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Social and Legal Status of LGBTQIA+ Community

Mehul Shokeen and Karan Vohra

ABSTRACT

*Natural identity refers to either a social category defined by membership rules and characteristics attributes or expected behaviours or socially distinguishing features that a person takes a special pride in and is considered to be socially consequential, not only this it refers to an individual's self-identification as a man, woman, transgender or other identified category. Identity is not always given by the environment and society it can also be created by an individual for himself/ herself. It's one's own complete choice as to which category they want to fall under. Every individual has its own traits and characteristics that a person develops with time, the person is known by its nature and not by the labels put out by the society. Sexual orientation has always been the basis for the classification of beings, people are discriminated on the choice of whom they want to be with which is absurd rather shocking. Where India is considered to be the biggest democracy in the world, earlier people didn't have the right to freely express themselves where Article 21 guarantees right to life and right to personal liberty to life. A person's choice of how and with whom to live his life is guaranteed under article 21. After years of struggle on 6 September 2018, the Court ruled that **Section 377** was unconstitutional. But the problems for the minority seems never ending with no provision and laws mentioned regarding the same-sex marriage in the country. In U.S. since 9 July same sex couple have the same federal benefits as provided to opposite sex couple. Canada became the first country to legalise same-sex sexual activity and same-sex marriage (it has been elaborated briefly in the paper). India which is considered as a developing nation with more people being educated, people are realising their worth and who they are as an individual. With changes in law people are getting to know the community more and developing a soft corner for them. The paper covers all the spheres of section 377 and the scenario before and after the historic verdict.*

GENDER IDENTITY

Natural identity refers to either a social category defined by membership rules and characteristics attributes or expected behaviours or socially distinguishing features that a person takes a special pride in and is considered to be socially consequential. In accordance to the cognitive psychology the term “identity” refers to the capacity for self-reflection and awareness of self. Identity negotiation which means a process, in which a person negotiates with the society at large regarding the meaning of their identity, is an important aspect of one’s natural identity because at the end a person has to reflect himself in front of the society.

The natural identity of an individual should be treated to be absolutely essential to his being.

- After two decades of struggle, on 6 September 2018, the Court ruled unanimously in Navtej Singh Johar v. Union of India that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". The verdict was historic, giving hopes to millions of people who are battling for their lives all these years. The people weren't able to express themselves freely as they were scared they could be booked. Sooner the government realised the law was violating the constitution of India, where article 19(1)(a) of Indian Constitution says that all citizens have the right to freedom of speech and expression. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode.
- There are more than 2.5 million gay people in the country, and these are the one who came and registered themselves with their own will to the Health Ministry of India. There are so many who are still in the closet scared and petrified of the discrimination faced from the heterosexual group. It's been almost two years since the big verdict, people have started talking about it and realising a soft corner for the minority. There have been more depictions and discussions of homosexuality in the Indian news media and Bollywood after the abolishment of the section 377. The amendment raised many questions in the mind of people as the changed brought to the law was only regarding the consensual sex among the adults, there is no law regarding the same sex marriage in this country. Which leaves people with flickering minds, questions like “Is it is it legal to have same sex marriage”? “Can people with same sex have a live-in relationship”? “Can they adopt kids”? questions like these starts hovering over our minds.
- Our constitution does not talk about it only, which is disheartening. If these countries can legalised same-sex marriage, why can't INDIA? Can this be backed by saying that India is still a Developing country it? Maybe yes. The thing is INDIA being the 2nd most populated country in the world, it has a slow judiciary system with some cases pending for almost 25 years, but this is one way of seeing and analysing it.

1.1 WHAT NATURE GIVES IS NATURAL

The part of the personality of a person has to be respected and not despised or looked down upon. The said inherent nature and the associated natural impulses in that regard are to be accepted. 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. Destruction of individual identity would tantamount to crushing of intrinsic dignity that cumulatively encapsulates the values of privacy, choice, freedom of speech and other expressions. It can be viewed from another angle. An individual in exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her.

- The eminence of identity has been clearly stated in **National Legal Services Authority v. Union of India and others**¹, popularly known as NALSA case, wherein the Court was dwelling upon the status of identity of the transgender. Radhakrishnan, J., after referring to catena of judgments and certain International Covenants, opined that gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender² (Transgender people have a gender identity or gender expression that differs from their assigned sex) or transsexual³ (a person who emotionally and psychologically feels that they belong to the opposite sex) person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. The learned Judge further observed that at times, genital anatomy problems may arise in certain persons in the sense that their innate perception of themselves is not in conformity with the sex assigned to them at birth and may include pre- and post- operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Elaborating further, he stated:

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 or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender

¹, Citation - WP (Civil) No 400 of 2012 composed of Justice K.S. Panicker Radhakrishnan and Justice Arjan Kumar Sikri

² <https://en.wikipedia.org/wiki/Transgender>

³ <http://www.isna.org/faq/transsexual>

identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category

- 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 would be available to the said community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health and so on. Emphasizing on the aspect of human rights there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination.
- The Constitution has fulfilled its duty of providing rights to transgender. Now it is time for the society to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of transgender as third gender.

1.2 HOMOSEXUALITY IS INALIENABLE

- It is to be put forth that *sexual identity is how one thinks of oneself in terms of to whom one is romantically or sexually attracted*. Sexual identity may also refer to sexual orientation identity, which is when people identify or dis-identify with a sexual orientation or choose not to identify with a sexual orientation. Sexual identity and sexual behaviour are closely related to sexual orientation, but they are distinguished, with identity referring to an individual's conception of themselves, behaviour referring to actual sexual acts performed by the individual, and sexual orientation referring to romantic or sexual attractions toward persons of the opposite sex or gender, the same sex or gender, to both sexes or more than one gender, or to no one.
- To draw reference from **Dudgeon vs. the United Kingdom**⁴ case, plaintiff who was a shipping clerk also a gay activist has been interrogated about his sexual activities. He filed a complaint with concerned authority in 1975 which had taken 30 years to the decision in international jurisdiction and held that Article 8 of ECHR which provides right to privacy and family life and Article 14 which prohibits discrimination applies to same sex activities also. The court laid its decision in favour of LGBTs and said that their rights have been violated under Article 8 of ECHR, further they stated that right to family life also includes sexual relation. This was the first case in European Court in favour of homosexuals.

⁴European Court of Human Rights (ECtHR) case, Section 11 of the Criminal Law Amendment Act 1885 which criminalised male homosexual acts in England, Wales and Northern Ireland violated the European Convention on Human Rights.

SEXUAL ORIENTATION AND CONSTITUTION

SEXUAL ORIENTATION

Sexual orientation refers to sexual and romantic feelings for people of the same gender, a different gender, or more than one gender. People who identify their sexual orientation as “straight” or “heterosexual” typically feel attracted to people of a different gender than themselves. People who identify as “lesbian” or “gay” typically feel attracted to people of the same gender as themselves. People who identify as “bisexual” typically feel attracted to more than one gender, such as being attracted to both women and men. “Pansexual” is a term used by people who feel attracted to more than one gender and feel that other terms don’t include people who are transgender and gender nonconforming (people who have a gender identity or gender expression that doesn’t match their sex assigned at birth). People who use the term “queer”⁵ (denoting or relating to a sexual or gender identity that does not correspond to established ideas of sexuality and gender, especially heterosexual norms.) may use it to mean lesbian, gay, bisexual, or pansexual, or they may use it because other terms don’t quite describe their experiences.

Some people might identify their sexual orientation one way, but experience attractions that don’t match the label they are using. For example, a person might identify as “straight,” but feel attracted to people of the same gender or more than one gender and sometimes act on those attractions. Sexual orientation can also change over time for some people. For example, a person might be attracted only to people of the same gender as themselves, and then later be attracted to more than one gender.

GENDER IDENTITY

- Gender identity is a person’s internal feelings of being a woman, man, both, or neither. Most people have a gender identity and/or gender expression (how a person shows their gender through their appearance or behaviour) that matches their sex assigned at birth. However, some people have a gender identity or gender expression that is different from their sex assigned at birth; these people might use the term “transgender” or “gender nonconforming” to describe their gender identity. Gender can be expressed in many ways: through our clothes, speech, activities, hobbies, and our behaviours. It’s ok for any of these things to change at different times, or in different situations, depending on what feels comfortable.

ARTICLE 21 OF THE CONSTITUTION

PROTECTION OF LIFE AND PERSONAL LIBERTY

No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵. <https://www.cosmopolitan.com/sex-love/a25243218/queer-meaning-definition/>

Article 21⁶ secures two rights:

- 1) Right to life, and
- 2) Right to personal liberty.

The Article prohibits the deprivation of the above rights except according to a procedure established by law.

‘Everyone has the right to life, liberty and the security of person.’ The right to life is undoubtedly the most fundamental of all rights. All other rights add quality to the life in question and depend on the pre-existence of life itself for their operation. As human rights can only attach to living beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. There would have been no Fundamental Rights worth mentioning if Article 21 had been interpreted in its original sense.

2.1 SEXUALITY AS A FUNDAMENTAL RIGHT.

- It is submitted that the question that is required to be posed here is whether sexual orientation alone is to be protected or both orientation and choice are to be accepted as long as the exercise of these rights by an individual do not affect another’s choice or, to put it succinctly, has the consent of the other where dignity of both is maintained and privacy, as a seminal facet of Article 21, is not dented.
- 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 that are, to put in a capsule, —constitutionally permissible. As long as it is lawful, one is entitled to determine and follow his/her pattern of life. And that is where the distinction between constitutional morality and social morality or ethicality assumes a distinguished podium, a different objective.
- Supreme Court has given a broad and liberal interpretation to the term life as used in Article 21. Reference has been drawn from **In Munn Vs. Illinois**⁷ (94 U.S. 113), Field spoke of the right to live as follows, “by the term ‘life’ as here used, something more is meant than sheer animal existence”. Supporting this view, Justice Bhagwati, in **Francis Coralie Vs. U.T. of Delhi**⁸, had observed, “we think that right to life includes the right to live with human dignity and all that grows along with it namely, the bare necessities of life such as the adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself. The protection extends to all those limbs of body by which the life is enjoyed”.

⁶Central Government Act
Article 21 in The Constitution Of India 1949

⁷ Munn v. Illinois, 94 U.S. 113 (1876),

⁸ 1981 AIR 746, 1981 SCR (2) 516Bench: Bhagwati, P.N

In **Norris v. Republic of Ireland**⁹, the gay man brings case before the court from the fear of being arrest as the main petitioner Norris stated that he was suffering from great depression and loneliness when he realized that he is homosexual and his feelings of sexuality would make him criminal. The court accepted it.

2.2 RIGHT TO PRIVACY

Each individual has a right to privacy¹⁰ and it extends on the matter of marriage, procreation, education, family relationships etc. They have a right to be let alone and have a personal sphere that is free from government intrusion and make decisions on intimate relations without being penalized. Homosexuals just express their sexuality, consensually and without harming others. The matters of one's sexual preferences and personal choices centre one's dignity and autonomy. This right to privacy is a necessity for the pursuit of happiness and one's sexuality is at the core of this area of privacy. Curbing this right requires a very strong reason and one's sexual preferences and sexual orientation aren't of that paramount importance that it would justify this infringement of one's rights.

Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of fundamental rights guaranteed by Article 14, 15 and 21 of the Constitution.

- Even in the South African Constitutional Court in National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others¹¹ has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It lays down that 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.

2.3 MYTH OF STDs AMONG HOMOSEXUALS

- To take reference from the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV¹² (HIV is an infection that can lead to AIDS. AIDS - AIDS is a set of symptoms and illnesses that develop as a result of advanced HIV infection which has destroyed the

⁹ Case number 6/1987/129/180 Nationality of parties – Irish

¹⁰ The right to privacy refers to the concept that one's personal information is protected from public scrutiny – Article 21

¹¹ Court – Constitutional court of south Africa Citation - ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)

¹²<https://www.healthline.com/health/hiv-aids>

immune system). Counsel submits that that statutes criminalizing homosexual activity tend to impede public health programmes “by driving underground many of the people at the risk of infection”. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

ROOTS OF HOMOSEXUALITY

Homosexuality, bisexuality and other sexual orientations are equally natural and reflective of expression of choice and inclination founded on consent of two persons who are eligible in law to express such consent and it is neither a physical nor a mental illness, rather they are natural variations of expression and free thinking process and to make it a criminal offence is offensive of the well-established principles pertaining to individual dignity and decisional autonomy inherent in the personality of a person, a great discomfort to gender identity, destruction of the right to privacy which is a pivotal facet of Article 21 of the Constitution, unpalatable to the highly cherished idea of freedom and a trauma to the conception of expression of biological desire which revolves around the pattern of mosaic of true manifestation of identity. That apart, the phrase —order of nature is limited to the procreative concept that may have been conceived as natural by a systemic conservative approach and such limitations do not really take note of inborn traits or developed orientations or, for that matter, consensual acts which relate to responses to series of free exercise of assertions of one’s bodily autonomy.

The growth of personality, relation building endeavour to enter into a live-in relationship or to marry with a sense of commonality have become a mirage and the essential desires are crippled which violates Article 19(1)(a) of the Constitution. The American Psychological Association has opined that sexual orientation is a natural condition and attraction towards the same sex or opposite sex are both naturally equal, the only difference being that the same sex attraction arises in far lesser numbers.

In the case of **Grace Jayamani vs. E Peter AIR 1982¹³** and **Lohana Vasantlal Devchand vs. State.**

¹³ Equivalent citations: AIR 1982 Kant 46, ILR 1982 KAR 196

Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment. By criminalising sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals. The section exposed homosexual persons to disproportionate risk of prosecution and harassment. There have been documented instances of harassment and abuse, for example, Lucknow 2001 and Lucknow 2006.

3.1 HOMOSEXUALITY IN VEDIC AGE.

Traces of Homosexuality are also to be seen in the ancient and Vedic age¹⁴. People in those days used to openly conduct their sex life and sexuality in public.

It was observed that LGBT people were found from the ancient periods. India consists of much LGBT text in its history. LGBT relation use to found from Vedic period. 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 such as:

Ardhanarishvara - In Hindu mythology many god and goddess several times represented as males and females for different evident which represent character of both genders at once in a single person. The biggest example of such creation is Ardhanarishvara¹⁵. Ardhanarishvara is depicted as half male and half female, split down the middle. The right half is usually the male god Shiva and the left half consist of the female i.e. goddess Parvati. This term mean the lord whose half is a women.

Iravana- A person who was a part of Mahabharata, he was the son of Arjun (Pandava Prince). Iravana also known as Aravan were worshiped among Transgender community. Aravana died in kurukshetra war; he was a follower of Goddess Kali. Before his death he wishes to marry and kept such wish before Goddess kali, no women was ready to marry with him as he was on his death bed. To complete his wish Lord Krishna taken the incarnate of female name Mohini and married Aravan and gave the pleasure of marriage to him.¹⁶

¹⁴ he Vedic period or Vedic age (c. 1500 – c. 500 BCE), is the period in the history of the northern Indian subcontinent between the end of the urban Indus Valley Civilisation and a second urbanisation which began in the central Indo-Gangetic Plain c. 600 BCE.

¹⁵ Mathur, S and Chaturvedi, B.K .(2012). Hindu Gods and Goddess. Diamond Books. ISBN: 81-288-0802-8. pp 27 – 31

¹⁶Pattanaik, D. (2010). Jaya : An illustrated retelling of the Mahabharata. Penguin Group. ISBN : 9780143104254. pp 245

Ayyapan- It is believed that Ayyapan was born from 2 males, he was a child of lord Shiva and lord Vishnu's incarnate of Mohini¹⁷. Shiva later was attracted by Mohini's beauty and they both united and gave birth to a child called Dharmasastra¹⁸.

Bhagirath - In the famous Bengali text called Krittivasa Ramayana which talks about the story of two queens that conceived a child. Maharaja Dilipa, the king of sun dynasty died without giving heir to the state at that time Lord Shiva appeared before the two widow queens and asked them to make love with each other and if they did so then they will conceive a son with lord Shiva blessing. They both execute the same order and conceived a son which was born boneless but with the blessing of sage Ashtavakra the child got full health and he named him Bhagirath who was born from two vulvas and the child later become the most famous king of India¹⁹.

Shikhandi - In the Mahabharata a girl Shikhandi, whose mother Draupada train and raised her daughter like a Manand and made her marry to a female²⁰.

Mavendra Singh Gohil -A prince who was born in 1965 at Ajmer was the son of Maharaja Shri Raghbir Singhji Rajendra Singhji Sahib. Before marriage he uses to act like gay many times due to that he married by the thought that after marriage he will be alright. After marriage he revealed his homosexuality to his wife and the marriage ended with divorce. He is the only person of royal family in Modern India who revealed his sexual orientation in public. In 2008 he adopted child to continue the responsibilities as a prince. It was the 1st known gay case who adopted child in India. In 1992 he got involved in social activities for LGBT's in Gujarat²¹.

The Kama Sutra acknowledges third-gender marriages wherein same-sex couples with great attachment and complete faith in one another” get married together.

In Vatsyaan's Kamasutra, it's clearly mentioned that gay relations existed in ancient India too.

1. According to a legend, Lord Shiva was conscious of Krishna with Raslila. For this, he took bath Yamuna and took the form of Gopi. He took the back of Krishna as Gopi and formed Rasli. Poonawala has called it the attraction of the same gender.

¹⁷ Vishnu took incarnate of Mohini to kill the devil called Bhasmasur.

¹⁸same sex marriage in India and the west. Penguin Group Publication. pp 99

105. ISBN13: 9780144000593, ISBN10: 0144000598. Retrieved June 08, 2014 from books.google.co.in

¹⁹Vanita, R. (2011). Born to Two Mothers, The Hero Bhagiratha. pp 23-27. Retrieved June 02, 2014 from www.manushi-india.org/pdfs_issues/PDF%20146/Pg%2022-33.pdf.

²⁰ 78Pattanaik, D. (2000). The Goddess in India ä The Five Faces of the Eternal Feminine. Library of congress catlogue publication. ISBN: 0-89281-807-7. pp 98-115

²¹ 9 Howard, S. (2013). The Kamasutra Diaries Intimate Journeys through Modern India. Nicholas Brealey Publisher. ISBN: 9879383260942. Retrieved on June 03, 2014 from books.google.co.in.

2. The temple of **Khajuraho** is also famous for erotic idols. These temples have different significance because of these idols. When such idols were made in that period, then it is natural. This was also happening at that time.

RELIGIOUS ART:

Some religious art which depicts homosexuality in ancient India:

- . On the walls of Khajuraho it which that two women holding each other²²
- . In Kandariya, Mahadev temple which is situated in Khajuraho, their walls depicts that a group of three women and one man involve in indiscriminating sexual activities.
- . In Ahmadabad at Shiva temple which was constructed in 1060 CE depicts the interest between two women together for sexual activities.

Hence, in the light of above arguments, no law has the right to criminalise homosexuality since it is a concept which is natural and has been followed since Vedic times.

3.2 RIGHT TO PRIVACY.

- It is to forward that each individual has a right to privacy and it extends on the matter of marriage, procreation, education, family relationships etc. They have a right to be let alone and have a personal sphere that is free from government intrusion and make decisions on intimate relations without being penalised. Homosexuals just express their sexuality, consensually and without harming others. The matters of one's sexual preferences and personal choices centre on one's dignity and autonomy. This right to privacy is a necessity for the pursuit of happiness and one's sexuality is at the core of this area of privacy. Curbing this right requires a very strong reason and one's sexual preferences and sexual orientation aren't of that paramount importance that it would justify this infringement of one's rights.
- It is totally one's choice, each and every citizen of this nation has the right to choose with whom they feel sexually and emotionally attracted to and law and society has no right to infringe and interfere with the same on any given grounds and matter.
- Hence, it is further to be concluded that exercise of right to privacy is a fundamental right and each and every person has the right to conduct their sex life and personal relationships the way they want to and any interference with the same by the state shall infringe their fundamental right to privacy.

²² Narain, L.A. & Dube, A.N. (1986). Khajuraho Temple of Ecstasy. Lustre Press.

GAY RIGHTS ACROSS SEAS

The right to sexual privacy²³ must be granted the sanctity of a natural right, and be protected under the Constitution as fundamental to liberty and as a soul mate of dignity. Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive colonial legislation. In order to ensure to sexual and gender minorities the fulfilment of their fundamental rights, it is imperative to ‘confront the closet’ and, as a necessary consequence, confront ‘compulsory heterosexuality. Confronting the closet would entail “reclaiming markers of all desires, identities and acts which challenge it.” It would also entail ensuring that individuals belonging to sexual minorities have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them.. But equally, our constitutional jurisprudence must recognise that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms. In conceptualising a right to sexual privacy, it is important to consider how the delineation of ‘public’ and ‘private’ spaces affects the lives of the LGBTIQ community.

3.1 LAWS PERTAINING TO GAY COHABITATION ACROSS WORLD

As there are detailed laws and regulations for same sex marriage in the 25 countries all over the world who have legalised the same. In 2015 - The U.S. Supreme Court makes same-sex marriages legal in all 50 states in Obergefell v. Hodges. Since July 9, 2015, married same-sex couples throughout the United States have had equal access to all the federal benefits that married opposite-sex couples have, providing that they can adopt the child and even get their name registered on the birth certificate. Canada is considered one of the most gay-friendly countries in the world, in fact, being ranked first in the Gay Travel Index chart since 2018. Lesbian, gay, bisexual, and transgender (LGBT) rights in Canada are some of the most advanced in the Americas and in the world. Same-sex sexual activity has been lawful in Canada since June 27, 1969. Canada became the first country outside Europe and the fourth country in the world to legalize same-sex marriage nationwide after the enactment of the Civil Marriage Act. Same-sex adoption has also been legal in all provinces and territories under varying rules.

The rights of LGBT Canadians are now as well protected as those of other Canadians largely due to several court decisions decided under Section 15 of the Canadian Charter of Rights and Freedoms. The Constitution of Canada does not explicitly grant or deny any right to LGBT people, however

²³<https://www.yalelawjournal.org/article/sexual-privacy>.

section 15 of the Charter prohibits all types of discrimination by the government which LGBT people could be subject to.

In conceptualising a right to sexual privacy, it is important to consider how the delineation of 'public' and 'private' spaces affects the lives of the LGBTIQ community

In the case of **Dudgeon v. United Kingdom**, privacy has been defined as under:-

"Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis - it is "the right to be let alone"."

In **R. Rajagopal v. State of Tamil Nadu and others**²⁴, while discussing the concept of right to privacy, it has been observed that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and it is a "right to be let alone", for a citizen has a right to safeguard the privacy of his/her own, his/her family, marriage, procreation, motherhood, child-bearing and education, among other matters.

3.2 SEXUAL PRIVACY IS A FUNDAMENTAL RIGHT

Privacy and protection of sexual orientation lie at the core of the fundamental rights under Articles 14, 15 and 21 of the Constitution.. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set.

In **A.R. Coeriel and M.A.R. Aurik vs. the Netherlands**²⁵, the Human Rights Committee observed that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone

The South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others** has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It lays down that 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.

In the India Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21.

According to **Grace Jayamani v. E Peter AIR 1982**²⁶,

²⁴ Equivalent citations: 1995 AIR 264, 1994 SCC (6) 632

²⁵ Communication No. 453/1991

²⁶ Equivalent citations: AIR 1982 Kant 46, ILR 1982 KAR 196

Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment. By criminalizing sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals. The section exposed homosexual persons to disproportionate risk of prosecution and harassment.

JUDEGEMENTS PERTAINING TO HOMOSEXUALITY

Delhi High Court in Naz Foundation²⁷ and thereafter advert to the legal base of the decision in Suresh Koushal's case. The Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. The High Court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and that sex-discrimination cannot be read as applying to gender simpliciter. Discrimination, as per the High Court's view, on the basis of sexual orientation is grounded in stereotypical judgments and generalization about the conduct of either sex.

The National Coalition for Gay and Lesbian Equality vs. The Minister of Justice, Sachs J., The Petitioners contend that (I) Section 377 discriminates on the basis of sex and violates Articles 15 and 16; and (II) Discrimination on the ground of sexual orientation is in fact, discrimination on the ground of sex.

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

RIGHTS AND FREEDOM OF LGBTQIA COMMUNITY

The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the

²⁷ Citation(s): 160 Delhi Law Times 277

constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality so that they, with the aid of judicial creativity, are able to fulfil their foremost constitutional obligation, that is, to protect the rights bestowed upon the citizens of our country by the Constitution.

Gender identity

Gender identity is how a person feels and who they know them self to be when it comes to their gender. There are more than two genders, even though in our society the genders that are most recognized are male and female and usually is based on someone's [anatomy](#) (the genitals they were born with). There are many different gender identities, including male, female, transgender, gender neutral, non-binary and almost over of 72 different types.

Human rights

According to the United Nations:

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Constitutional rights

There is no difference between persons who defy social conventions to enter into inter-religious and inter-caste marriages and those who choose a same sex partner in the sense that the society may disapprove of inter-caste or inter- religious marriages but this Court is for enforcing constitutional rights. Similarly, even if there is disapproval by the majority of the sexual orientation or exercise of choice by the LGBT persons, the Court as the final arbiter of the constitutional rights, should disregard social morality and uphold and protect constitutional morality which has been adverted to by this Court in several cases, including **Manoj Narula v. Union of India**²⁸, for that is the governing rule. It is argued that the Delhi High Court in Naz Foundation (supra) has referred to and analyzed the concept of constitutional morality and ultimately struck down Section 377 CPC clearly stating that carnal intercourse between homosexuals and heterosexuals with consent cannot be an offence.

²⁸ WRIT PETITION (CIVIL) NO. 289 OF 2005 Bench: Chief Justice, Dipak Misra, Madan B. Lokur, Kurian Joseph, S.A. Bobde

5.1 CO-RELATION BETWEEN GENDER IDENTITY AND HUMAN RIGHTS.

Sexual orientation and gender identity are both integral parts of each person's personality or identity. Human rights experts have described them as some of the most basic aspects of self-determination, dignity and freedom.

Sexual orientation is defined in the Preamble to the Yogyakarta Principles as "each person's capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender"

- The right to sexuality incorporates the right to express one's sexuality and to be free from discrimination on the grounds of sexual orientation. In specific, it relates to the human rights of people of diverse sexual orientations, including lesbian, gay, bisexual and transgender (LGBT) people, and the protection of those rights, although it is equally applicable to heterosexuality. The right to sexuality and freedom from discrimination on the grounds of sexual orientation is based on the universality of human rights and the inalienable nature of rights belonging to every person by virtue of being human.
- The LGBT community possesses the same human, fundamental and constitutional rights as other citizens do since these rights in here in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 CPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organization of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature

Grace Jayamani vs. E Peter²⁹ (AIR 1982 Kar 46, Lohana Vasantlal Devchand vs. State)

Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalizing sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals. The section exposed homosexual persons to disproportionate risk of prosecution and harassment. There have been documented instances of harassment and abuse, for example, Lucknow 2001 and Lucknow 2006.³⁰

Freedom from discrimination on the grounds of sexual orientation is found in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

The UDHR provides for non-discrimination in Article 2, which states that:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social

²⁹ Equivalent citations: AIR 1982 Kant 46, ILR 1982 KAR 196

origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.”

Sexual orientation can be read into Article 2 as "other status" or alternatively as falling under "sex".

In the ICCPR, Article 2 sets out a similar provision for non-discrimination:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In Toonen v Australia the United Nations Human Rights Committee (UNHRC) found that the reference to "sex" in Article 2 of the ICCPR included sexual orientation, thereby making sexual orientation prohibited grounds of distinction in respect of the enjoyment of rights under the ICCPR.

The right to be free from discrimination is the basis of the right to sexuality, but it is closely related to the exercise and protection of other fundamental human rights.

Every human has a right to conduct his sex life the way he wishes to and should always be allowed to choose his partner regardless of his sexual orientation.

In **Shakti Vahini v. Union of India and others**³¹ and **Shafin Jahan v. Asokan K.M**³², it has been clearly recognized that an individual's exercise of choice in choosing a partner is a feature of dignity and, therefore, it is protected under Articles 19 and 21 of the Constitution.

The authority in **NALSA**³³ is one such recent illustration where the rights of transgender as a third sex were recognized which had been long due in a democracy like ours. This Court ruled: -

"It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic. It must be understood in a way that intricate and advances modern reality. The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs, we are simply protecting the Constitution and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular is a characteristic of our vibrant democracy.

As we have pointed out above, our Constitution inheres liberal and substantive democracy with rule of law as an important and fundamental pillar. Rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human being. These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights."

In **Investigating Directorate: Serious Economic Offences and others v. Hyundai Motor Distributors (Pty) Ltd and others**³⁴: In **Albertyn & Goldblatt**, Facing the challenge of

³¹ WRIT PETITION (CIVIL) NO. 231 OF 2010

³² CRIMINAL APPEAL NO.366 OF 2018

³³ Citation(s) WP (Civil) No 400 of 2012

³⁴ Citation(s) [2000] ZACC 12, 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC)

transformation: Difficulties in the development of an indigenous jurisprudence of equality, **Re Hyundai Motor Distributors (Pty) Ltd**, the Constitutional Court of South Africa observed:-

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.

CONCLUSION

The reality is the in a country like India the existing heterosexual marriages are backed by certain right, with India having the longest constitution in the world it has numerous right and provisions provided that determine who you can co-sign your lease, whom to you can pass on the property, who you can nominate for life insurance and so on. And also all these rights are related to the people who are blood related. So it's a lot. It will take years for the leaders of the country to bring the change. But this change should not just be in the paper or in the law, the change should come in the minds and hearts of the people so they can finally accept the community. To realise they are too human and everyone has a right to feel and be themselves no matter what, these people are no different. The real problem is that homophobia is so deep routed in minds of the people, from years they have seen only people of opposite sex together which they think is the ideal picture. By decriminalising section 377 of the Indian penal Code it gave hope to all the gay people in the world's biggest democracy, so they can liberate themselves and their thoughts without any hesitation. Coming out as LGBTQ+ is never easy, even in societies that are supportive and protective of the community's rights. The process begins with accepting oneself, followed by asserting that identity to the world. Judicial reform may create an enabling platform to come out, but social realities don't necessarily change in sync. The battle must be fought as much inside courtrooms, as inside drawing rooms, classrooms and meeting rooms, every day of our lives. The novelty of a post-377 world quickly wore off, as social structures, inflected by class, caste, and religion, cut into their hopes of a life of dignity and equality. There is a long way to go.