> Mosley V. News Group Newspapers Ltd. [2008] Ewhc 1777 (Qb).

L.V.A. Dixitulu and others<sup>19</sup> that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.<sup>20</sup>

In the case of Saurabh Chaudri and others v. Union of India and others,<sup>21</sup> it was observed that "Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding."

The following observations made in the case of Ashok Kumar Gupta and another v. State of U.P. and others<sup>22</sup> further throws light on this role of the courts:-

"Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature.

Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire length and breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'. It is the duty of the courts to realize the constitutional vision of equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago.

### **Transformative Constitutionalism And The Rights Of Lgbt Community:**

The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution. The Court in State of Kerala and another

v. N.M. Thomas and others<sup>23</sup> observed that the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.

The concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.

It is this ability of a Constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the *raison d'etre* for the Constitution.

### **Constitutional Morality And Section 377 Ipc:**

The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism.

In one of the Constituent Assembly Debates, Dr. Ambedkar, explaining the concept of constitutional morality by quoting the Greek historian, George Grote, said that "By constitutional morality, Grote meant a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest

<sup>19</sup> Chief Justice Of Andhra Pradesh And Others V. L.V.A. Dixitulu And Others (1979) 2 Scc 34 35 (2003) 11 Scc 146.

<sup>20</sup> Chief Justice Of Andhra Pradesh And Others V. L.V.A. Dixitulu And Others (1979) 2 Scc 34 35 (2003) 11 Scc 146 Para 82.

<sup>21</sup> Saurabh Chaudri And Others V. Union Of India And Others (2003) 11 Scc 146.

<sup>22</sup> Ashok Kumar Gupta And Another V. State Of U.P. And Others (1997) 5 Scc 201.

<sup>23</sup> State Of Kerala And Another V. N.M. Thomas And Others Air 1976 Sc 490.

that the forms of constitution wall not be less sacred in the eyes of his opponents than his own."<sup>24</sup>

### **Social Morality Vis-À-Vis Constitutional Morality:**

In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher.

The adoption of the Constitution was, in a way, an instrument or agency for achieving constitutional morality and means to discourage the prevalent social morality at that time. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness.

While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then they said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution.

### **Conclusion:**

- The concept of identity discussed in the NALSA case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity. With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one's orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles.

- In Suresh Kumar Kaushal, this Court overturned the decision of the Delhi High Court in Naz Foundation thereby upholding the constitutionality of Section 377 IPC and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible.

- Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The role of the

Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

- The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

- Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

- The right to live with dignity has been recognized as a human right on the international front and by number of precedents of the supreme Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless.

- Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

- After the privacy judgment in Puttaswamy, the right to privacy has been raised to the pedestal of a

<sup>24</sup> Constituent Assembly Debates, Vol. 7 (4th November 1948).



fundamental right. The reasoning in Suresh Kaushal, that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace. The said reasoning in Suresh Kaushal opinion is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitution.

- A cursory reading of both Sections 375 IPC and 377 IPC reveals that although the former Section gives due recognition to the absence of willful and informed consent for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of 'willful and informed consent' to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgender. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words 'subject to any other provision of the IPC'. This indicates that Section 375 IPC is not subject to Section 377 IPC.

- The expression 'against the order of nature' has neither been defined in Section 377 IPC nor in any other provision of the IPC.

- Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in Maneka Gandhi and other later authorities.

- An examination of Section 377 IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 IPC in its present form has resulted in an unwanted collateral effect whereby even 'consensual sexual acts', which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

- Section 377 IPC, so far as it criminalizes even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious

to the society. Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in Shayara Bano, Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

- An examination of Section 377 IPC on the anvil of Article 19(1) (a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults is it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1) (a) of the Constitution.

- Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), and cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC.

- The decision in Suresh Kaushal, not being in consonance with what we have stated hereinabove, is overruled.

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