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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 vs 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 30 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 analyzes 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.

I. INTRODUCTION

I am what I am, so take me as I am' - Johann Wolfgang von Goethe

Shakespeare through one of his characters in a play says —What's in a name? if we call a rose by any other name, then also it would smell the same. This phrase conveys that what really matters is the essential qualities of the substance and the fundamental characteristics of an entity but not the name by which 'it' or 'a person' is called. Similarly, people cannot be

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differentiated or discriminated or denied Basic Human Rights, just on the basis of their sexual preferences.

The idea of human rights rests on the central premise that all humans are equal. It follows that all humans have dignity and all humans should be treated as equal. Anything which undermines that dignity is a violation as it violates the principle of equality and paves the way for discrimination. Such discrimination also violates the basic essence of the preamble of the Indian Constitution which mandates justice and equality of status for everyone in all spheres whether it is social, economic or political.

Gay Pride parades held in Delhi, Kolkata and Bangalore on 29 July, 2008 is a clear example that LGBT and Queer identities may be acceptable to more Indian youths than ever before, but within the boundaries of family, home and school, acceptance of their sexuality and freedom to openly express their gender choices still remain a constant struggle for LGBTQ, especially in a diverse country like India.

II. WHAT IS LGBTQ+

The term 'LGBTQ+' is used to denote following sects of people -

1. **Lesbian:** A lesbian means, a woman who is sexually attracted to a woman.
2. **Gay:** A gay means, a man who is sexually attracted to the man.
3. **Bisexual:** A bisexual person is someone who is sexually attracted to people of both sexes.
4. **Transgender:** It is a term used to define people whose gender identity and gender expression, differs from that usually associated with their birth sex.
5. **Queer:** Queer is a term used to refer to sexual and gender identities who are neither heterosexual nor cisgender (opposite of transgender). The term 'Queer' in itself is a community as they generally go for using pronouns instead of being restricted to, He, She etc.

The '+' in 'LGBTQ+' signifies that the above list is not exhaustive it includes other categories as well like Pansexual, asexual, Intersex etc.

III. HISTORY OF HOMOSEXUALITY IN INDIA

Homosexuality means sexual desire or behavior directed toward people of one's own sex or gender i.e., when a person is attracted towards the same gender to which he belongs, the he is said to be Homosexual. Its is not a new concept, it has been prevalent in India from a very long time. Ancient texts like Rig Veda which dates back to around 1500 BC and sculptures depict

sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility. The description of homosexual acts in the Kamasutra, the Harems of young boys kept by Muslim Nawabs & Hindu Aristocrats, male homosexuality in the Medieval Muslim history like Malik kafur are some historical evidences of same-sex relationships.

Amara Das Wilhelm in her book² compiled years of extensive research of Sanskrit texts from medieval and ancient India, and proved that homosexuals and the "third gender" were not only in existence in Indian society back then, but were also widely accepted. In the *Kama Sutra*, a 2nd century ancient Indian Hindu text, the chapter "Purushayita" in the book mentions that lesbians were called "Swarinis". These women often married other women and raised children together. They were also readily accepted both within the 'third gender' community and ordinary society.³

However, these experiences started losing their significance with the advent of Vedic Brahmanism and, later on, of British Colonialism. Giti Thadani (a researcher) claims that Aryan invasion dating back to 1500 B.C began to suppress homosexuality through the emerging dominance of patriarchy.

In the Manusmriti there are references to punishments like loss of caste, heavy monetary fines and strokes of the whip for gay and lesbian behavior. Imposing of these punishments clearly indicate that Homosexuality was practiced at that time. Since 1974, homosexuality ceased to be considered an abnormal behavior and was removed from the classification of mental disorder.

This clearly shows that how, with time, homosexuality has gone on from being completely a natural act to being an unnatural act which is against the order of the nature.

IV. IS HOMOSEXUALITY UNNATURAL

In 2018, Commenting upon the landmark judgment '*Navtej Singh Johar V. Union of India*' of The Hon'ble Supreme Court against Section 377, Rashtriya Swayamsevak Sangh (RSS) leader Mr. Arun Kumar uttered the word – "*unnatural*" in his comments. He stated:

"Gay marriage and relationship are not compatible with nature and are not natural, so we do not support this kind of relationship. Traditionally, India's society also does not recognise such

² Amara Das Wilhelm, *Tritiya-Prakriti: People of the Third Sex: Understanding Homosexuality, Transgender Identity and Intersex Conditions through Hinduism* 24 (Xilbris Corporation, 2013)

³ The Quint, <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377#read-more> (Last Visited March 19, 2021)

relations."⁴

Indian Penal Code was enacted in 1860. Thus, it is a Victorian era draconian law which criminalizes the homosexuality based on Judeo-Christian theology rather than on science. The law relegated some people to inferior status based solely on how they looked or who they loved, invaded their privacy, and degraded their dignity. Sexual orientation or gender identity should not be a deciding factor in determining the role play of any individual in a progressive society but, section 377 of Indian Penal Code, 1860 did that.

The act of engaging in Sexual activity with the same sex was considered 'against the order of the nature' which as per Section 377 IPC includes homosexual and transgendered community. However, this is a completely bizarre argument because according to various researches, Homosexuality exists in at least 1500 species of animals especially in dolphins. So, if it is prevalent in so many Species, then how can a single specie i.e., Human Beings declare it to be against the order of Nature.

V. IS HOMOSEXUALITY ANTI-RELIGIOUS?

Every religion has their own religious texts and writings which they blindly follow but these Religious writings have now become outdated and has been wrong at many levels from the very start for example untouchability is justified in various Hindu Religious books. According to many religious and ancient books, the practice of untouchability and differentiation on the basis of race and caste was justified at that time to ensure proper functioning. This practice continued till a provision was added in The Constitution of India prohibiting the practice of untouchability.

Contrary to untouchability, many religious experts consider Homosexuality as Anti-religious but it is not true at all as there are many ancient Indian texts which contains verses supporting the LGBT community. The Hindu epics mention several characters who demonstrate a range of sexual orientations and gender identities, including Shikhandi, Chitrangada (wife of Arjuna and mother of Babruvahana), and Brihannala from the Mahabharata. None of these characters are discriminated against because of sexual orientation or gender identity in the sacred text. Rather, they are all treated with respect, and judged by their abilities rather than their sexuality. The Arthashastra has numerous mentions of LGBT individuals in various professions free from any persecution. And the stories of Ardhanareeshwara (Shiva as half-man, half-woman) and Lord Ayyappa who was born to Shiva and Mohini (Female avatar of Lord Vishnu) indicate the

⁴ Supra 3.

subtle approach that Hinduism adopts towards matters of gender. Apart from the texts, even the Monuments have depicted existence of homosexuality. The scriptures and monuments in Khajuraho, Madhya Pradesh depict the existence of homosexuals during the past and thus are a proof that they were accepted as a part of the society rather than being anti-religious.

VI. PROBLEMS FACED BY LGBTQ

Even though we might call ourselves advance and modern generation but it is disheartening to see the atrocities faced by people belonging to LGBTQ Community at different places and environment. Some of the common problems which they face are:

1. According to UNESCO Report of 2018, LGBTQ Children face a lot of bullying in schools, colleges etc. and are also discriminated. This act of bullying and discrimination leaves a permanent scar in their life and it often takes them years to get out of that. (UNESCO Report, 2018)
2. If a person declare himself or is found to be belonging to LGBTQ Community then generally a bounty is set for their Secret Honour Killings. Recently, many people have become victim of such honour killings.
3. Women suffer the most for belonging to LGBTQ Community as when a woman declare herself as a lesbian or a bisexual, then the family generally suggests them to go for sanctioned corrective rapes in which a woman has sexual intercourse with a man without her will to treat the 'Disease of Homosexuality'.
4. LGBTQ People not only face discrimination in schools and colleges but this menace does not end even after the completion of their education, they are also Discriminated while getting jobs as no employer wants to hire a person with a different sexual preference as that idea does not go well with the society and is often questioned by other employees. Thus, they are unable to get better pay jobs and are stuck in the vicious circle of poverty.
5. Non-acceptability of LGBTQ is not only prevalent in rural areas but also in urban families as the families in urban areas are more concerned about their status in the society that they tend to forget their duties towards their children and often throw them out of the houses in order to prevent their social status when they find out that their child belong to LGBTQ Community.
6. LGBTQ people are often thrown to correction centers where they are administered psychotic drugs as part of 'corrective therapy for Homosexuality'. They get so addicted

to these drugs that even after getting out from the torture of correction centers, they find solace in drugs and other psychotropic substances and thereby, become addicted to it.

7. People belonging to LGBTQ Community are often Isolated from everyone, which leads them into depression.

VII. SECTION 377 INDIAN PENAL CODE, 1860

Section 377 of the Indian Penal Code, a figment of colonial creation, criminalized unnatural sexual acts 'since its application as law in 1862'. Homosexuality falls within such acts and may attract punitive measures.⁵

The Now Redundant Provision of Section 377 of Indian Penal Code, 1860 (Herein after referred to as IPC) talked about Unnatural offences and stated that whoever voluntarily has *carnal inter-course* against the order of nature with any man, woman or animal, shall be punished with Life Imprisonment or Rigorous Imprisonment of up to 10 years.

Although not explicitly defined, "carnal inter-course against the order of nature" has been dealt by the Indian courts in the intervening years to include anal sex, oral sex, and in some cases other non-procreative sexual acts, such as mutual masturbation.⁶

This offence was made non-bailable and cognizable offence in which sodomy and homosexuality was considered one and the same thing. A homosexual man was viewed as a 'type of person' who has only anal intercourse with his partner. However, the emotional attachments, fantasies and other desires were not given due consideration. Thus, de jure, it was an attempt to criminalize sodomy while de facto it was an attempt to criminalize and stigmatize homosexuality.

In *Fazal Rab Vs State of Bihar, 1983*, The Hon'ble Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy. The court observed that the offence under Section 377, IPC implies sexual perversity. Considering the consent of the boy and no use of force by the adult, the Supreme Court reduced the sentence from 3 years rigorous imprisonment to six months rigorous imprisonment. This clearly implied that even though the homosexual act was consensual, but by virtue of Section 377 of IPC, he was still imprisoned. By applying Section 377 IPC in such a manner, the court completely violated his Fundamental Right to Live with dignity (Article 21), Fundamental Right to freedom to express (Article 19(1)(a)) among many other fundamental rights.

⁵ R.A. Nelson, Indian Penal Code 3738 (S.K. Sarvaria Ed., 9th ed.2003).

⁶ Gupta A. Section 377 and the dignity of Indian homosexuals. Economic and Political Weekly.

Section 377, not only deals with homosexuals but also punishes heterosexual couples engaged in sodomy i.e., if a married couple engages in ‘Anal Intercourse’ instead of ‘Normal Intercourse’, then both Husband and Wife will be considered guilty, if the wife consented for anal intercourse but, if she did not, then the husband alone will be considered guilty under Section 377 IPC.

In India, Marriage is taken as an implied consent by the wife for 'normal' sexual intercourse and not for ‘anal’ sexual intercourse i.e., if a couple has married, then it will be presumed that both of them have consented to have sexual relations. So, if the husband does Marital Rape on her wife i.e., forcefully, without her consent have ‘normal sexual intercourse’ with her, then this, will not be termed as offence of rape, if the wife is aged 18 years and above. This is a big blow to the Indian Penal Code as it allows heinous offence like a marital rape but punishes for the consenting sexual act amongst same sex consenting adults.

In 1994, a controversy emerged when a medical team visited the Tihar Jail in Delhi and reported a high incidence of sodomy in the male wards. They recommended making provisions for condoms, as there was a risk of HIV infection being transmitted into the jail inmates. The jail authorities abstained from making provisions for condoms since it will mean that they are approving a crime and aiding and abetting an offence under the IPC.⁷ As a consequence of the inactivity of the prison staff, the AIDS Bhedbhav Virodhi Andolan filed a petition in the Delhi High Court challenging the official position and the constitutionality of Section 377.⁸

(A) Naz Foundation Govt. v. NCT of Delhi, 2009⁹

In July 2001, Lucknow police raided a park and detained a few men on the suspicion of them being homosexuals and then were charged under section 377 IPC. The police also arrested nine more men associated with ‘Bharosa Trust’, an NGO which was working to create awareness amongst people about safe sexual practices and STDs by distributing pamphlets providing tips on safe sex to homosexuals.¹⁰ These people were then accused of running a sex racket and were denied bail.

As Gupta¹¹ argues, ‘the Lucknow incidents show that the mere existence of Section 377, even if it cannot and is not being enforced in prosecuting sexual acts in private, adds a certain

⁷ Siddharth Narrain, *The Queer Case of Section 377* (http://www.sarai.net/publications/readers/05-bare-acts/06_siddharth.pdf ; last accessed on 27th March, 2021).

⁸ Ruth Vanita, *Queering India* 15(2002).

⁹ WP(C) No.7455/2001, Delhi High Court; Decision on 2nd July, 2009.

¹⁰ Arvind Narrain, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva in health and human rights* 153 (2004)

¹¹ *Supra* 6

criminality to the daily lives of homosexual men and puts them under the gaze of the law and a constant threat of moral terrorism'. After this, Naz Foundation (a non-governmental organization working on HIV/AIDS and sexual education and health since 1994) filed a petition in 2001 before the Delhi High Court challenging the constitutional validity of Section 377 of IPC.¹²

The petitioner argued that Section 377 of IPC violated their fundamental right to life and liberty, right to privacy and dignity, right to health, right to equality and freedom of expression. It was also submitted that Section 377 undermined the public health efforts which aimed at reducing the risk of transmission of sexually transmitted diseases like HIV/AIDS, as the fear of prosecution under this Section prevented people from talking openly about their sexuality and lifestyle.

Finally, in 2009, Delhi High Court held that Section 377 of IPC imposed an unreasonable restriction over the two consenting adults from engaging in sexual intercourse even in private. Thus, it was in direct violation of their basic fundamental rights enshrined under Articles 14,15,19 and 21 of the Constitution of India. The instant reaction to the judgment was of extreme elation from the sexual minorities across the nation while religious leaders condemned it with equal passion.¹³

VIII. CURIOUS CASE OF SAVITA AND BEENA

On 22 July 2011, two women, Savita and Beena shocked the world by becoming the first lesbian couple to be legally married in India.

They both knew each other from their childhood. Savita had been forced into an arranged marriage in 2010 with a police constable from her village, but after five months of marriage, she ran away because of the repeated abuses by her husband and her in laws. The Local Panchayat dissolved the Marriage. Her Uncle again tried to marry her off later after which, Savita decided to kill herself but was saved by Beena. There was open declaration in the village to kill Savita. but, Beena took Savita to her house to keep her protected.

Later, they both filed affidavit in the Gurgaon court with evidences, that they are married as husband and wife. The additional sessions judge Vimal Kumar of Gurgaon Court in its order based on a 2009 ruling from the Punjab and Haryana High Court to "ensure help and give assistance to runaway couples and on the basis of Naz Foundation Case, on 25 July, stated that

¹²About Us – Naz Foundation. (n.d.), from Nazindia.org website: <https://www.nazindia.org/aboutus/> (last accessed on 3rd April, 2021).

¹³ Nirmimesh Kumar, Delhi High Court Strikes Down Section 377 of the IPC, THE HINDU, 2nd July 2009, New Delhi.

Veena and Savita had filed an affidavit that they were married, but did not comment on the validity of the marriage. Thereby, not explicitly accepting the union but also not rejecting it altogether.

(A) Suresh Kumar Koushal v. Naz Foundation, 2013

After eight years of a long battle, When the LGBTQ+ community was just letting out a sigh of relief, various Individuals and faith-based groups outrightly rejected the idea of decriminalizing homosexual relationships as held by Delhi High Court in *Naz Foundation Govt. V. NCT Of Delhi, 2009*, citing India's rich history bathed in ethics and tradition. They filed an appeal before the Supreme Court of India to reconsider the constitutionality of Section 377.

The division bench of Justice GS Singhvi and Justice SJ Mukhopadhaya in Hon'ble Supreme Court on 11th December 2013, overturned the judgment of the Delhi High Court and re-criminalized homosexuality. The bench held that LGBT+ persons constituted a 'minuscule minority' and therefore did not deserve constitutional protection and further observed that Section 377 of IPC did not suffer from the vice of unconstitutionality and thus, is totally constitutional. Supreme Court vehemently ignored basic fundamental rights under Article 14, 15, 19 and 21, just because LGBT constituted miniscule minority. Thereby, bypassing the essence of the Constitution of India.

But the silver lining of this judgment was that, instead of putting a halt on the LGBT movement, it rather rekindled a new wave of activism in India. The Supreme Court's regressive judgement faced immense criticism from every nook and corner for erasing basic human rights of homosexuals. The result was that public conversation about LGBT rights witnessed an upsurge in India, which later turned into a massive movement.

IX. RIGHTS OF TRANSGENDER PEOPLE

The main activists during the mass LGBT movement belonged to the Transgender Community as they have been the worst sufferer of exploitation amongst the whole LGBTQ+ community in India due to their degraded social, educational and economical status. These people have never been considered as a part of society and have always been subjected to exploitation, ostracization i.e., exclusion, humiliation and violence either in the hands of society or the authorities in power.

The constant rejection and not having access to resources, these people often resort to beggary or prostitution, making them more vulnerable to discrimination, STD's and crimes such as human trafficking. But, the 2014 Judgement of the Supreme Court in *NALSA V. Union of India*,

2014 brought in a new ray of hope and euphoria for these transgender people as for the first time in the history, they were recognized as the third gender.

(A) National Legal Services Authority v. Union of India, 2014

The issue before the Hon'ble Supreme Court in this case was whether there was a need to recognize the hijra and transgender community as a third gender for the purposes of public health, education, employment, reservation and other welfare schemes?

The Supreme Court in this landmark judgement created the 'third gender' status for hijras or transgenders. As earlier, the transgender people were forced to describe themselves as either male or female, but after the judgement, they could proudly identify themselves as transgender or Third Gender. The Judgment also laid down the framework to guarantee the transgender community a bunch of basic human rights which can be summarized as follows:

1. The Supreme Court held that the non-recognition of their identities was in violation of Article 14,15,16 and 21 of the Constitution of India.
2. The Supreme Court further directed the Government of India to treat the members of "Third Gender" as an economically and socially backward class in terms of giving them reservation. It also stipulated that government should make proper policies for the transgender community in the light of Articles 15(2) and 16(4) to ensure equality of opportunity in education and employment as per the judgement, the third gender would be categorized as other backward classes [OBC] to confer them the benefit of reservation in relation to government jobs and educational institutions.
3. The court also took cognizance that a conflict between one's birth gender and identity is not essentially a pathological condition. So, rather than adopting a 'treatment of the abnormality', the focus should be on 'resolving distress over a mismatch'. In simple words, it means that the court recognized the difference between both the gender and biological components of sex. The court defined biological characteristics to include genital, secondary sexual features, chromosomes etc. but defined gender attributes as one's self-image i.e., an individual's deep emotional or psychological sense of sexual identity and character which is not restricted to the binary sense of male and female but can lie on a broad spectrum.

After this judgement, transgender people now can change their gender without undergoing a sex reassignment surgery. Additionally, they also have a constitutional right to identify and register themselves as the third gender. Apart from this, various state government took small steps to benefit the transgender population by making policies of health and housing. However,

a major blow to this judgement came after the passing of Transgender Persons Bill, 2018

X. TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019

Transgender Persons (Protection of Rights) Bill, 2019 was enacted with an objective to protect the rights of the Transgender Community by prohibiting discrimination against them with regards to employment, education, healthcare, access to government or private establishments. But in the name of empowering the community, the bill further exposed them to institutional oppression and dehumanizes their body and identity. Some lacunas with the Bill are:

1. The bill takes away the right from transgender people to determine their sexual orientation. As per the bill, the change of gender identity in documents can only be done after proof of sex reassignment surgery which must be certified by the District Magistrate. This not only affects autonomy and privacy of transgender people, but also exposes them to harassment in the hands of authorities.
2. Punishment for Sexual abuse against Transgender is only two years imprisonment as per Transgender Persons (Protection of Rights) Bill of 2019 whereas, a similar kind of offence if, happened against women attracts a serious punishment under IPC extending up to 7 years imprisonment.
3. There are no provisions in relation to providing any scholarships, reservation or changing the school curriculum to make it LGBT+ inclusive or ensuring safe inclusive schools and workplaces for the trans community.

XI. GOVERNMENT'S VIEW ON LGBT+

'You don't have to be a cow, to fight for animal rights!' -Shashi Tharoor

On 23 February 2012, the Ministry of Home Affairs expressed its opposition to the decriminalization of homosexual activity by Delhi High Court, stating that in India, homosexuality is seen as being immoral. The Central Government reversed its stand on 28 February 2012, asserting that there was no legal error in decriminalizing homosexual activity. On December 18, 2015, Shashi Tharoor, a member of the Indian National Congress party, introduced the bill for the decriminalization of Section 377, but the bill was rejected by the house by a vote of 71-24.

In 2016, Kerala mooted free sex-reassignment surgeries in Government hospitals after it introduced the first State government policy on transgender people. This was a positive move by the state government, giving a hope that from this time onwards, all the steps taken in respect of people belonging to LGBT Community will be in the positive direction. But, recently, on

25 February 2021, the Central Government side in a case stated in Delhi High Court that marriage can only be between biological man and woman. Thereby, strongly opposing validation of same sex marital unions.

On 5th March 2021, The Hon'ble Supreme Court of India issued notices to the Centre and other parties after hearing a Public Interest Litigation (PIL) challenging Health Ministry guideline banning transgender and gay persons from donating blood. A three-judge bench, headed by Chief Justice of India (CJI) SA Bobde, was hearing a petition filed by one T Santa Singh challenging the constitutional validity of Section 12 and 51 of the Guidelines on Blood Donor Selection and Blood Donor Referral, 2017, issued by the Ministry of Health and Family Welfare. The rule imposed a complete ban on members of the LGBT community and female sex workers from donating blood considering these groups to be in high-risk of contracting HIV/AIDS infection. So, instead of checking the blood sample of people who are donating blood, the guidelines are arbitrarily excluding LGBT Community from donating blood.

The above instances clearly states that the stance of central and state government on Rights of LGBT Community is going back and forth and it still is not determined whether the Government approve of the whole community or not.

(A) K.S. Puttaswamy v. Union of India, 2017

In the *Suresh Kumar Koushal V. Naz Foundation* judgement when the Naz Foundation argued before the Supreme court that Section 377 of IPC violated the right to privacy, this argument was not given much importance as Right to privacy was not a settled law. Then in 2017, *Puttaswamy* Judgment basically focused only on right to privacy and declared it as an intrinsic part of right to life under article 21 and therefore declared it as a fundamental right.

But this case is also closely related to rights of LGBT because of Justice Chandrachud's opinion in the *Puttaswamy* judgment under the heading titled 'discordant notes' in which he rejected the rhetoric opinion of the court in *Suresh Kumar Koushal* Case and observed that sexual orientation also falls within the wide ambit of right to privacy. Moreover, under Section 377, a third party could sue the partners who voluntarily entered into sodomy thereby infringing on the right to personal liberty and privacy as enshrined in the Fundamental Rights of the Constitution. *Puttaswamy* decision notes also registered the criticism about *minimis hypothesis* principle used in the *Suresh Kumar Koushal* judgment and stated that the minuscule population of LGBT+ cannot be the ground to deprive them of the basic fundamental rights and such curtailment of the fundamental right cannot be held tolerable even when a few are subjected to hostile treatment, as opposed to a large number of people.

The USA Supreme Court observed in *Lawrence v. Texas*¹⁴, ‘the choice of sexual orientation is part of the intimate and personal choices and falls under the zone of privacy because it is a choice central to personal dignity and autonomy as well as central to the liberty protected by the Fourteenth Amendment of the American constitution’.¹⁵ Similarly, the Constitutional Court of South Africa observed in *National Coalition of Gay and Lesbian Equality v. Minister of Justice*¹⁶, ‘If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.’¹⁷

(B) Navtej Singh Johar v. Union of India, 2018

After the Hon’ble Supreme Court in *Suresh Kumar Koushal* Case overruled Delhi High Court judgement of 2013, homosexuals were again considered criminals for doing consensual sexual acts. After which, India witnessed an increasing number of LGBT rights protests when some high-profile names including hotelier Keshav Suri, Ritu Dalmia, dancer Navtej Singh Johar among many others came forward and filed the petition before the Supreme court challenging the constitutional validity of Section 377 of IPC.

The Supreme court agreed to refer the issue to a larger bench and heard several petitions in relation to it. The Government further stated that it will not interfere in the matter and will leave it to be decided by the Supreme Court in accordance with its own wisdom. Petitioners argued that section 377 violated their constitutional rights to privacy, freedom of expression, equality, human dignity and protection from discrimination.

The 5-judge bench finally gave its verdict on 6th September 2018 and unanimously held that:

1. Section 377(1) is unconstitutional up to the extent of consensual intercourse between adults as it infringes the fundamental rights of intimacy, autonomy and identity. Thereby, decriminalized act of homosexuality.
2. Section 377 is vague and does not create intelligible differentia between what is “natural” and what is “unnatural”.
3. It also curbs freedom of expressing one’s sexual identity, ie. right to freedom of expression as enshrined under Article 19 of the Indian constitution.
4. The sexual orientation is an inherent part of self-identity and invalidating the same is denying the right to life.

¹⁴ 559 US 538 (2003)

¹⁵ Rachel Sweeney, *Homosexuals and the Right to Privacy*, 34 CUMB L REV 171

¹⁶ (CCT11/98) [1998] ZACC 15:1999 (1) SA 6

¹⁷ Ibid

5. Not giving them basic rights just because they constitute a minuscule section of the population cannot be a valid justification to deny them this right.
6. The court also heavily criticized the *Koushal* judgement and called it irrational, arbitrary and manifestly unconstitutional.
7. It was also emphasized that discrimination on the basis of sexual orientation is unconstitutional because sexual orientation is a natural phenomenon as proven by scientific and biological facts.
8. The Supreme court also directed the government to create public awareness regarding LGBT rights and to eliminate the stigma surrounding the LGBT people. The judges further elaborated upon the issues surrounding mental health, dignity, privacy, right to self-determination and transgenders.

(C) Arun Kumar v. Inspector General of Registration, 2018

It is a case from the Madras High Court which reads into the category of brides Under Hindu Marriage Act, 1955 to also include transwomen. As per Hindu Marriage Act, 1955 the definition of marriage only includes men and women. This judgment expanded the category of women to include transgender people to identify as women to be brides as well. It takes the clause of self-identification as has been mentioned in the *NALSA* judgment, where a person can identify as any gender identity without needing a State or external body to verify their identity. Evolving this clause, The Court said that if an individual wishes to identify as a transwoman, then they have the constitutional right. This, among many other cases, lays the foundation for marriages within the LGBTQ+ community broadening the right to marry.

However, this does not mean that LGBTQ+ have right to marry in India in every case. There is no Supreme Court Judgment as of now to allow it.

XII. CONCLUSION

There is not an iota of doubt regarding the fact that all the judgments related to LGBT People will shape the future of the LGBT rights movement in India. The significance of the *NALSA* judgement and *Navtej Singh Johar* judgement is not only limited to the recognition of third gender identity and decriminalization of homosexuality. But these judgements are also progressive because apart from deciding upon the issue in hand, they have even laid down the basic groundwork to confer a host of other civil rights which were earlier not available to the LGBT community but are ordinarily enjoyed by the heterosexual persons and cisgender persons. These civil rights include the right to marriage, right to adoption, right to surrogacy, right against discrimination, freedom from sexual assault etc.

But, even after so many developments, LGBT People are still struggling to get the societal validation. A Supreme Court Judgment can merely pass a resolution, but it is the duty of the society to not discriminate against LGBT People and to make them feel inclusive. Merely allowing Sexual Acts between the same sex couple will not bring them at the equal peril as the other citizens as the future of same sex marriage, Legal Sanctity of adoption by same sex couple, right against oppression etc. are still uncertain and the community is still fighting for it. So, the battle is clearly not yet won, there is a long road ahead to make India an inclusive country in the true sense.
