
LGBTQ LIBERATION IN USA AND INDIA: FROM RELUCTANCE TO TOLERANCE

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ABSTRACT

With the evolving dynamics of the world, major breakthroughs in technology, accommodation and abundance of resources, tolerance and empathy for obliging to varied choices, we, as global leaders have come a long way with our ever sculptured foresight and implausible vision of a better future. Recognition and acceptance of an individual, are regarded as of the major driving forces behind a dignified existence, and sans identity, the name per se results in mere redundancy. The novel ideas of individual autonomy and liberty, without any forms of negative distinctions constitute the epitome of substantial equality in any progressive democracy. The whole design of freedom of self-determination, more specifically inclined towards sexual orientation of an individual can not only be traced in international arenas, but explicitly could also be found in the Indian jurisdiction as well. With the progress of time, societies have come to associate identity within the structure a spectrum rather than the archaic and redundant binary system. The paper intends to cover the historic downturn of the identities of these “beyond normative” groups to “homophobic” state of gender tolerance, with tracing down the oppression, consequences following the socio-political stigma and which triggered social movements around the globe in demand of liberation, legal status quo and a dignified recognition. The paper also intends to shed light upon the ground realities after the attainment of the sought after liberation through social, political and judicial perspectives, in doing so an attempt is also made to outline the factors that have stunted the awareness for the masses.

Keywords: Liberation, Queer, Homosexuality, Identity, Privacy, Individual autonomy.

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INTRODUCTION

In the era of deepening and democratisation of prerogatives of private life into public sphere, the draconian and archaic conventional heterosexual behaviour is now being shaped into the tangent of multiple sexual orientations. The LGBTQ community has a legacy from oppression, to liberation. The path has been long and exhausting. With the advent of renaissance, people have come to escape from the clutches of typical conventional relationships which are in the “ordinary course of nature”. With the development of these ideas, societies have branched out to a fragmented and formation of new spectrum of individuals whose individual autonomy and freedom of choices becomes a state’s priority. Activism and movements driven by the demands of equality and recognition, has elevated the concern of sexuality. The cohesive foundation of the state on the other hand, has contradicted to the very idea of an individual’s desire by acting as an exception, and therefore has tried to combat the whole scenario of homogenous space. The LGBT’s yearning to liberation strikes at the predominance and a “sole” existence of a heterosexual state.³

The developing liberated idea of gay and lesbian movements not only recommends distinguished identities but also advocates for social reformation and emergence of a tolerant and unprejudiced world. The respect for human choices and representation of it being voluntary would be the shaping stone of these movements.⁴

The major concepts revolving around the parasol of homosexuality would be how the particular concept came into light right from mingling in the shady bars of USA⁵, to explicitly demanding freedoms, dignity and legal recognition with vehemently taking out protests and rallies on the streets. The very idea of “infliction towards the same sex” was a mixed bag comprising of not only sexual/bodily pleasures, but also in the line of being self-reliant and independent in contrast to the male counterparts. The concept of “homosexuality” was not concrete and did not crystallize due to geographical dislocations and furthermore the ideologies were diverging with a variety of notions coming to the forefront, for example, “homophiles”, “lesbians”, “queer community”. The homophile movement was then criticised and therefore, it branched out to “gay” and “lesbian” activism taking place, separately. Social/ medical acknowledgment

³ Sumit Sourav Srivastava, *Disciplining the “Desire”: “Straight” State and LGBT Activism in India*, 63(3) SOCIOLOGICAL BULLETIN, 368–385 (2014).

⁴ Joseph Sherry, *Gay and Lesbian Movement in India*, 31(33), ECONOMIC AND POLITICAL WEEKLY, 2228–2233 (1996).

⁵ Ramom de Souza Torrecilha Souza. *The mobilization of the Gay Liberation Movement*, PORTLAND STATE UNIVERISTY DISSERATION AND THESES, (1986).

felt a closer to reality post the AIDS epidemic wherein awareness and accommodative approach, around the idea was visible from the consensus. There was a transgression/diversification from associating binary nature of an individual to a larger spectrum of multiple personality syndrome. In India also, the courts have extensively dealt with the concepts of “transgender” community with bifurcated groups like “hijras”, “kinnar”, “hermaphrodites” “cross dressers”. While granting legal recognition to “third gender” the courts have acknowledged the fact that these concepts belonged from the ancient era of “Ramayana” and “Mahabharat” also other tantric and mythological scriptures and writings. Nonetheless, with Section 377⁶ being decriminalised to the extent that it penalises consensual penile non vaginal sex between individuals and also the right of sexual orientation being treated as a fundamental right under Article 21 of the Constitution, the stand for further development and empowerment is strengthened.

UNDERSTANDING LGBT/QUEER IDENTITY

LGBT “Lesbian-Gay-Bisexual-Transgender” and IQ “Intersex and Queer” – colloquially known as “queer politics” – are shaping the politics of “desire” and, more specifically, re-sculpting the self-proclaimed hegemonies of the rules of engagement regarding family, marriage, and succession, which are the cornerstones of human society.⁷

Queer means beyond or deviating from the usual or expected. The word ‘queer’ is used both as a noun and as an adjective or even as a verb. As a noun or adjective, ‘queer’ is a ‘pejorative’ term for denoting ‘particular subject’ and reflects on ‘what it means to be a queer’. It directly signifies ‘homosexual’ people or those who practice homosexuality or lesbianism or bisexuality, and it is against of the ‘normal’ mode of heterosexuality. As a verb ‘queer’ denotes ‘to spoil’ or ‘to put out of order’ or ‘its outlaw work’. Then queer as a verb referring to rejection of the sacrosanct values of sexual purity. So, the term ‘queer’ is used for describing the homosexual people or the LGBT (lesbian, gay, bisexual, and transgender) community as well as their activities relating to sex which are beyond ‘sexual normativity’.⁸

Within the concentric circles of sex, gender, and sexuality, the concept of LGBT is delicately woven. As a result, three interconnected challenges must be addressed which begin with how are sex, gender, and sexuality related to one another, which creates a pandora's box of

⁶ The Indian Penal Code, 1860, § 377, No. 45, Acts of the Parliament, 1860 (India).

⁷ Id § 2.

⁸ Kunal Debnath, *LGBTQ Movement in India: A Post-Civil Society Resistance?*, 20, 103-124 (2018).

conflicting views on desire. *Secondly*, how sexuality (bodily), may not necessarily remain suspended at one's disposal and rather could be binary or multi-sexual. *Thirdly*, how to understand the mental faculties of being one (LGBT) and what could possibly comprise its fundamental elements.⁹

The word Transgender (TG) is often regarded as an umbrella term for those whose gender identity/expression or behaviour does not align to their biological sex, according to several Indian precedents. In other words, they don't identify with the sex assigned to them at birth, nor are they male or female, by identity. Hijras are not males by look or psychology, yet they are similar to women in that they lack a female reproductive organ and do not have menstruation. Emasculated (castrated, nirvana) men, non-emasculated men (not castrated/akva/akka), and inter-sexed people are among the hijras (hermaphrodites).

Persons who desire to undergo or have undergone sex reassignment surgery (SRS) to align their biological sex with their gender identification in order to become male or female are also considered transgender. They are commonly referred to as transsexuals. Furthermore, transvestites are those who enjoy cross-dressing in garments of the opposite gender. As a result, in modern usage, "transgender" has come to refer to a wide range of identities and experiences, including but not limited to pre-operative, post-operative, and non-operative transsexual people who strongly identify with the gender opposite to their biological sex: male and female.¹⁰

LGBTQ OPPRESSION MOVEMENT IN USA

The history of homosexuality in the United States has been largely hidden, love has been expressed in secret, and lives have been lived in the shadows far too often. For years, being homosexual or lesbian meant being abandoned by family, being fired from a job, being pushed into hospitalisation, and even facing imprisonment. However, love triumphed, and people who believed in their gay identities found a way to thrive in places all over the world. Equal rights for them, on the other hand, are a pipe dream that will never be realised.

GROWTH OF "HOMOPHILE MOVEMENT" (1949-1960)

"Knights of the Clock" was founded as one of the first LGBT rights organisations in the late 1950s and early 1960s. The major theme of this was to address homophobia and racism, along

⁹ Id § 2.

¹⁰ National Legal Services Authority v. Union of India, (2014) 1 SCC 1.

with comprehending social cultural and superstitious notions affecting interracial people who happen to be gay or lesbians. The issues also revolved around employment and public integration of same sex relationships.¹¹

During this time, the “*Mattachine Society*” was formed which comprised of a handful of gay men who noticed that homosexuality was being started to be considered as a “minority”. For them, a revolutionary public outburst explicitly demanding the rights would emphasise the focus on particular changes in the institutional set up. The goal was to drive out discrimination, prejudice and bigotry and conglomeration of all these would trigger the growth of “ethical homosexual culture.

The Mattachine Society was aided by a lesbian organisation, the “*Daughters of Bilitis (DoB)*,” created by Del Martin and Phyllis Lyon in San Francisco in 1955. Together, they hosted public meetings and dialogues on social concerns, which they then duplicated in local and national publishing companies, creating a sense of awareness among the general public.

The “*Homophile Movement*” was coined by these early organisations. The Homophile movement contended fiercely that homosexuals were a minority group deserving of the same rights and advantages as any other minority group, especially the right to privacy. These organisations were motivated by a sense of belonging, as well as a sense of solidarity and support. These groups maintained that gays could be assimilated into normal society while maintaining their privacy.

The yearning for acknowledgment felt genuine and clear as homophile organisations sprang up all over the country. The homophile movement used the idea of concentration to aggregate politically motivated interests. Their organisational set was large and bureaucratic. Due to the un-unified and indivisibility throughout political constituencies, there was a restricted ability of the gay population to engage in party politics. Therefore, the homophile movement transformed the “disorganised framework” of the gay movement into a well organised structure and triggered the locomotive abilities as a whole.

¹¹ MILESTONES IN THE AMERICAN GAY RIGHTS MOVEMENT, <https://www.pbs.org/wgbh/americanexperience/features/stonewall-milestones-american-gay-rights-movement/> (last visited March 2, 2022).

CRITICISM OF HOMOPHILE MOVEMENT

While members of the Homophile movement were preoccupied with gaining political prominence, other gay people were less concerned because their ideas differed. These “so-called” homophile groups were not only distinct and separate in their own but also were not hostile to “transgender” issues; rather it was considered that these issues were parallel and not intersecting.¹²

Later in the 1960s, the homophile movement started to face criticisms for their acculturation ends, too much concentration on a “particular group” of people, to be precise. During this time, “homosexuality” as a concept began to take shape and large portions of the public took notice.

With visibility, came resistance to these groups, especially attempts for regulation and punishments were being carved out. The community’s presence was mainly predominant in the dubious and shrouded clubs and other mystical methods of socialization and indulgence with each another. Components of homosexual subculture were existing in an unconnected and disorganised fashion. Scepticism and surrounding dilemma of the definitional understanding of “homosexuality” was hindering the actual feelings to be out of the box.

Harassment and discrimination had become an everyday affair which ultimately led to the uprising of riots and protests, especially in cities like Los Angeles, San Francisco and New York City. One of such legendary riots which marked the foundation of the liberation movement was the “*Stonewall Inn*” riots, which were prolonged and unconstrained, harsh demonstrations against harassment of the police. These riots were symbol of new militancy which resulted in the mass radical movement. In its wake, local queer activists began to discourse their ideas for the right to be vocal about their sexual choices without reluctance. This landmark event will be symbolised and credited for reviving the glimmer behind modern LGBT liberation movement in the USA.¹³ Christopher Street Gay Liberation Day memorialises the one-year anniversary of the Stonewall riots where “*pride parades*” was taken up.”¹⁴

Post the Stonewall riots; there was a transition in the understanding and fragmentation of homosexuality as a whole vis-à-vis gay and lesbian identities. These fragmentations and

¹² Joseph Nicholas DeFilippis, *A Queer Liberation Movement? : A qualitative content analysis of queer liberation organizations, investigating whether they are building a separate social movement*, PORTLAND STATE UNIVERSITY DISSERTATION AND THESES, (2015).

¹³ Id § 9.

¹⁴ Walt Hickey, Dan Avery, *A timeline of LGBTQ rights in the United States, from before Stonewall to today* (June 01, 2020) <https://www.businessinsider.in/politics/world/news/a-timeline-of-lgbtq-rights-in-the-united-states-from-before-stonewall-to-today/slidelist/76142375.cms#slideid=76142605>.

articulate differences brought about the formation of “*Gay Liberation Front*” (GLF). These liberationists questioned the conventional arrangements which hindered sexuality to be limited to monogamous and heterosexual spheres. The primary agenda predominantly revolved around public demonstrations leading to visibility and analysis of gay oppression, and committed to a resultant socio political change. The GLF was the first organisation to adopt the word "gay" in its initials, after drawing inspiration from anti-war activists.¹⁵ This clearly marked the shift from the bounded political interest of the Homophile movement, towards re-deployment politics.¹⁶

However, the need for “activism” in place of “liberation” was felt absolute and real. This marked the birth of *Gay Activist Alliance* (GAA), which particularly focused on “gay and lesbian” issues,¹⁷ which was in contrast to GLF’s extended aid to Black Panthers. The agenda was redefined to emphasize the extension of institutional protection to Gays by working within the framework of conventional political activity and social appearance.¹⁸

People of colour, who claimed that the primary motto was too much focused on men and their ancillary difficulties, and lesbians, who believed that the primary motto was too much focused on men and their ancillary issues¹⁹, slammed these new organisations. The “*Lesbian Feminist Liberation*” (LFL) was founded in this environment in opposition to the GAA's bigotry and exploitation. Lesbian women's interests²⁰ and concerns were central to the LFL. However, alternative philosophies arose within LFL, leading to the establishment of other specialised target groups, such as “The Furies,” whose goal was to make them self-sufficient and independent by breaking stereotypes “only” associated with men, such as auto maintenance.²¹ Incidentally, the phrase “coming out of the closet” gained momentum by denoting a sense of empowerment of the marginalised groups of lesbian women who ideologically diverged from the mainstay of the Gay Liberation Movement with their radical separatists ideas and their endeavour on being self-reliant by undertaking tasks beyond their ordinary gender roles. Thus, the phrase was popularly interpreted as the act of being vocal and transparent about one’s sexuality. This formula of interpersonal relationships in order to establish nexus with expanded

¹⁵ Id § 10.

¹⁶ *Ibid.*

¹⁷ GAY ACTIVISTS ALLIANCE. “Lambda,” 1970. Flyer. NYPL, Manuscripts and Archives Division, Gay Activists Alliance Records. <http://web-static.nypl.org/exhibitions/1969/alliance.html>.

¹⁸ Id § 10.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

structural issues acted as a catalyst in organizing political advocacy, thus ushering broader social changes.

The validation and the momentum of these movements were divided unequally on the grounds of racism. After the above dynamism crept in, the recognition and visibility of gay and lesbian men and women of colour was demanded. This resulted in the formation of formal and informal groups/organizations comprising of influential personalities which primarily focused on legalization and political stabilization of LGBTQ community of colour along with the already uplifted white men and women.

The declassification of homosexuality as a mental disease by the American Psychiatric Association in 1973 was the first hint of success after much effort. In 1977, Harvey Milk (a gay man) became the first openly elected public officer when he won a seat in San Francisco's democratic decision-making process.

WITH THE START OF THE AIDS EPIDEMIC, THE MOVEMENT CRYSTALLISED

In the 1980s and the 1990s, on the onset of the HIV AIDS epidemic, gay men were stigmatised by referring them to be the *causa causans* of the outburst, specifically commenting as “nature’s revenge on gay men”. The response of the government on the issue was laid back to an extent for 6 long years and in the meanwhile, gay activists took lead and started to form relief camps, social service organizations and political affirmations, for example the *ACT UP (AIDS Coalition to Unleash Power)* being the most recognised one. Soon after, American’s public fear of “homophobia” crept in which led to anti-gay activists taking initiatives via media and newspapers. The lack of social policy response of the Government ironically strengthened and aided the gay movement to flex its political muscle. During this timeline, gay task forces were advocating for “*hate crime legislation*” following the murder of gay activists and revolutionaries. The penetrating homophobia and heterosexists was blatantly challenged via literature and extensive and a holistic interpretation on the topic. The main goal was to establish a legitimate political front with legislative power, both in national and regional levels. The issues were not only concerned with conferring “special rights” but also equally focused on cultural and social aspects like marriage, which was ultimately faced by backlash with the congress passing the *Defense of Marriage Act* which disregarded same sex couples.

With the above developments taking place, “*Queer nation*” emerged as a broader framework which consisted not only the gay and lesbians, but also various other multiple gender

personalities of diversified sexual orientations, which refined the outlook on the subject as a whole.

TOWARDS LIBERATION IN THE 20TH CENTURY

A drastic evolution of the concept of homosexuality, transforming its context from behaviour towards identity occurred in the 20th century. This in turn, led to the formation of communities and institutions around this newer interpretation of this concept. A pivotal political agenda was also developed that was widely debated and synthesised. However, differences arose in regard to the strategies, goals and approach of the movement as this era also witnessed a very momentous revolution for the coloured people. There were other communities within the movement such as low-income individuals, trans-genders and sex radicals who felt that their concerns were not addressed by the mainstream gay rights goals.²²

While homosexual couples had fought for decades for legal recognition of their relationships, it was Vermont's approval of the country's first marriage equality bill in 2000 that made marriage equality a reality. *Lawrence v. Texas*, a landmark ruling by the US Supreme Court in 2003, declared the sodomy prohibitions unconstitutional. While overruling *Bowers v. Hardwick* (1986), the Court specifically said that the state cannot interfere with the existence of these groups by infringing on individuals' private sexual spaces. The Massachusetts Supreme Judicial Court later that year determined that prohibiting homosexuals and lesbians from marrying each other violated the state's constitution.²³ The California Supreme Court also held that marriage is a basic right granted to same-sex couples, paving the path for ultra-liberalism. As a result, states such as Vermont, New Hampshire, the District of Columbia, and New York followed suit. In 2010, President Barack Obama repealed the military's "Don't Ask, Don't Tell" policy, which prohibited service members from disclosing their sexual orientation, allowing the LGBT population to serve in the military.

The year 2013, marked the abolition of California's "Proposition 8" of the federal Defence of Marriage Act, 1996. Then after the prolonged debate on marriage equality concluded in the historic judgment of the US Supreme Court in *Obergefell v. Hodges*, wherein the Court categorically observed that the ban on same sex marriage violated the equal protection clause

²² Id § 10.

²³ Id § 12.

and the due process clause of the 14th amendment of the US Constitution, thereby declaring same sex marriages to be legal in all the 50 states.

JUDICIAL MOVEMENT VIS-À-VIS LGBTQ LIBERATION IN INDIA

LGBTQ liberation in India was initially shaped from the desire of a “straight” state. This approach was under the whims and fancies of the so-called “normalcy” with regard to sexual orientation, only.²⁴ Considering the vast cultural heritage of Indian subcontinent, with unity in diversity, amalgamation of manifold ideologies and beliefs, the very concept of “homosexuality” stood as a distinguished taboo among masses. The demarcated groups on the basis of caste has been the trigger point of non-acceptance of “queer community” as dignified individuals who possess every right of recognition in social, political, and economic front. Despite the fact that homosexuality has been practised in traditional civilizations since the dawn of time, “sexual identity” has never been a political issue in any of these societies until lately.²⁵ Individuals may be indulged in same sex relationships, but there was some sort of reluctance on being explicitly identified as “gay” or “lesbian” in India.

There had been deliberations on several aspects of Hinduism where certain religious sects, texts and celebrations have been initiated with intent of celebrating homosexuality. Further, writings from the epics of the Mahabharata and Ramayana also suggest instances of tantric initiation rites that, upon closer analysis are based on the premise of the universal bi-sexuality of the human personality. These evidences and accounts of the ancient Indian society point towards not only the acknowledgement of homosexuality in the society, rather to a very wholesome acceptance towards the fluidity of human attraction. .²⁶

To elaborate further on the dynamics of the community as a whole, Transgender comprises of *Kothis, Hijras, eunuchs, Jogappas, Aravanis, Shiv-Shakthis, and other members of the community have a long history in our country, as evidenced by Hindu mythology and other sacred literature. The concept of “tritiya prakrti” or “napunsaka”, is also found in Vedic and puranic literature. The term “napunsaka” describes a person's inability to reproduce.*

²⁴ Id § 2.

²⁵ Subir K Kole, *Globalizing Queer? AIDS, Homophobia and the politics of Sexual Identity in India* (2007) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2018684/>

²⁶ Id § 3.

*Transgenders that discuss the concept of psychic sex" are also mentioned in length in Jain writings.*²⁷

On a careful survey of these multi faced ways, for example through poetry, writing, scriptures, music compositions writings, one could conclude that the major theme of origination of the mere idea of homophobia was contrasted with the gay liberation movement of USA and thus, it regarded as a system of neo-capitalism.

The social and cultural boundaries circumventing the idea of same sex relationships were so closely knit within the stigma and dogmas of reluctance and fear. Moreover, the population of the homogenous groups were at par treated with that of minority community in the yardstick of discrimination, social acceptance constitutional guarantee to freedom and liberty. Resultant of the same is thus, lack of recognition, both legal and political.

JUDICIAL OUTLOOK IN SHAPING "HOMOSEXUALITY"

Justice K.S.P. Radhakrishnan, categorically mentioned *"Our culture seldom recognises or cares to recognise the anguish, suffering, and pain that transgender people experience, nor does it respect the innate feelings of transgender people, particularly those whose mind and body reject their natal sex. This categorically highlights the basis of intense social stigma and disgrace attributed to the LGBT community with mockery, ridicule, abuse and even treating them as "untouchables".*²⁸

In terms of legislation, the Criminal Tribes Act of 1871 was the first to regard the entire hijra group as fundamentally "criminal" and "addicted to the systematic committing of non-bailable acts. The Act regulated the registration, surveillance, and regular, often maliciously motivated policing of eunuchs, criminal tribes, and other people who dressed themselves in women's garb to perform in public.

In the case of *National Legal Services Authority v. Union of India*,²⁹ the Supreme Court for the first time designated the trans community as "third gender" for the purposes of protecting their constitutional rights under Part IV of the Constitution. Under Articles 14, 19, and 21, this distinction would appear to be discriminatory. The court's goal was to raise awareness about

²⁷ *Ibid.*

²⁸ Id § 8.

²⁹ (2014) 5 SCC 438.

how the transgender community would be recognised as equal members of society rather than as outcasts.

SECTION- 377³⁰ FAILING TO PASS CONSTITUTIONAL MUSTER VIS-À-VIS “CONSENSUAL” SEX

Whoever intentionally has sexual intercourse against the order of nature with any man, woman, or animal commits “unnatural offence” according to Section 377 of the IPC, 1860. Having carnal intercourse between the thighs is carnal intercourse against nature's order. As a result, engaging in intercourse by placing the male organ between another's thighs is an unnatural act. It should be observed that the act under Section 376 is sexual intercourse, whereas the act in Section 377 is carnal intercourse against the natural order.³¹ On careful observation and deliberation of the above provisions, the Court categorically observed that the impugned provision of Section 377 passes the constitutional muster and therefore, does not violate any of the fundamental rights guaranteed under Article 14, 19 and 21.

Following the contentious Suresh Kumar Koushal decision³², in the case of *Naz Foundation v. Union of India*, the Delhi High Court categorically preferred an expansive interpretation of sex so as to include prohibition of discrimination on the basis of sexual orientation, and that sex discrimination cannot be read as applying to gender simpliciter. Discrimination based on sexual orientation, according to the High Court, is based on stereotypical judgments and generalisations about the behaviour of either sex³³. Inclusion was another component of the Indian Constitution that the High Court emphasised, because the Indian Constitution symbolises the concept of inclusiveness that has been firmly established in Indian society and developed over many years. Those who are perceived as deviants or different by the majority are not to be excluded or ostracised on that basis, the High Court ruled unambiguously. LGBT individuals can be assured of a life of dignity and non-discrimination in a society that exhibits openness and understanding, according to the High Court.³⁴

For the aforementioned reasons, the High Court declared Section 377 to be unconstitutional with reference to violation of Articles 14, 15, and 21 of the Constitution insofar as it criminalises consensual sexual acts of adults in private. As far as penile non-vaginal (without consent and

³⁰ The Indian Penal Code, 1860, § 377, No. 45, Acts of the Parliament, 1860 (India).

³¹ Suresh Kumar Koushal v. Naz Foundation (Civil Appeal No. 10972 of 2013).

³² Naz Foundation v. Union of India, (2009) SCC OnLine Del 1762.

³³ Navtej Singh Johar v. Union of India, AIR 2018 [SC](#) 4321.

³⁴ Id § 30.

including minors) was concerned, Section 377 was held to be passing the constitutional muster.

Post the remarkable observation of the High Court in the above judgement, the need for an explicit constitutional guarantee was still unaddressed. The Supreme Court in the case of *Navtej Singh Johar v. Union of India*³⁵ rightly observed, in the sense that it criminalises even consensual sexual activities between capable adults, Section 377 fails to pass the test of intelligible differentia between non-consensual and consensual sexual acts of competent adults in private space that are neither injurious nor contagious to society. Section 377 makes the LGBT community a social “pariah and dereliction”, and is patently arbitrary and whimsical, because it is misused as a strategic instrument for harassing the LGBT community through discrimination and unequal treatment.

The Honourable court extensively discussed about individual autonomy where an individual can surrender his autonomy (bodily) wilfully to another individual and their intimacy in privacy is their choice, moreover after the *Puttaswamy* judgment³⁶, bodily privacy is taken under the ambit of being a fundamentally guaranteed right enshrined under Article 21. Not only is such a concept of identity holy, but it also recognises the core feature of humanity in a person's essence. Autonomy establishes identity, and that identity, in turn, becomes a part of an individual's dignity in the end.

The expression “against the order of nature” has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it “against the order of nature.”

On Constitutional morality, the Court while making a remarkable observation goes on to state that “*constitutional morality*” cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

³⁵ Navtej Singh Johar v. Union of India, AIR 2018 [SC](#) 4321.

³⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

Justice DY Chandrachud, in his concluding observations, speaking of constitutional validity of Section 377, articulated *Cessant Rationale Legis Et Cessat Ipsa Lex* meaning that when the reason for the law ceases, the law ceases itself. A great emphasis was also laid down to the dynamic and ever growing nature of the constitution which leads to progressive realisation of rights and non-retrogression. This *idea of transformative constitutionalism* becomes the mantra for an ideal state which is pragmatic and tolerant for accommodation of various beliefs, notions, choices and freedoms.

EPILOGUE

Post the historic ruling of the Apex Court in *Navtej Singh Johar*, there are still issues that needs to be addressed. The ruling has nonetheless paved way for a transformative society, both from the angle of socio-cultural liberation as well as a formal legal recognition. The need for an overreaching legislation was felt, as though a formal recognition was attributed to the LGBTQ community, but to implement the rationale of the pronouncement, not only in letter but also in spirit, various amendments in the existing law framework were absent. To cater to issues like marriage³⁷, adoption, succession, etc., either a new legislation was to be brought or substantial amendments were to be incorporated in the existing laws. In this aspect the Central government enacted the Transgender Persons (Protection of Rights) Bill, 2019, which specifically protects the interests of the community with respect to discrimination, health care, residence, employment, education, etc. However, marriage seems to be a “heterosexual privilege” and the centre has maintained adversarial views on allowing and legalising same sex marriages.³⁸ “It will require a great societal transformation and a more liberal and progressive outlook for arriving at an interpretation.”

“One defines oneself. That is the glorious form of individuality” as rightly deciphered through judicial precedents, wining and loosing are sides of the same coin, perhaps, when **Mr. Saurabh Kirpal** was appointed to serve as the first “gay” judge in Delhi High Court. Therefore, as we progress, through slow and steady, we are aiming for a better society, where freedoms are not only a dead letter of law, but also very much into practice, and till that is achieved the LGBTQ

³⁷ Dawn Onishenko, *Equal Rights/Equal Marriage: Creating Spaces for Jurisgenerative Praxis*, 38 HUMBOLDT JOURNAL OF SOCIAL RELATIONS, 79–93 (2016).

³⁸ R. Vanita, *Same-Sex Weddings, Hindu traditions and Modern India*, 91 FEMINIST REVIEW, 47–60 (2009).

community would continue to stay in a disadvantageous position as compared to heterosexuals, despite the reflection of strong usage of language and eloquence in the judgment.