

## **Sexuality, Law and Constitution Beyond Gender Binary in India: Judicial Approach**

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### ***Abstract***

*Across the world, discriminatory laws made many years ago continue to affect lives of many people, criminalizing same sex relations and failing to protect women and girls..... I am all too aware that these laws were often put in place by my own country. They were wrong then, and they are wrong now. As the UK's Prime Minister, I deeply regret both the fact that such laws were introduced and the legacy of discrimination, violence and even death that persists today.<sup>2</sup>*

**Keywords:** Rights of LGBTQ, Law and Constitution

### **I. Prefatory Statement**

Rule of Law or Rule by Law..?

Regret by Theresa May for historic wrongs of criminalizing natural choices and fear of state will certainly fall in later. Freedom from fear and want are the hallmark of civilized state in post-World War era. Equality of status and equal protection of laws are certainly inalienably attached to a dignified life. No modern state can afford to deprive of the individuals from these highest aspirations of the humanity. Social contract theory as documented after 2<sup>nd</sup> World War in the form of UDHR recognizes freedom, justice and peace as the foundations of the world. Furthermore, it unambiguously underscores the inter-relationship among and between freedom of individuals, standards of life, social progress and peace.

Designed on the foundations of this edifice of human rights, the Constitution of India also recognizes equality before law to all individuals without any

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<sup>2</sup>The Guardian, Mar.17,2018.

discrimination on the grounds of race, religion, caste, place of birth or sex etc. Though the Constitution stood the test of time by serving the people of India during last seventy years yet the failure in infusing life in the letters of the script of the Constitution turned most of the constitutional promises into rhetoric. Skepticism emerged out of the gap between constitutional aspirations, vision and philosophy on one side and ground realities on other. Failure to realize promises enshrined in the Preamble became subject matter of semantics for academics studies. Taking up one of the contemporary aspects of exclusion of individuals beyond the binaries of gender [Lesbian, Gay, Bi-sexual, Trans-gender community (LGBTc), also addressed as homosexuals,<sup>3</sup>] this contribution aims at unfolding layers of principles expounded and elaborated by the Constitutional Bench of the Supreme Court of India (SUPREME COURT OF INDIA) in *Navtej Singh Johar v. Union of India*.<sup>4</sup>(*Navtej Singh's*)

This judgment being a *magnum opus* infused fresh insights by recognizing individuality within the domain of right to life and dignity guaranteed under Article 21 of the Constitution. Individuality is an innate and natural aspect of one's life and personality. The society should have minimal intervention in one's individualistic affairs, intimate choices and sexual orientation. Addressing the challenges of constant persecution through unequal treatment, disparities, oppression, rule of law and marginalization, the SUPREME COURT OF INDIA attempted to bring LGBTc to mainstream by undoing the rhetoric. The judgment is not less than a Bill of Right for individuals beyond gender binaries to restrain the brutal majoritarian forces. It marks the dawn of the new era recognizing the rights of the LGBTs to equal opportunities as the part of mainstream to live in harmony with others and assure dignity.

In view of above, this contribution intends to underscore the inalienability of sexuality from right to privacy and dignity. The researcher has ventured to

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<sup>3</sup> "...it encompasses a variety of phenomena related to a same-sex sexual orientation. Although the definition of the term often focuses mainly on sexual acts and attractions between persons of same biological sex, homosexuality also refers to patters of same sex romantic and emotional bonding, identities and communities based on same sex desires and relationships, and the shared cultures created by those communities". Gregory M. Herek, *Homosexuality 1* (Department of Psychology, University of California, 1999).

<sup>4</sup> AIR 2018 SC 4321.

distinguish constitutional morality from social morality. Furthermore, an attempt has been made to examine *raison d'être* of decriminalization of consensual acts of intimacy between LGBTc on the anvil of constitutional ethos in Indian scenario. The forthcoming study is not exhaustive but inclusive. The scope of this study has been confined to jurisprudential aspects of the issue covering kinds of morality, distinction between constitutional and social morality, theories of rights, multiple aspects of privacy, obligation of state to decriminalize and be inclusive.

## II. Sexuality as Personhood v. Moral Dilemmas

I am what I am, so take me as I am.<sup>5</sup>

Individuality is essence of life. Denial of self-expression and natural identity is indispensable part of one's life. Sexual Orientation is innate to human being and important attribute of one's personality and identity. Human sexuality has two natural variants – homosexuality and bi-sexuality. Important thing to understand is that to be a homosexual or bisexual- is not a matter of choice as these are natural traits. Therefore, LGBTs who are placed in category of homosexual are at part with bisexual entitled to complete autonomy over their innate choices and intimate desires concerning the personal domain of their life. They deserve equal freedom to choose their partners.

A glance at the process of criminalizing the homosexuality reveals that in the first half of 20<sup>th</sup> century, homosexuality was considered as a problem of psychopathology or developmental arrest.<sup>6</sup> It was assumed that usually child grows as a heterosexual adult and homosexuality was the outcome of arrested development.<sup>7</sup> Thus, homosexuality was treated as a disorder or mental illness, which was meted out with social ostracism and revulsion.<sup>8</sup> Gradually, with the development of scientific studies and research, homosexuality started to be labelled as a complex subject but inherent, normal and natural variant of human sexuality.

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<sup>5</sup> Navtej Singh Johar (2018) p. 4337.

<sup>6</sup> Report: The Committee on Homosexual Offences and Prostitution, 1957. 30.

<sup>7</sup> Benjamin J. Sadock et al, Kaplan and Sadock's Comprehensive Textbook of Psychiatry 2060-89 (9<sup>th</sup> Ed. 2009).

<sup>8</sup> supra note 3. 4513, 516.

On the eve of completion of seven decades of commencement of the Constitution of India, though small yet significant part of Indian masses feels deprived and fearful of disclosing their sexual identity. The script of the Constitution certainly incorporates the dictum *includes all excludes none*<sup>9</sup>. The language of the preamble envisioning equality of status and opportunity, liberty of thought, speech and expression dignity of individual and furthermore various rights recognized in part III certainly treats all persons equal in terms of sexuality. S. 377 of IPC criminalizing consensual homosexuality is a pre-constitution law. It's sustainability in post-constitutional era by virtue of saving clause of Art. 372 resulted into its conflict with the constitutional spirit of rule of law.<sup>10</sup> Law itself deprived of LGBTQ and also HIV infected people of their right to health, medical assistance, equal opportunities etc. marginalized them. Rule by Law eclipsed freedom from fear and want. Narrow interpretation of right to life and personal liberty, right to privacy and right to live with dignity resulting into the sufferings of the individuals of LGBTQ presented a serious challenge before the administration of justice. The Court took note of following real instance of persecution and expulsion culminating into feel of dejection.<sup>11</sup>

Social realities underlying above dejection are more aggravated in the form of verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces for consummation resulting into denial of the self and the obliterating the identities as well. An egalitarian society accommodates diversity of linguistics, culture and ideologies- liberal and conservative as well. The people of stereotypes mindset start moral policing and unnecessary interferes in the personal life of others. Compromising of dignity in such an atmosphere of constant exclusion turns society into open prison. Foucault supports 'a state of conSupreme Court of Indiaous and permanent visibility that assures the automatic functioning of power'.<sup>12</sup> Endorsing the effects of such a law in

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<sup>9</sup>Arts. 14, 15(1), 16, 17 21-A, 25, 26, 29, 30 of the Constitution of India.

<sup>10</sup> Section 377 of Indian Penal Code.

<sup>11</sup> Part of Written Submission by Voice Against S. 377, W.P. (CRL) No. 76/2016 p. 18.

<sup>12</sup> Michel Foucault, *Discipline and Punish: the Birth of the Prison* 201 (Pantheon, 1977).

realities, Ryan Godman opines that private individuals also start exercising policing power to control LGBTs without any authorization by the State.<sup>13</sup> Henceforth, *prima facie* S.377 appears neutral and loses its neutrality by criminalizing not a natural act but a distinct sense of identities. These identities are certainly none other than LGBTs. Alternatives provided by the Constitution to draw the curtain to cover the law of British era were as under:

- a. the Parliament to repeal old laws;<sup>14</sup>
- b. the President to adapt, modify an existing law by Order u/a 372(2) to bring such law in consistence with the Constitution;<sup>15</sup>
- c. the judiciary to resolve the quandary.

Following issues were serving as blow on constitutional governance in India since its inception, although the judiciary has attempted to resolve from time to time:<sup>16</sup>

***Rights and Freedoms* Vs. S. 377**

(14)	Equality
[19(1)(a)(c)]	Expression & Association
(21)	Fear of state action & persecution
	Reputation & personal security
	Shelter, privacy & Individuality
	Dignity

With the dawn of new millennium, the Millennial<sup>17</sup> and Post Millennial<sup>18</sup> Generations witnessed transition in each domain of life – social, economic, geographical, technology and so on. The revolution in ICT sector turned the whole globe into a single village and a paradigm shift was noticed. Theories in

<sup>13</sup> Ryan Goodman, 'Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptic', 89 California Law Review 688(2001).

<sup>14</sup> supra note 8. Schedule VII, Arts 245-256.

<sup>15</sup> Id, Arts 372 (2).

<sup>16</sup> Naz Foundation v. Government of NCT of Delhi and Others filed in 2001 W.P(C) No. 7455 and decided on 2<sup>nd</sup> July 2009, Suresh Kumar Koushal and others v. Union of India AIR 2014 SC 563.

<sup>17</sup> Millennial Generation: Born between 1981-96 (Gen Y).

<sup>18</sup> Post-Millennial Generation: Born between 1996 onwards (Gen Z).

each sphere of life underwent the different phases resulting into diversity of opinions and multiplying the range of ideas. Life of individuals- whether personal, professional or social was not immune from the effects of this rapid transition.

With the passage of time, in context of personhood, public perception also divided into opposing homosexuality is immoral and against nature and favouring autonomy of sexual desires as personal. Ostracizing of sexuality is deprivation of personhood. Here it would not be out of place to mention that seeds of this conundrum of gap in thoughts lies in flexible and dynamic socio-political forces. These forces keep on changing very swiftly in comparison to the mindset of the people. Therefore, a non-receptive part of the society views changes in the social values, habits, life style as negative and mutates stereotype mindset while people with flexible and receptive mindset adapts easily.

### III. International Perspectives on Sexual Orientation

UDHR envisions dignity as an equal and inalienable right of all the members of the human family.<sup>19</sup> Art. 2 sets a benchmark for states to ensure availability of rights and freedoms mentioned under the Declaration without any distinction on any ground covering sex in its fold. Term 'sex' has been used as prohibited ground of distinction making any distinction unlawful under International Law.<sup>20</sup> Further, WHO has removed homosexuality from the list of diseases in International Classification of Diseases.<sup>21</sup>

In 1957, Wolfenden Committee Report highlighting misuse of anti-sodomy laws as a means of blackmailing homosexuals resulted into passing of Sexual Offences Act, 1967.<sup>22</sup>

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<sup>19</sup> UDHR, 1948.

<sup>20</sup> Id.

<sup>21</sup> The ICD- 10 Classification of mental and behavioral disorders: clinical descriptions and diagnostic guidelines, WHO, Geneva, 1992, <http://www.who.int/classifications/icd/en/bluebook.pdf>. Mar. 20, 2020.

<sup>22</sup> The Report of Departmental Committee on Homosexual Offences and Prostitution, 1957.

Additionally, the Courts on the status of LGBT and their mainstreaming in United States,<sup>23</sup> Canada,<sup>24</sup> South Africa,<sup>25</sup> U.K.,<sup>26</sup> Phillipines<sup>27</sup> and other jurisdictions<sup>28</sup> have also been active in curbing criminalization of homosexuality. These legal systems endorsed that choice to have intimate human relationship should be protected against social opprobrium and unfair intrusion by the state.

Yogyakarta principles, 2006 and 2017 documented by a special group of international human rights experts to prepare framework concerning sexual orientation and gender identity deserve special mention here. These principles have been taken into account by the SUPREME COURT OF INDIA in *NavtejSingh's* Case. Basically, these are the principles adopted by above distinguished group and encapsulate right to the universal enjoyment of human rights, right to equality and non-discrimination, right to recognition before the law, right to life, protection against medical abuses, freedom of opinion and expression.<sup>29</sup>

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<sup>23</sup> Obergefell et. al v. Hodges, Director, Ohio Department of Health 576 US (2015), Prince Waterhouse v. Hopkins 490 US 228 (1989), Kimberly Hively v. Ivy Tech Community College of Indiana 830 F.3d. (2016), Baldwin v. Foxx EEOC App. No. 0120133080 2015 WL 4397641, Roberts v. US Jaycees 468 US 609, Lawrence v. Texas 539 US 558.

<sup>24</sup> DelwinVriend and Others v. The Queen, Alberta and Others 1998 (1) SCR 493, Egan v. Canada (1995) 2 SCR 513,

<sup>25</sup> National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs 2000 (1) BCLR 39.

<sup>26</sup> Euan Sutherland v. U.K. 2001 ECHR 234.

<sup>27</sup> Ang Ladlad LGBT Party v. Commission of Elections GR No. 190582 (2010)

<sup>28</sup> Trinidad and Tobago Judge rules homophobia laws unconstitutional, <https://www.theguardian.com/world/2018/apr/13/trinidad-and-tobago-sexual-offences-act-ruled-unconstitutional> visited on 21.3.2020, see also <https://www.theguardian.com/world/2018/apr/07/caribbean-anti-gay-law-ruling-high-court-trinidad-tobago> visited on Mar. 21,2020, **Nigeria:**<https://www.theguardian.com/globaldevelopment/2018/mar/30/blackmail-prejudice-persecution-gay-rights-nigeria> visited on Mar. 21,2020, **New Zealand**<https://www.theguardian.com/world/2018/mar/19/new-zealand-gay-rights-activists-demand-compensation-over-convictions> visited on Mar. 21,2020.

<sup>29</sup> Available at <https://yogyakartaprinciples.org/>, Mar. 21,2020.

Homosexuality has been decriminalized in 124 countries.<sup>30</sup> The survey also mentioned that same sex couples have been allowed to marry and enter into partnership in total 24 and 28 countries respectively. Another group of nations have passed legislations to protect the interests of LGBTc against discrimination.

The U.K. once exponent of criminalizing homosexuality as colonial power itself passed a law to prohibit discriminatory treatment in employment, education, social protection and housing on ground of sexual orientation.<sup>31</sup> In 36 Commonwealth member states, homosexuality is still illegal and nine nations prescribe maximum penalty of life imprisonment. To quote:

..... the UK stands ready to support any Commonwealth member wanting to reform outdated legislation that makes such discrimination possible.

She assured to extend support to any Commonwealth member in bringing about legal reforms. There are 74 countries including India, criminalize same sex sexual conduct till the year, 2017.<sup>32</sup>

In recent years, the Human Rights Committee (HRC) of UN General Assembly (UNGA) has also been proactively addressing the issue of individual choices in context of sexual orientation. In its 34<sup>33</sup>, 42<sup>34</sup> and subsequent meetings<sup>35</sup>, expressing grave concern at acts of violence and discrimination, it considered the report to revise national legal systems to hold perpetrators accountable, to take protective measures against torture, cruel, inhuman or degrading treatment

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<sup>30</sup> Aengus Carrol and Lucas Ramon Mendos, "State Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalization, Protection and Recognition", 12 ILGA, 26-36(2017).

<sup>31</sup> The Guardian, Mar.17,2018, supra note 1.

<sup>32</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association, Sexual Orientation Laws of the World, (2017).

<sup>33</sup> UN Resolution (HRC), Human rights, sexual orientation and gender identity A/HRC/RES/17/19. Adopted on 17 June 2011.

<sup>34</sup> UN Resolution (HRC), Human rights, sexual orientation and gender identity A/HRC/RES/27/32. Adopted on 26 Sep. 2014.

<sup>35</sup> Report: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity Pursuant to A/HRC/19/41. Adopted on 17 Nov. 2011.

on grounds of sexual orientation and gender identity, ensure uninterrupted asylum, repealing laws criminalizing homosexuality for engaging in consensual same sex sexual conduct and harmonize the age of consent for heterosexual and homosexual conduct, ensure that criminal laws are not used to harass or detain people based on their sexuality or gender identity and expression, enact comprehensive anti-discrimination legislation covering prohibition on ground of sexual orientation, freedom of speech and expression of LGBTs, capacity building programmes for sensitization for police, prison, border guards, immigration officials and legally recognize LGBTs and trans-genders by the OHCHR for Human Rights.<sup>36</sup> Subsequently in 2016, the HRC reiterated its resolution and denounced the violence and discrimination based on sexual orientation and gender identity.<sup>37</sup> To follow up the impact of resolutions by the member nations, the UN appointed independent expert on sexual orientation and gender identity for sensitizing and ensuring proper implementation at national levels. The OHCHR issued **a framework document – a must read** for government officials, parliamentarians, judges, officials of NHRCs, human rights defenders to understand fundamental human rights of LGBT and intersex people.<sup>38</sup> The recent report depicts that the exploitation, marginalization and exclusion of LGBT and gender diverse persons in education, health care, housing, employment and occupation has not ceased yet.<sup>39</sup>

The Report of the OHCHR highlighted that there are three types of constitutional scriptures wherein sexual orientation have been covered either directly or indirectly. These can be classified as under:

- a. Explicit constitutional guarantees: Bolivia, Ecuador, Portugal, South Africa, Sweden and Switzerland.
- b. Explicit Guarantees but in the Provincial Constitutions: Argentina, Brazil, British Virgin Islands, Germany and Kosovo.
- c. General Language on non-discrimination interpreted by judiciary to treat LGBTc Equal to others: Canada, Colombia, Hong Kong, China, India and Nepal.

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<sup>36</sup> Id, p 25.

<sup>37</sup> A/HRC/RES/32/2. Adopted on 30 June, 2016.

<sup>38</sup> UN Office of Human Rights Commissioner, Living Free and Equal, (2016).

<sup>39</sup> A/74/181 adopted on 17 July 2019.

#### **IV. National Perspectives on Sexual Orientation**

The report referred above highlighted another angle of persecution of LGBTs in India in context of 'honour killings'.<sup>40</sup> It spelt out India as one of the countries having repealed law criminalizing homosexual acts between consenting adults.<sup>41</sup> *This fact raises doubt on the authenticity of this Report as Indian Parliament has not repealed S. 377 so far although the SUPREME COURT OF INDIA has declared law criminalizing homosexuality as unconstitutional.* However, it exposed ground realities of Indian society that the act of declaring criminalization as unconstitutional by the court could not improve the situation. The LGBTs were still being deterred by health care institutions and personnel from seeking services affecting adversely to handle HIV/AIDS and other health concerns.<sup>42</sup>

##### **(a) Sexual Orientation: Inherent and Innate Sense of Identity**

*Homosexuality refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It implies to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex.*<sup>43</sup> The SUPREME COURT OF INDIA relied on the findings of American Psychological Association and referred that, sexual orientation is a natural condition and attraction towards the same sex or opposite sex are both naturally equal, the only different being that the same sex attraction arises in far lesser numbers. Homosexuality is a natural variant of human sexuality like heterosexuality.<sup>44</sup>

*In the beginning of 20<sup>th</sup> century, it was considered as disorder. The different studies revealed that manifestation of sexual attraction towards person of same*

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<sup>40</sup> Report of Commissioner of UN for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, para 25, 9 (2016-17).

<sup>41</sup> Id., para 43, 14.

<sup>42</sup> Id., para 56, 18.

<sup>43</sup> KK Gulia and HN Mallick, 'Homosexuality: a Dilemma in Discourse', 54, Indian Journal of Physiology and Pharmacology, 5-8 (2010).

<sup>44</sup> Lawrence v. Texas 529 U.S. 558 (2003)

*or opposite sex is a natural condition.*<sup>45</sup> *Indian Psychiatric Society has also expressed that sexual orientation is not a psychiatric disorder.*<sup>46</sup>

Additionally, S. 3 of the Mental Healthcare Act, 2017 also introduces a new ground of prohibition i.e. sexual orientation against discrimination in providing access to mental health care unambiguously.<sup>47</sup>

### **(b) Privacy and Autonomy**

Sexual relations, choices, inclinations, bonding all are in fact the issues falling within the domain of privacy, in other words, individuality. 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....<sup>48</sup> Rights of LGBTc are not so called rights but are real rights founded on sound constitutional ethos. These rights dwell in privacy and dignity. Sexual orientation is an essential component of identity. Thus, it is imperative to widen the scope of the right to privacy to incorporate right to 'sexual privacy' to protect the rights of sexual minorities.

It must be founded on the right to autonomy of a free individual and must capture the right of persons of the community to navigate public places on their own terms, free from state interference.<sup>49</sup>

The SUPREME COURT OF INDIA further underscored that right to privacy under Indian Constitution is quite pervasive covering spatial privacy, decisional

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<sup>45</sup> APA, Diagnostic and Statistics Manual of Psychological Disorders, 1973.

<sup>46</sup> Indian Psychiatry Society: 'Position Statement on Homosexuality', IPS/statement/02/072018/available at [http://www.indianpsychiatricsociety.org/upload\\_images/imp\\_download\\_files/1531125054\\_1.pdf](http://www.indianpsychiatricsociety.org/upload_images/imp_download_files/1531125054_1.pdf) visited on 21.3.2020; see also T.S.Sathyanarayana Rao and K.S. Jacob, 'Homosexuality and India', Indian J. Psychiatry, Jan-March: 54 (a) 1-3(2012), Gurvinder Kalra, 'Breaking the ice: IJP on homosexuality', Indian J. Psychiatry, July-Sep. 54(d) 299-300 (2012).

<sup>47</sup> Mental Healthcare Act, 2017 S. 18 (1), (2) read with S. 21(1) (a).

<sup>48</sup> K.S.PuttaSwamy and Another v. Union of India and Ors. (2018) 5 SCC 1, NALSA v. Union of India and Others AIR 2014 SC 1863

<sup>49</sup> Id., para 297.

privacy and privacy of choice.<sup>50</sup> Emanating from the 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.<sup>51</sup>

**(c) Human Dignity-Inseparable constituent of Personality**

Dignity, though difficult to define exactly, has been observed as indispensable part of right to life.<sup>52</sup> The SUPREME COURT OF INDIA preferred to deem it as intrinsic value of every human and the meaningful existence.<sup>53</sup> Meaning of ‘dignity’ against the backdrop can be perceived as liberty to self-determine, self-expression, autonomy, bodily integrity, one’s sexual inclinations.<sup>54</sup> The inter-relationship among above all establishes that a person if becomes homosexual (LGBTc), that person does not cease to be an individual. One’s individuality does not perish. Criminalization of one’s sexual orientation by the society affects one’s mental status as well as one’s family, profession, social and educational life. Absence of dignity for a few even in a minority may certainly, sooner or later, create a chaos and disorder in a society. It may backfire by dividing the society into have and have nots ultimately threat to ideal of fraternity. Civilized societies must inevitably ensure one’s dignity by providing them freedom to exercise their choices within reasonable restraints. Discrimination on the ground of sexual orientation is jural opposite of dignity and self-respect of the individual. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity and dignity of a person. The social values and morals have their space provided consonant with constitutional ethos.

**(d) Decriminalization of S. 377: Juridical Analysis**

Criminalization of homosexuality has its roots in British history. Revisiting historical approaches towards Greco-Roman times, emergence of Christianity

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<sup>50</sup> Id., para 248,249,371 & 521.

<sup>51</sup> supra note 3. p. 121 para 412.

<sup>52</sup> Francis Coralie Mullin v. Administrator, UT of Delhi AIR 1981 SC 746.

<sup>53</sup> K.S.PuttaSwamy and Another v. Union of India and Ors. (2018) 5 SCC 1, Common Cause v. Union of India and Another AIR 2018 SC 1665.

<sup>54</sup> NALSA v. Union of India and Others AIR 2014 SC 1863, Shakti Vahini v. Union of India and Others (2018) 7 SCC 192, Shafin Jahan v. Asokan K.M. AIR 2018 SC 1933.

and medieval times can help to understand the mindset behind criminalization of homosexuality.<sup>55</sup> Much clarity can be gained from position of Catholic Church.<sup>56</sup> Christianity opposed homosexuality being unnatural. Theologian Thomas Aquinas observed that unnatural sexual practice of homosexuality is having its root causes in the corruption of the soul and distortion of right reason.<sup>57</sup> He opined that unisexual lust is unnatural crime.<sup>58</sup>

Aquinas as consequentialist examines the validity of sexual intercourse on the basis of outcome. Procreation was the ultimate purpose of sexual intercourse.<sup>59</sup> Same sex relations not resulting into procreation were addressed by him contrary to nature. Usually, vaginal intercourse is potentially procreative sex act. Thus, oral or anal mode of sex between hetero or homosexual against nature. The social perception arose from the dominance of church that all methods of sexual processes by the use of the organs other than natural - penis to vagina are unnatural.

Now if one evaluates the legitimacy of sexual acts on the basis of consequence of procreation, sexual intimacy between same sexes are forbidden. However, if the purpose is not to procreate but to exercising personal choice, loving and being loved, bonding and inclinations towards the same sex, these should not be treated either harmful or immoral. These feelings are also natural

Continuation of homosexuality as crime in 21<sup>st</sup> century demanded fresh insights. An act to be punishable needs to be tested on the yardstick of 'Harm Principle'. Relying on Mill, the Supreme Court of India held that the state is authorised to intervene in private life provided harm is caused to others. Power of the civilized state can be used to prevent one from causing harm to others.<sup>60</sup> So if

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<sup>55</sup> Julian Carter, 'On Mother-Love: History, Queer Theory, and Non-lesbian Identity' 14 *Journal of History of Sexuality* 107-138 (2005).

<sup>56</sup> John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, (Chicago, The University of Chicago Press 1980).

<sup>57</sup> *Summa Theologiae* Ip 2p, q. 31 a 7.

<sup>58</sup> *Summa Theologiae* Ip 2p, q 94 a 3.

<sup>59</sup> *Summa Theologiae* Supp. 3, q 65 a 3.

<sup>60</sup> Mark Strasser, 'Lawrence, Mill, and Same Sex Relationships: on Values, Valuing and the Constitution' 15 *Southern California InterdiSupreme Court of Indiaplinary Law Journal* (2006).

Mill's theory is applied in context of homosexuality, it is a disgust not the harm caused to others. It does not authorize one to govern or dictate others. From Bentham's point of view, 'if homosexuality is viewed outside the realms of morality and religion, is neutral behavior which gives the participants pleasure and does not cause pain to anyone else'. Such acts cannot constitute offence and no merit in punishing at all.<sup>61</sup> He laid down a triple layers test to examine validity of sodomy laws:

- i. any direct harm to another person;
- ii. any harm to the stability and security of the society;
- iii. any danger to society.

The answer is in negative. No harm is cause by the act of sodomy. It just produces pleasure and pleasure is by their perverted taste. Both the individuals are willing. They neither harm any individual nor disturb the peace of the society. The ultimate purpose of law is to augment the total happiness of the community and excluding anyone from happiness by punishing through law is itself an evil.<sup>62</sup> To sum up the issue of criminalization, it is apt to quote Aristotle:

Justice in relation to the person is defined in two ways. For it is defined either in relation to the community or one of its members what one should or should not do. Accordingly, it is possible to perform just and unjust act in two ways, either towards a defined individual or towards the community.<sup>63</sup>

Right to privacy has been recognized in post-world war regime while criminalization of homosexuality is injected in colonies during British Rule.<sup>64</sup> Sexual urge and consent are absolutely individualistic phenomenon. The expression 'Order of nature' used in S. 377 is used and applied by the social and religious analogy. Therefore, conflict between privacy and socio-theological analogies will certainly be resolved in modern world in favour of the former. As endorsed by Nietzsche to extend protection to natural inclinations:

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<sup>61</sup> Jeremy Bentham, 'Offences against One's Self', <http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/>, Mar. 21, 2020.

<sup>62</sup> Jeremy Bentham, 'An Introduction to the Principles of Moral and Legislation, The Liberty of Economics and Liberty', Chapter XII (Oxford: Clarendon Press, 1907).

<sup>63</sup> H.C. Lawson Tancred, *The Art of Rhetoric/ Aristotle*, (Penguin 2004).

<sup>64</sup> *The Guardian*, Mar.17,2018, Supra note 1.

*Same sex love is not a mockery of nature, but rather nature at play...*<sup>65</sup>

Finding no reason to sustain criminalization of homosexuality, the SUPREME COURT OF INDIA resolved in favour of the Article 21 to give paramount importance to dignity of life by restoring privacy and autonomy.

#### **V. Constitutional Morality v. Social Morality**

Arvind P. Datar, representing the petitioner, submitted that the Supreme Court India in *Suresh Koushal* was guided by social morality leading on majoritarian perception. He submitted that the issues instead had to be debated and examined on the anvil of constitutional morality. The Supreme Court India while determining the dilemma between constitutional morality and social morality resolved that in the matters concerning privacy, dignity, anti-discrimination approaches against marginalization and deprivation of basic human rights of sexual minority, social morality has to yield to constitutional morality. The constitutional governance in India kept certain rights of individuals and 'discrete and insular minorities' beyond the reach of majoritarian governments.<sup>66</sup> These rights should be equally available to all to avoid rhetoric. Rights of an individual ought not to be persecuted by dictates or social prejudices. Social transformation envisioned by the framers of the Constitution can become a reality only if all the cultural, linguistic, religious and sex minorities have constitutional safeguards against the tyranny of the majority. Hart cautioned against imposition of majoritarian morals and opined that popular morality or overwhelming majority should not always be marked by widespread 'intolerance, indignation and disgust'<sup>67</sup> Democratic principles treating all equal should weigh.<sup>68</sup>

The Supreme Court of India removed the fallacies arising out of the unclear difference between social morality and constitutional morality. Social morality is basically contextualized in past and existing factors while constitutional morality is construed not only in context of past and present but futuristic vision also. Societal values and moral ideas are dynamic in nature. It certainly laid a

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<sup>65</sup> James Daley, *Great Speeches on Gay Rights* 24-30 (Dover Publications, 2010).

<sup>66</sup> The Constitution of India, Arts. 29-30.

<sup>67</sup> Peter August Bittlinger, *Government enforcement of morality: a critical analysis of the Devlin – Hart Controversy*, Doctoral Dissertation, 69-70, 1896- February 2014 (1975).

<sup>68</sup>Supra note 59.

dictum that in case of friction between constitutional morality and social morality, constitutional morality will prevail. Since social morality by nature is scattered due to variable socio-economic and political forces at its foundations. On the other hand, constitutional morality is clearly spelt out and overshadows social morality resulting into withering away the differences. Gradually it becomes part and parcel of the life of the stakeholders provided the constitutional morality is resilient and can mitigate the friction between organic and inorganic forces. Rapid transformation demands timely customization of law and adaptation by institutions of justice. In such a situation, the identification of gap between kinds of morality is very significant to ensure sync in society, morality, law and justice. Administration of justice should respond to the needs of social values, goals and policies to fill up the vacuum by interpreting law in compatible way.

#### **VI. Transformative Constitutionalism- Includes All Excludes None**

The beauty of Indian Constitution is that its spirit envisions to include all exclude none.<sup>69</sup> It is adequately receptive and adaptable to organic socio-politic forces. Besides, it gives due significance to minorities and accommodates pluralism. The foundational principles of the Indian Constitution severed the virus of S.377 to extend inalienable rights beyond gender binaries. Furthermore, the societal notions of heteronormativity should also not be permitted to stand in the way of enjoying the fundamental freedoms by the stakeholders. By discontinuing the perpetuation of injustices and opprobrium of sexual minorities, the Supreme Court of India realized the dream of 'Transitional Justice' by drawing the curtain on the past.

#### **VII. Conclusion**

The upshot of aforesaid discussion is that the Supreme Court of India being the crusader delivered this judgment which cannot be considered less than a Bill of Rights of LGBT. Understanding the limitations of other two organs of the government and giving them due respect, it gave paramount importance to constitutional morality. It acknowledged the prolific observation of Lord

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<sup>69</sup>Arts. 14, 15(1), 16, 17 21-A, 25, 26, 29, 30 of the Constitution of India.

Neuberger lightening the path on its adventure to recognize rights of LGBTQ. To quote Lord Neuberger-

We must always remember that Parliament has democratic legitimacy-but that has disadvantages as well as advantages. The need to offer oneself for reelection sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity.<sup>70</sup>

The respondents and intervenors contended that revisiting this matter shall present court as a counter-majoritarian institution. Rejecting this contention, the Court observed that being a watchdog of constitutional morality, it cannot turn a blind eye towards its responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.<sup>71</sup>

Resisting temptation to move on linear tracks appeasing majority unlike other two organs, the Supreme Court of India shown its courage and untiring commitment to restore faith of the stakeholders in the Constitution. It decoded the chores (script of the constitution and legal instruments) and paused on the language to continue its momentum from *volkspele*jurisprudence to *toyitoyi*jurisprudence.<sup>72</sup> Finally, it is submitted that in contemporary civilized society looking at achieve Agenda for Sustainable Development, 2030 based on inclusive participation and governance, the SUPREME COURT OF INDIA has performed its constitutional obligation to realize the rights progressively. Going beyond the gender binaries, it unfolded a new chapter of constitutional governance to apply balm on the sufferings and pain of millions for sustaining transformative constitutionalism.

### VIII. Further Areas of Research

Above contribution was confined to the judicial approach beyond gender binaries in Indian context. Jurisprudential analysis of various foundational concepts directly and indirectly related with the theme has been made through

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<sup>70</sup> Lord Neuberger, UK Supreme Court decisions on Private and Commercial Law: The role of Public Policy and Public Interest, Centre for Commercial Studies Conference (2015).

<sup>71</sup> Navtej Singh (Para 499).

<sup>72</sup> Van der Walt, "Dancing with Codes-Protecting, developing and deconstructing property rights in a constitutional state, 118 (2) J.S.Apr.L. 258 (2001).

this paper. Therefore, now it is important to conduct a survey of public perception towards the homosexuality and LGBTQ for evaluation of impact of the judgment of Supreme Court of India. The problem with Indian governance is that despite of the efforts of the judiciary to protect and enforce human rights in the past, the impact of the decisions remain poor and is not shown on the ground level. The guidelines issued in D.K. Basu, Vishakha, M.C. Mehta and numerous other cases met the similar fate and remain beyond the knowledge of the stakeholders. However, the information society is expected to show some different results. Therefore, evaluation of awareness of people living across the nation regarding the rights of LGBT on the basis of empirical studies can be further area of research. Without the awareness of stakeholders, the society may or may not afford their recognition. To quote Dr. Ambedkar:

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.<sup>73</sup>

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<sup>73</sup>Government of Maharashtra, Dr. Baba Saheb Ambedkar: Writings and Speeches, (1) 56 (2014).