

Rights Of LGBTQ In India and The Struggle for Societal Acceptance

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Abstract

Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) rights in India have evolved in recent years. However, LGBTQ citizens still face certain social and legal difficulties as compared to the people who do not belong to that community. It is duty of the court to pass just and reasonable order, duty of the Government to ensure that verdict reaches to the general public and duty of the public to welcome the decision of the court with open arms. However, with regard to the Rights of LGBTQ+ people, even though the Supreme Court of India in *Navtej Singh Johar v. Union of India* judgement, 2018 stepped up by abolishing the part of Section 377 of Indian Penal Code which criminalized act of homosexuality, the Government and the public also failed to utilize the judgment to the fullest as even after nearly 40 Months of passing of the landmark judgment, the situation with regard to LGBTQ Community has not improved much. The Central and State Government failed to make any special provisions for upliftment of LGBTQ people and the Community also failed to get societal acceptance from the citizens of the country. The paper looks at the long struggle of LGBTQ Community for basic Fundamental Rights and the Discrimination they face in different spheres of life with special reference to Transgender people and Judicial Pronouncements. The paper finally analyses the road ahead for the LGBT Community and what further legal and social changes are needed for LGBT individuals to gain full acceptance and equality within the conservative Indian society.

Keywords: LGBTQ+, Homosexuality, Unnatural, Societal Acceptance, Transgender and Cisgender.

1. Introduction

The expressions "lesbian," "gay," and "bisexual" portray an individual's sexual direction and on the whole incorporate ladies and men who are transcendentally or some of the time pulled in to people of a similar sex.¹ The term "transgender" is independent of sexual orientation and describes individuals whose gender identity (the sense of gender that every person feels inside) and/or sex articulation (their conduct, apparel, hair style, voice, and body attributes) is not the same as the sex allocated to them during childbirth.²

The LGBT people group or GLBT people group, additionally alluded to as the homosexual network, is an inexactly characterized gathering of female attracted to

female people, male attracted to many people, cross-sexual, third gender, joined by a typical civilization and their developments. These people group for the most part praise pride, assorted variety, individuality, and sexuality. LGBT promoters see Lesbian, gay, bisexual and transgender peoplegroupworkingasabalancetofavouritism,discriminatory,biphenanthrol,transgenderism,classism, and conventionalist pressures that subsist in the bigger surrounding. The term pride or from time to time homosexual pride is utilizes to convey the LGBT social order's character and total quality; homosexual pride walks give a prime instance of the usage and a display of the common significance of the LGBT.³

The lesbian, gay, bisexual and transgender people group is differing in politics association. Few of them individuals who are homosexual androgynous or third gender not

¹"The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding" *National Academic Press*, 2011.

²*Id.*

³*Id.*

view themselves as a component of the lesbian, gay, bisexual and transgender people group.

Lesbian

'Lesbian' is a term most widely used in the English language to describe sexual and romantic desire between females. The word may be used as a noun, to refer to women who identify themselves or who are characterized by others as having the primary attribute of female homosexuality, or as an adjective, to describe characteristics of an object or activity related to female same-sex desire⁴.

Gay

'Gay' is a word (a noun or an adjective) that primarily refers to a homosexual person. The term was originally used to refer to feelings of being "carefree", "happy", or "bright and showy"; it had also come to acquire some connotations of "immorality" as early as 1637⁵. In modern English, 'gay' has come to be used as an adjective, and as a noun, referring to the people, especially to men, and the practices and cultures associated with homosexuality.

Bisexuality

'Bisexuality' is romantic or sexual attraction or behaviour toward males and females. The term is especially used in the context of human sexual attraction to denote romantic or sexual feelings toward men and women⁶. It is one of the three main classifications of sexual orientation, along with a heterosexual and a homosexual orientation, all a part of the heterosexual-homosexual continuum. People who have a distinct but not exclusive sexual preference for one sex over the other may identify themselves as bisexual⁷. 'Bisexuality' has been observed in various human societies⁸

and elsewhere in the animal kingdom⁹ throughout recorded history. The term 'bisexuality', however, like the terms hetero- and homosexuality, was coined in the 19th century¹⁰.

Transgender

'Transgender' is a general term applied to an assortment of people, practices, and gatherings including inclinations to differ from socially ordinary sexual orientation jobs. 'Transgender' is simply the condition of one's "sexual orientation personality" (recognizable proof as lady, man, neither or both) not coordinating ones "doled out sex" (ID by others as male, female or intersex dependent on physical/hereditary sex)". "Transgender" doesn't suggest a particular type of sexual direction; transgender individuals may distinguish as hetero, gay, promiscuous, pansexual, polysexual, or agamic; some may consider traditional sexual direction marks lacking or inapplicable to them. The exact definition for transgender stays in motion, however incorporates.¹¹

- "Of, identifying with or assigning an individual whose character doesn't adjust unambiguously to traditional thoughts of male or female sex jobs, yet joins or moves between these .

- "Individuals who were allotted a sex, ordinarily during childbirth and dependent on their privates, yet who feel this is a bogus or inadequate depiction of themselves."

- "Non-distinguishing proof with, or non-introduction as, the sex (and expected sexual orientation) one was appointed during childbirth."¹²

2. Historical background of LGBT

The history of LGBT history to the essential recorded instances of people having similar sex affection and sex of old human advancement, including the verifiable setting

⁴"Lesbian" *Oxford English Dictionary* (1st edn. 1989).

⁵Online Etymology Dictionary". available at: <https://www.etymonline.com/> (visited on April 13, 2020).

⁶"Sexual Orientation, Homosexuality and Bisexuality" Available At: *APAHelpCenter.org*. (last visited on April 14, 2020).

⁷Margaret Rosario *et.al.*, Sexual identity development among lesbian, gay, and bisexual youths: Consistency and change over time, 46-58 *Journal of Sex Research* (2011).

⁸Louis Crompton, *Homosexuality and Civilization* 28 (Belknap Press, Massachusetts, 2006)

⁹Bruce Bagemihl, "*Biological Exuberance: Animal Homosexuality and Natural Diversity*" (1st edn. 2001).

¹⁰Douglas Harper, "Bisexuality". *Online Etymology Dictionary* available at: <https://www.etymonline.com/> (last visited April 13, 2020).

¹¹APA Style Guide: Avoiding Heterosexual Bias in Language" available at: <https://www.apa.org/pi/lgbt/resources/language> (last visited on March 13, 2020).

¹²*Id.*

of 'Lesbian', 'Gay' having pleasure and 'transgender' (LGBT) society and social orders far and wide. What gets by after various time of misuse—achieving disrespect, disguise, and riddle—has simply in later decades been looked for after Asia the Hijra are a station of third-sexual direction, or transgender social event that live a cultured occupation. Hijra may be brought into the world male sex, and some may have been brought into the world female.¹³In India Homosexuality is a topic of conversation since antiquated occasions to present day times. Hindu writings had taken positions with respect to the gay characters and topics. The antiquated Indian content Kamasutra composed by Vatsanya Devotes a total part on sexual gay conduct. Authentic scholarly proof shows that homosexuality has been pervasive over the Indian subcontinent from the beginning of time.

3. Constitutional, Legal Measure and Governmental Policies Related To Lgbt Community

Article 14 of the Indian Constitution

Article 14 of the constitution of India stated that —“The State will not deny to any individual balance under the steady gaze of the law or the equivalent assurance of the laws inside the domain of India.”¹⁴ Article 14 of Indian Constitution Explained—one of the most important guarantees from our constitution is to be treated equally, or the right to equality in the country. It might seem pretty simple and basic but believe me, without this right, we would have a whole different society. There will be a chance of a state of chaos and possibly anarchy in every little aspect of life.

Here, state refers to the country which includes all the states and union territories in it. A simple meaning of the above statement can be that all are equal in the eyes of the law or everyone will be treated equally. However, the phrases 'equality before the law' and 'equal

protection of the law' refers to two different aspects. At first glance, I think it might be clear that the second phrase, that is, "equal protection of the law" seems positive. I mean, it provides a sense of security and rightly so. It means equality of protection by the law under similar or equal circumstances. This means that treatment for a particular activity can be different for individuals placed in different groups which means preference can be given to one and not to other taking account of their conditions.

The first phrase, "equality before the law" gives a negative vibe. It means that absence of special privileges to a section of people or any individual under the eyes of the law. People will be give the same treatment and punishment under same circumstances and for same crimes irrespective of their status and value. However, there are three exceptions included in the constitution. They are as follows-

1. For any official actions or acts, neither the president of the country nor the governor of a state is answerable to any court. The key word here being 'official'. This does not point to any personal transgressions.
2. While the president of the country or the governor of a state is still serving the term of his office, he will not face any criminal prosecution. Any such matters will be suspended until the end of their terms.
3. Civil cases where some relief or settlement is expected cannot be brought in front of the president or a governor when they are still in office. As you all might know, our constitution was formed by borrowing various aspects from different constitutions around the world. In this Article 14 of the Indian Constitution also, the phrase, "equal protection of the law" has been borrowed from the Constitution of the United States of America. It was in the 14th Amendment of the American Constitution. According to this, similar people will be treated alike and no one will be favoured and discriminated.

This acts like a loophole where the government can classify people for tax purposes. For examples people with higher income have to pay higher tax percentage than those who earn less. The state can also exempt

¹³“The Early Gay Rights Moments” *available at:* [https://www.history.com/topics/gay-rights/history-of-gay-rights#:~:text=The%20gay%20rights%20movement%20saw,In%201965%2C%20Dr.\(Last Visited on April 14, 2020\).](https://www.history.com/topics/gay-rights/history-of-gay-rights#:~:text=The%20gay%20rights%20movement%20saw,In%201965%2C%20Dr.(Last Visited on April 14, 2020).)

¹⁴ The Constitution of India, 1950, Art.14.

some people or even organizations from paying taxes under some circumstances like charities and trusts. Different tax rules can be imposed in different trade aspects like liquor and textiles.

Therefore, "equal protection" means equal treatment in equal situations or same situations. But the same people will be treated differently in different situations. This different treatment will be same for all people who live or act under these situations. Article 15 of the Constitution of India states, "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—

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

(2) 'No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any 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 out of State funds or dedicated to the use of the general public.'¹⁵

Article 15 of Indian Constitution Explained –

The main point of this article is that 'the state shall not discriminate against any citizen on grounds only of religion, race, caste sex, places of birth or any of them'¹⁶

The statement is pretty much self-explanatory but it also means that the state can however discriminate on some other bases such as making special provisions for backward classes or scheduled castes and tribes as seen fit by the state. The state is also free to make any special provisions for women and children which might help and benefit towards their overall best interests. The article also states that no one will be denied access to any public service or place such as shops, public entertainment places, public hotels etc.

Article 19

Is a British human rights organization with a specific mandate and focus on the promotion of freedom of expression and freedom of information worldwide founded in 1987. The organization takes its name from Article 19 of the Universal Declaration of Human Rights, which States, "Everybody has the privilege to opportunity of assessment and articulation; the privilege incorporates opportunity to hold sentiments without obstruction and to look for, get and confer data and thoughts through any media paying little heed to boondocks"

Activities

Article 19 monitors threats to free expression around the globe; lobbies governments to adopt laws that conform to international standards of freedom of expression; and drafts legal standards that strengthen media, public broadcasting, free expression, and access to government-held information. The Law Programme also produces legal analysis and critiques of national laws, including media laws. In addition, Article 19 intervenes in cases of individuals or groups whose rights have been violated; and provides capacity-building support to non-governmental organizations, judges and lawyers, journalists, media owners, media lawyers, public officials and parliamentarians.

Article 19¹⁷

Everyone shall have the right to hold opinions without interference. Everybody will reserve the option to opportunity of articulation; this privilege will incorporate opportunity to look for, get and confer data and thoughts of numerous types, paying little mind to outskirts, either orally, recorded as a hard copy or in print, as craftsmanship, or through some other media of his decision. The activity of the rights accommodated in passage of this article conveys with it uncommon obligations and duties. It might in this manner be dependent upon specific limitations, however these will just be, for example, are given by law and are essential (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

¹⁵The Constitution of India, 1950, Art.15.

¹⁶The Constitution of India, 1950, Art.15.

¹⁷The Constitution of India, 1950, Art.19.

4. The Transgender Persons (Protection Of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Bill, 2019 has been passed in Rajya Sabha on November 26, 2019 during the winter session of the Parliament. The Bill was passed on August 5, 2019 in the Lok Sabha during the monsoon session of the parliament and was coincided with the abrogation of Article 370 in the state of Jammu and Kashmir. The Bill received assent from President on December 5, 2019 and was made into a law. The Transgender Persons (Protection of Rights) Act, 2019 seeks to provide a framework to empower Transgender persons in social, economic and educational fields and is also intended to benefit the transgender community.

The Supreme Court of India had directed in *National Legal Service Authority v. Union of India*¹⁸ that the transgender community must be recognised as a third gender along with male and female and it has also been directed by the court that both the Centre and State Government should frame such scheme for the welfare of the Transgender community i.e. taking measure to provide medical care facilities and reservations.

Feature of the Act

- a. Identification: An application be made by a transgender person to the District Magistrate for issuing a certificate of identity as a Transgender Person. The law states that a transgender person will have the right to self-perceived gender identity.
- b. Definition of Transgender Person: The Act gives a definition of "Transgender Person" as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as Kinner, Hijra, Aravani and Jogta.¹⁹

¹⁸AIR 2014 SC 1863.

¹⁹The Transgender Persons (Protection of Rights) Act 2019 (No.40 of 2019), s.2 (k).

- c. Prohibition against Discrimination:²⁰ The Act protects the Transgender Person against discrimination. A statutory ban or discrimination against a transgender person now exists. The Act prohibits discrimination against a transgender person, including denial of service or unfair treatment concerning:
 - i. Education
 - ii. Employment or occupation
 - iii. Medical healthcare
 - iv. Right to purchase, reside, rent or occupy any property.
 - v. Right to movement.
 - vi. Opportunities to work in public or private office.
 - vii. Access to enjoyment of good, facilities and other opportunities that is available to the public.
 - viii. Access to government as well as private establishment.
- d. National Council for Transgender Persons: The Act also provides that the Central Government shall establish a National Council for Transgender Persons to advise, monitor, evaluate and review the policies and programmes for transgender persons. The other function of national council for transgender persons is to redress the grievances of transgender persons.

5. Judicial Attitude towards Lgbt Community And Cases Related To Lgbt Community

The attitude of the Indian state towards Homosexuality is now well known. Section 377 of the Indian Penal Code, 1860 relates to Unnatural Offences and includes Homosexuality within its domain. In India this Law relating to homosexuality was adopted from the British penal code dating to 19th century.

The thrust of Section 377 is to criminalize sexual acts which are "against the order of nature"²¹. Any non-procreative sexual activity is thus viewed as being "against the order of nature"²². Since only penile-vaginal sexual activity is procreative and therefore acceptable, all penetrative sexual activity, other than penile vaginal, between both

²⁰*Id.*

²¹Indian Penal Code, 1860 (45 of 1860), s.377.

²²*Ibid*

heterosexual and same-sex couples, is considered to be against the order of nature and thus criminally proscribed under Section 377.

*Naz Foundation v. Govt of NCT of Delhi*²³ was the case in which the following issue were raised before the High Court of Delhi:

(1) Whether the impugned provision should be interpreted to decriminalise penile non-vaginal sex between consenting adults;

(2) Whether the fundamental rights of equality, life, liberty, privacy, dignity, and freedoms are violated by the impugned provision (Articles 14, 15, 19 and 21);

(3) Whether the impugned provision acts as an impediment to the implementation of HIV/AIDS control measures

(4) Whether the decriminalisation of the impugned provision is opposed to societal views and public morality?

The High (Court) right off the bat repeated the test for any law which meddles in close to home freedom, as set out in *Maneka Gandhi v. Union of India*²⁴: that

- (i) There must be a methodology;
- (ii) That technique must be tried against at least one of the crucial rights presented under Article 19 which are pertinent; and
- (iii) It is likewise defenceless to be tried against Article 14, and must be correcting, simply, reasonable and not self-assertive.

Right to Privacy

The Court noticed that the Indian Constitution doesn't contain an unequivocal arrangement comparable to the privilege to security; anyway the Supreme Court has deciphered such a privilege based on Article 19 securing opportunity of articulation and development, and Article 21 ensuring the privilege to life and freedom.

The Court made broad reference to United States law on the privilege to protection as add something extra to the Constitution, including

*Roe v. Swim*²⁵ and *Planned Parenthood of South-eastern Pa v. Casey*²⁶ It at that point proceeded to consider the advancement of this privilege in India including the instance of *Kharak Singh v. The State of U.P*²⁷ which followed the privilege to protection in India to one side to 'life' in Article 21 of the Constitution. The Court presumed that Section 377 precludes the poise from securing such people, condemns their character and abuses their entitlement to security which is ensured inside the ambit of Article 21 of the Constitution.

In making this finding the Court excused the contentions of the MHA that the decriminalization of homosexuality will prompt the expansion of HIV/AIDS on the premise that there was no clinical proof to help this conflict. The Court additionally noticed that this case negated the contentions made by NACO and the Ministry of Health and Family Welfare.

Regarding the open ethical quality contentions set forward by the respondents the Court, referring to the European Court of Human Rights law of *Dudgeon v. The United Kingdom*²⁸, and *Norris v. Republic of Ireland*²⁹ expressed that insignificant open objection or well-known ethical quality is certainly not an adequate reason for setting such limitations on the delight in central rights. The Court stated that the main profound quality which matters is Constitutional profound quality.

The Court established that the Constitution of India ensures and advances assorted variety and guarantees a populist society where opportunity is not, at this point a benefit. The Court decided that criminalisation of homosexuality contradicts that Constitutional profound quality.

Article 14 and Equality

The Court emphasized the test set by Article 14 that any differentiation or order be founded on an understandable differentia which has a

²³ 160 Delhi Law Times 277

²⁴ (1978) 1 SCC 248

²⁵ US 113 (1973)

²⁶ 505 US 833 (1992).

²⁷ (1964) 1 SCR 332

²⁸ 45 Eur. Ct. H.R. (ser. A) (1981)

²⁹ 142 Eur. Ct. H.R. (ser. A) (1988)

reasonable connection to the target looked for and isn't uncalled for or on the other hand treacherous. Section 377, the Court stated, doesn't recognize open and private acts, or among consensual and non-consensual acts accordingly doesn't consider pertinent elements for example, age, assent and the idea of the demonstration or nonattendance of damage. The Court expressed that such criminalisation without proof of mischief appeared to be discretionary and preposterous.

In considering the lawful standards forced by Article 14 of the Constitution the Court took into account the Declaration of Principles of Equality "as current universal comprehension of Standards on Equality". Drawing on Principles right to balance, equivalent treatment and meaning of separation the Court stressed the need to incorporate sexual direction among secured grounds of separation and assemble backhanded segregation and badgering into any thought of the privilege to fairness. Along these lines, managing the contention that Section 377 was impartial, as put together by the MHA, the Court expressed that in spite of the fact that the arrangement all over is unbiased and targets acts as opposed to people, in its activity it unreasonably focuses on a specific network, having the outcome that all gay men are viewed as criminal. This drove the Court to reason that Section 377 segregated against a specific network infringing upon Article 14 of the Constitution.

Article 15 – Sex or Gender

Article 15 was portrayed by the Court as a specific utilization of the general right to correspondence under Article 14. The Court considered the candidate's contention that the reference to 'sex' in Article 15 ought to be deciphered as remembering sexual direction for the premise that segregation on the grounds of the last depends on generalizations of lead based on sex. The Court itself alluded to the Human Rights Committee's choice in *Toonen v. Australia*³⁰ in which the Tasmanian Criminal Code which condemned sexual acts between men, was viewed as an infringement of Article 2 of the Worldwide Covenant on Civil and Political Rights, where a reference to

'sex' was taken as counting sexual direction. On that premise the Court expressed:

"We hold that sexual heading is a ground like sex and that division on the reason of sexual bearing isn't permitted by Article 15. Further, Article 15(2) fuses the idea of flat use of rights. As such, it even precludes segregation of one resident by another in issues of access to open spaces. In our view, separation on the ground of sexual direction is impermissible even on the level use of the privilege cherished under Article 15."

The Court thus found that Section 377 was unlawful based on Article 15 of the Constitution. In its decision, the Court alluded to the faith in comprehensiveness which is imbued in the Indian Constitution and clarified that separation was:

"The direct opposite of equity and that it is the acknowledgment of balance which will encourage the respect of each person". In the light of its discoveries on the encroachment of Articles 21, 14 and 15, the Court discovered it pointless to manage the issue of infringement of Article 19 of the Constitution. In aggregate, the Court pronounced that Section 377 of the Indian Penal Code, to the extent that it condemns consensual sexual demonstrations of grown-ups in private, abuses Articles 21, 14 and 15 of the Constitution.

The Court held that criminalisation of consensual sex between adults in private violates the Constitution's guarantees of dignity, equality, and freedom from discrimination based on sexual orientation (Articles 21, 14 and 15). Thus, the Judges 'read down' Section 377 so that it no longer criminalises consensual sex between adults in private.

However the Judges held that Section 377 will continue to govern cases of non-consensual sex between adults as well as any sex with children. The Court held that an adult would be any person above 18 and that any person below 18 would be presumed not to be able to consent to a sexual act.

Though, Section 377 was held to be unconstitutional by a bench of the Delhi High Court, The Supreme Court of India, in *Suresh*

³⁰No.488/1992 CCPR/C/50/D/488/1992.

K. Koushal v. NAZ Foundation³¹ the following issues were placed before the court:

(1) Whether section 377 of IPC violates the fundamental rights of equality, life, liberty, privacy, dignity, and freedoms of the individual?

(2) Whether the decision by high court in Naz Foundation case which decriminalized homosexuality is right

In its judgment the Supreme court bench of Justices G. S. Singhvi and S. J. Mukhopadhyaya stated —

“We hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable.”³² The bench of Justices G.S. Singhvi and S.J. Mukhopadhyay however noted that the Parliaments should debate and decide on the matter. A bench of Justices upheld the constitutional validity of Section 377 of Indian Penal Code that makes anal sex a punishable offense. The central government has filed a review petition on 21 December, 2013. In its review petition the Centre said: “The judgment suffers from errors apparent on the face of the record, and is contrary to well-established principles of law laid down by the apex Court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution.” The IPC, when enacted in 1860, was justified; but with the passage of time it had become arbitrary and unreasonable, the petition added. Naz Foundation has also filed a review petition against the Supreme Court order on Section 377. On January 28, 2014 preeminent court, excused the audit Petition documented by focal government, The United Nations human rights boss Navi Pillay voiced her failure at the re-criminalization of consensual same-sex connections in India, calling it “a huge advance in reverse” for the nation. In the wake of Indian preeminent court deciding that gay sex is illicit, UN boss worried on the requirement for fairness and restricted victimization lesbians, gays and bisexuals. Soon after the judgment, Sonia Gandhi, President of the then decision Congress party, requested that Parliament get rid of Section 377. Her child and Congress Party VP, Rahul

Gandhi additionally needed segment 377 to go and bolstered gay rights. In July 2014, Former Minister of State for Home Kiren Riju in the BJP drove Central government told the Lok Sabha in a composed answer that a choice with respect to Section 377 of IPC can be taken simply after profession of judgment by the Supreme Court. Nonetheless, on 13 January 2015.

The Indian Supreme Court’s decision in the case of Suresh Kumar Koushal v. Naz Foundation³³ is significant in many ways. However, the judgment is noteworthy not for what it has achieved, but for all that it has failed to do. The Delhi High Court’ judgment in 2009 built upon a decade of work by the LGBT activists. Since then the LGBT community has engaged the public attention through numerous protests, demonstrations, Fact Finding Reports, Conferences, Film Festivals and the well-known, pride marches.

Initially the way the LGBT community was kept abreast of the legal developments was both through the organising of periodic consultations on the petition by the Lawyers Collective (the Lawyers for Naz Foundation) for LGBT groups as well as by regular postings on an LGBT list serve. However the media soon began to evince more interest and report regularly on the developments

In National Legal Services Authority v. Union of India³⁴ the issues which were placed before is related to Trans gender rights:

- (1) Whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution.
- (2) Whether the absence of legislation protecting transgender people, the community faced discrimination in various areas of life

In This Case the Court held that non-recognition of gender identity violates the rights to equality and life, and that transgendered persons should not be compelled to declare themselves as either male or female. The lack of recognition of their gender identity curtails their access to education, health care and public places, and results in discrimination in the exercise of their right to vote and secure employment, driving

³¹Civil Appeal No. 10972 OF 2013.

³²*Id.*

³³*Id.*

³⁴ (2014) 5 SCC 438.

licenses and other documentation where eligibility is contingent on declaring oneself as either male or female. In the Indian context, the Transgenders already have a history of being marginalised because of the perilous construct of post-colonial norms and legislations. The Transgender Persons (Protection of Rights) Bill, 2016, can be cited as the latest addition to the list of disappointments. Though it is claimed to be a principled follow-up to the NALSA judgment, it fails miserably to protect the right of self-identification. From its initial definition - "Transgender person means a person who is neither wholly female nor wholly male" - the Draft Bill undermines the spirit of the NALSA judgment. And if that were not enough, it then goes on to set up a screening committee that will determine the genuinity of an individual's identity.

The text of the NALSA judgment ends with a demand from the Supreme Court that the central and the state governments uphold the privilege of transgender people to choose their self-recognized sexual orientation; and pursuant to this, be granted full legal recognition towards the same.

In *Joseph Shine v. Union Of India*³⁵ on 27 September, 2018 case the main issue is whether section 497 of IPC violates the fundamental right?

The Court observed and held the following: "Prima facie, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is

established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This amounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic.

When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in *Yusuf Abdul Aziz v. The State Of Bombay*³⁶ was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court. The said factual discovery will not detain us any further. In *Yusuf Abdul Aziz*³⁷ Case, the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the appellant was being prosecuted for adultery under Section 497 IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:- Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor. The last sentence in Section 497 prohibits this. It runs—In such case the wife shall not be punishable as an abettor. It is said that this offends Articles 14 and 15.

³⁵2018 SCC Online SC 1676.

³⁶AIR 1951 Bom 470, (1951) 53 BOMLR 736, ILR 1952 Bom 449.

³⁷*Id.*

In *Nimesh Bhai Bharat Bhai Desai v. State Of Gujarat*³⁸ the issues which was place before Gujarat High Court as follows :

- (1) whether a wife can prosecute her husband for unnatural sex acts under S.377 of the Indian Penal Code, 1860 (IPC).
- (2) whether with regard to a heterosexual couple, fellatio and cunnilingus amount to unnatural sex acts

In this case the court begins with a list of potential activities that may be against the order of nature. Notably, this list seems illustrative because the court states that unnatural sex can take various forms “such as” sodomy, bestiality, buggery, masochism, sadism, and fetishism. However, through the judgment the court does not seem to take note of any other kind of sex which may fall under the category of unnatural. Arguably, the court seems to understand carnal intercourse as sexual intercourse involving a penis and penetration as an act that can be accomplished only when the penis penetrates the anus. This conclusion further strengthened by the fact that they do not find fellatio an act of unnatural sex because though it does involve the penis, there is no penetration in the anus. By extension, cunnilingus is not unnatural because there is no penis involved. Accordingly, the court concludes that apart from sodomy, bestiality and buggery, no other sexual acts mentioned on their list classifies as unnatural act. The failure of the court to expand the list of unnatural acts shines a light on its narrow understanding of unnatural. However, this is not to argue that the list of unnatural acts must be expanded. This is just to draw attention to the fact that according to the court, unnatural sex acts are those which involve penile penetration into the anus of either a man, woman, or beast.

In this judgment, the Gujarat High Court has found that fellatio and cunnilingus are not unnatural sex acts as between heterosexual couples. Because of the wording of 377, the conclusion would have been the same regardless of whether consent was involved. However, since the amended rape provisions will cover non-consensual cases of fellatio and cunnilingus at least between the non-married

heterosexual couples, for the purpose of our analysis we will compare these two acts performed consensually, once by a non-heterosexual couple, and once by a heterosexual couple. The thrust of this judgment is that the heterosexual couple will not be found in violation of 377 whereas the non-heterosexual couple will be found guilty in violation of 377 because 377, “penalizes sexual activities between the homosexuals” . In other words, if a man has consensual oral sex with a woman, neither would be guilty under 377, but if a man performs the same acts with another man consensually, both will be guilty under 377. In other words, 377 will operate differently depending only the sex of the sexual partner. Therefore, this decision advances an interpretation of 377 which mandates discrimination based only on sex, a clear violation of Articles 14 and 15 of the constitution

After the *Suresh Kumar Kaushal Case* the issue whether section 377 of the IPC is constitutional valid or not was placed before the supreme court in *Navtej Singh Johar V. Union Of India*:³⁹ In this case The five-judge seat of the Indian Supreme (Court) collectively held that Section 377 of the Indian Penal Code, 1860 (Section 377), to the extent that it applied to consensual sexual direct between grown-ups in private, was unlawful. With this, the Court overruled its choice in *Suresh Kumar Koushal v. Naz Foundation* that had maintained the defend ability of Section 377.

The Court depended upon its choice in *National Legal Services Authority v. Union of India*⁴⁰ to emphasize that sexual orientation character is natural for one's character and denying the equivalent would be violative of one's poise.⁴¹ The Court depended upon its choice in *K.S. Puttaswamy v. Union of India*⁴² and held that denying the LGBT people group its entitlement to security on the ground that they structure a minority of the populace would be violative of their essential rights.⁴³ It held that Section 377 adds up to a preposterous limitation on the privilege to opportunity to

³⁹W. P. (CrI.) No. 76 of 2016.

⁴⁰*Id*

⁴¹*Id* at 156.

⁴²W. P. (CIVIL) NO 494 OF 2012.

⁴³*Id* at 271.

³⁸2018 SCC Online, Guj 732.

articulation since consensual animalistic intercourse in private "doesn't in any capacity hurt open fairness or ethical quality"⁴⁴ and on the off chance that it keeps on being on the resolution books, it would cause a chilling impact that would "abuse the security directly under Art. 19(1)(a)".⁴⁵ The Court asserted that that "closeness between consenting grown-ups of a similar sex is past the authentic interests of the state".⁴⁶ and homosexuality laws disregard the privilege to fairness under Article 14 and Article 15 of the Constitution by focusing on a section of the populace for their sexual direction. Further, the Court additionally depended upon its choices in *Shafin Jahan v. K.M. Asokan*⁴⁷ and *Shakti Vahini v. Union of India*⁴⁸ to reaffirm that a grown-up's entitlement to "pick an actual existence accomplice of his/her decision" is an aspect of individual freedom.

Justice Misra, Former The Honourable Chief Justice Of India (in the interest of himself and J. Khanwilkar) depended on the standards of transformative constitutionalism and dynamic acknowledgment of rights to hold that the constitution must guide the general public's change from an ancient to a down to business society where crucial rights are furiously monitored. He further expressed, "established profound quality would beat social ethical quality"⁴⁹ to guarantee that human privileges of LGBT people are ensured, whether or not such rights have the endorsement of a majoritarian Government.

J. Nariman as he would see it broke down the administrative history of Section 377 to infer that since the basis for Section 377, to be specific Victorian ethical quality, "has a distant memory"⁵⁰ there was no explanation behind the duration of the law. He finished up his conclusion by forcing a commitment on the Union of India to take all measures to broadcast the judgment to wipe out the shame looked by the LGBT people group in the

public arena. He additionally guided government and police authorities to be sharpened to the situation of the network to guarantee good treatment for them.

J. Chandrachud as he would see it perceived that however Section 377 was facially nonpartisan, its "impact was to destroy characters"⁵¹ of the LGBT people group. He expressed that, if Section 377 keeps on winning, the LGBT people group will be underestimated from wellbeing administrations and the "commonness of HIV will worsen"⁵² He expressed that not exclusively should the law not oppress same-sex connections, it must find a way to accomplish equivalent security and to give the network "equivalent citizenship in the entirety of its indications".⁵³

J. Malhotra certified that homosexuality is "not a deviation but rather a variety of sexuality".⁵⁴ She expressed that the privilege to protection doesn't just incorporate the option to be disregarded yet in addition stretches out to "spatial and decisional security".⁵⁵ She finished up her feeling by expressing that history owes a statement of regret to individuals from the LGBT people group and their families for the postponement in giving review to the disgrace and exclusion that they have endured the hundreds of years.

Indian judiciary has plays an important role in legalizing homosexuality. In *Navej Singh Johar* case, the Supreme Court of India held that section 377 of IPC is unconstitutional.

6. Conclusion and suggestions

Thus there is much heated debate is going on across the world in respect of the legality of homosexuality. India is the biggest democratic country in the world. Therefore it is the bounden duty of the Government to bestow liberty and equality to the citizens of the country. In this connection it is not an out of place to mention here about AH. Maslow's need of hierarchy. According to him, the

⁴⁴*Navej Singh Johar v. Union of India* W. P. (Crl.) No. 76 of 2016.

⁴⁵*Id* at 165.

⁴⁶*Id* at 224.

⁴⁷AIR 2018 SC 357.

⁴⁸(2018) 7 SCC 192.

⁴⁹*Id* at 79.

⁵⁰*Id* at 239.

⁵¹*Id* at 328.

⁵²*Id* at 368.

⁵³*Id* at 270.

⁵⁴*Id* at 455.

⁵⁵*Id* at 476.

people of the society will give much importance to the primary needs such as Food, Cloth, Shelter and Sex. After having satisfied these basic needs only, he will shift to the next phase of the needs in the pyramid such as self actualization and esteemed needs in the society.

Taking into consideration the current Indian cultural framework and the rising clash in the establishment of marriage, the interest for authorizing gay marriage is by one way or another disregarded and overlooked. Be that as it may, in not so distant future the generalization mentality of the general public for marriage as hetero establishment related with reproduction and rising of youngsters may likewise incorporate gay relationships where love between the accomplices will be given significance instead of the sex. At that point the inability to recognize the changing idea of society and the family will bring about more damage than anything else.

Suggestions are as follows:

1. LGBT people are also human beings like other citizens. They have also born from their parents like others born like LGBT is not their sin. Due to the defect of chromosomes, infirmity cum debility and other heredity cum genetically problems, they have born like that. It is not their fault. When other than LGBT people are entitled to enjoy the fundamental rights and the privileges of Directive principles of State policy, why the LGBT community can't also entitled to enjoy the same fundamental rights and privileges that are provided by the Constitution of India. To enjoy the same is their birth right. Nobody can preclude in enjoying the same being citizens of India. Therefore, the Government of India through the Parliament shall annul the Section 377 of the IPC, 1860 by reckoning the principles of natural justice and law of the land.

2. Due to physical and mental infirmity, the physically challenged people are entitled to get reservations in the schools and colleges besides even in getting the Government jobs and other employments. Like-wise the LGBT people are also suffering from their physical infirmity for centuries together. Then why can't the LGBT people are also entitled to

enjoy such type of reservations in prosecuting their studies and thereafter getting the government jobs and other employments. Therefore, the Government of India shall be amend the statute in such a manner, that the LGBT people shall also enjoy the same benefits in all walks of their lives so as to treat them also like other human beings.

3. Since the SC, ST and other aboriginal people have been suffered from quite a good number of problems such as social, cultural, educational and political besides deprived from the same since centuries together, after attaining the Independency, the Government of India has been provided and being providing a myriad privileges through the Constitution and other statutes in the above fields. Like-wise the LGBT people have been also suffering from the same problems besides social struggles and other mental agonies, indiscrimination and look down upon as untouchables from centuries together. Therefore it shall be recognized by the Government of India and shall be provided the same privileges as had entitled and enjoying by the above cited people by making suitable amendments to the statutes by the parliament of India. The same shall be on par with the above cited downtrodden people by reckoning the principles of natural justice besides socialistic pattern of society that is all are equal before law sans any discrimination.

4. Due to the deforestation and lack of food, the wild animals are off and on intruded in the nearby villages and causing damage and havoc to the crops and other properties of the people for the sake of their survival. Like-wise though the LGBT people are willing to work, nobody is ready to bestow employment to them in the society. Since there is no other alternative, they are habituated for begging and indulging in prostitution to eke out their livelihood for survival. Due to that fact only, they are thronging on the people at bus stations, railway stations, streets and during the time of journeys also. Due to precluding them from doing the work, they are forcefully habituated for begging and prostitution. We are experiencing in our daily life this type of pathetic episodes and scenarios. Therefore the Government shall implement such type of policies and programmes statutorily to bestow employment to the LGBT people in order to

eke out their livelihood sans become parasites on others.

5. The Government shall establish separate rehabilitation centres and implement certain reforms for the well-being of the LGBT people.

6. Like-wise, the Government shall establish hospitals and educational institutes separately if necessary for the wellbeing of the LGBT people so that make them to enjoy the benefits and privileges of the same on par with other human beings. Besides the above, the mindset of the people shall also be changed and they should be sympathized towards the LGBT people and treat them as their siblings and fellow human beings and the people of the society should not be treat them as untouchables and not keep them aloof.