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THE ROLE OF INDIAN JUDICIARY IN ADVANCING LGBTQIA+ COMMUNITY RIGHTS

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ABSTRACT

The role of Indian judiciary in promoting LGBTQIA+ rights has been transformative and growing that exemplifies exceptional judicial activism despite problems in social acceptance and lack of legislative framework. This article shall discuss the role of judiciary in India as an agent in dismantling taboos against the queer community and anti- LGBTQIA legal structures, especially through significant decisions like *Naz Foundation v. Government of NCT of Delhi (2009)*¹, *NALSA v. Union of India (2014)*², The *Puttaswamy* judgement³ and *Navtej Singh Johar v. Union of India (2018)*⁴. The courts through progressive interpretation of constitutional provisions, have identified fundamental right to dignity, privacy, equality and non-discrimination on basis of gender-identity or sexual orientation, upholding provisions of IPC Section 377 and introducing safeguards for trans community. By analyzing how the Indian courts has drawn upon principles of the constitution, human rights and comparative legislations to enforce LGBTQIA+ rights this article also explores and criticizes the recent same-sex marriage litigation and its exposed limitations. Though advancements are made in addressing acceptance issues, much more work remains to be done to institutionalize constitutional protection as real- world experience of equality and inclusion.

Keywords: LGBTQIA+, rights, sexual orientation, constitutional law

¹ *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 Delhi L.R. 277 (India).

² *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India).

³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

INTRODUCTION

The judiciary has emerged as a significant instrument in wrestle for LGBTQIA+ community rights, representing significant judicial activism in a situation of lack of legislative backing and presence of social prejudices. Over the last twenty years, the Indian judiciary, particularly the Apex Court have undertaken a growing structure from decriminalizing homosexuality to recognizing privacy, dignity and equality rights as fundamental in their due nature for sexual and gender minorities. The origin of discrimination of the queer community in legal context traces back to British colonial rule and their imposition of Victorian moral principles.⁵ The Section 377 of IPC⁶ drafted by Lord Macaulay presented the 19th century attitude towards sexual orientation and became an instrument of legal discrimination that persisted a long time even after independence.⁷ For decades the Indian legislature maintained a conservative and orthodox approach towards Section 377 with very less judicial intervention on its constitutional validity and its contradiction to fundamental rights⁸. The judicial activism emerged in late 90s and early 2000s and coincided with wider movements on a global level for the rights of the LGBTQIA+ community and increased acceptance and recognition of sexual orientation and gender equality as grounds safeguarded under principles of international human rights⁹.

EVOLUTION IN JUDICIAL RECOGNITION

The contemporary engagement of judiciary with the community rights in India started with the case of *Naz Foundation v. Government of NCT of Delhi (2009)*, where the Delhi High Court read down Section 377, decriminalizing consensual same- sex relations among consenting adults.¹⁰ The court recognized that criminalizing such acts is violative of Article 14, 15 and 21 of the Indian Constitution.¹¹ However, this trajectory experienced a setback in the case of

⁵ Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 Asian J. Comp. L. 1, 3-7 (2009).

⁶ Indian Penal Code § 377 (1860).

⁷ Alok Gupta, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* 11-15 (Human Rights Watch, 2008).

⁸ Geetanjali Misra, *Decriminalising Homosexuality in India*, 6 *Reprod. Health Matters* 20, 22 (2009).

⁹ Kelly Kollman & Matthew Waites, *The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction*, 15 *Contemp. Pol.* 1, 3-5 (2009).

¹⁰ *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 Delhi L.R. 277 (India).

¹¹ Kanishka Singh & Ashish Kumar Singhal, *LGBTQ+ Rights and Legal Recognition in India: Challenges, Progress, and the Way Ahead*, 7 *Int'l J. for Multidisciplinary Res.* 1 (2025).

Suresh Kumar Koushal v. Naz Foundation (2013)¹² when the Supreme Court overruled the Delhi High Court's judgement and adopted a formalistic approach to constitutional interpretation holding that Section 377 did not violate fundamental rights mentioned in the constitution and the intervention of the court was not appropriate given that it affected only a "miniscule" fraction of the people.¹³ This judgement marked as a dark chapter in constitutional jurisprudence highlighting the judicial avoidance in face of morality or the majority and fragility of minority- rights protection when put forward with judicial attitudes being conservative in their nature.¹⁴ Significant development in advancement of LGBTQIA+ community rights took place with the landmark case of *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), which recognized right to privacy as a fundamental right under Article 21 of Indian Constitution.¹⁵ This judgement explicitly acknowledged that freedom to make personal choices including sexual orientation and gender identity falls in the ambit of privacy.¹⁶ This called for multiple views within the judgement itself as it referenced the problematic nature of Section 377 of IPC and expressed concerns regarding constitutional law legitimacy regarding such provisions that criminalized sexual intercourse between two consenting adults.¹⁷ The framework established through the Puttaswamy judgement proved as an important tool in questioning the legitimacy and constitutional validity of Section 377, providing foundational arguments to contend that such criminalization of same-sex unions violated fundamental rights to dignity, privacy and individual/ personal autonomy.¹⁸ The high-point of judicial counsel for advocacy of LGBTQIA+ community rights arrived with the landmark decision of *Navtej Singh Johar v. Union of India* (2018) in which the Supreme Court overruled the Koushal judgement and held Section 377 as unconstitutional.¹⁹ The court emphasized that in cases like these constitutional morality shall prevail over social acceptance or morality in determining the ambit and application of fundamental rights and mere majority

¹² *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (India).

¹³ *Id.* at ¶ 43.

¹⁴ Sanjay Baudh, *Decriminalisation of Consensual Same-Sex Sexual Acts in the South Asian Commonwealth: Struggles in Contexts*, in *Sexual Orientation, Gender Identity and Human Rights* 119, 131-133

¹⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁶ *Id.* at ¶ 149 (Chandrachud, J.).

¹⁷ *Id.* at ¶¶ 150-158 (Chandrachud, J.).

¹⁸ Baudh, *supra* note 14, at 135-137.

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

cannot be used to justify denial of fundamental rights to minority groups²⁰. The overruled section created classification on unreasonable grounds, based only on sexual orientation of a person violating Article 14 of the Constitution and also marked as impermissible ground for discrimination under Article 15.²¹ Justice Nariman laid emphasis on the fact that the provisions of the constitution shall be interpreted in a way that fulfills their promise to deconstruct hierarchies and structures of subordination.²² Justice Chandrachud provides a comprehensive interpretation of principles of the constitution regarding LGBTQIA+ rights, laying emphasis on the interconnections between liberty, equality and dignity of individuals especially of minority groups.²³ Section 377 stood violative of multiple constitutional rights and infringed upon privacy and sexual autonomy of individuals safeguarded under the constitutional provisions of Article 21 and also stood violative of Article 14 and 15 for creating unreasonable grounds for classification and denied the individuals from queer community²⁴ the verdict's comprehensive engagement with principles of the constitution along with international human rights provisions to impose fundamental rights even against social acceptance and prevalent social prejudices and legislative deadlock and comparative application represented prudent reasoning that situation constitutional jurisprudence within broader reflection on equality, privacy, dignity and sexual autonomy.²⁵

TRANSGENDER RIGHTS AND CONSTITUTIONAL PROTECTION

Drawing parallels to evolution regarding sexual autonomy, the courts have also played a significant role in recognizing and safeguarding rights of individuals belonging to the trans community, who have traditionally over the years faced discrimination, marginalization and were exposed to social exclusion²⁶ The NALSA judgement acknowledged the right to self-identified gender identity as fundamental right with recognizing it as an integral part of

²⁰ *Id.* at ¶¶ 51-58 (Misra, C.J.).

²¹ *Id.* at ¶¶ 5-18 (Nariman, J.).

²² *Id.* at ¶ 19 (Nariman, J.).

²³ *Id.* at ¶¶ 1-159 (Chandrachud, J.).

²⁴ *Id.* at ¶ 122 (Chandrachud, J.).

²⁵ Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 McGill L.J. 951, 965-970 (2004).

²⁶ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* 15-35 (University of Chicago Press, 2005).

personal autonomy and dignity falling under the ambit of protections provided by Article 21²⁷ the court held that the people from the transgender community have the right to decide their “self- identified” gender and the State must recognize and safeguard this right and such recognition is not a social or mere medical issue but a human rights concern, placing the rights of the community firmly within the framework of the constitution of essential rights and human dignity.²⁸ This decision ordered the state to treat individuals from trans community as socially and educationally backward classes, entitling them to obtain reservations in educational institutions and employment sectors²⁹. It also mandated interventions through comprehensive policy to address issues relating to healthcare, social discrimination, social welfare and introduce institutional frameworks that are inclusive in their due nature³⁰. The progressive methodology and approach of this decision contrasted acutely with the Koushal judgement and its regressive interpretation of rights relating to sexual orientation and autonomy, representing inconsistencies within jurisprudential approach to address and interpret LGBTQIA+ rights.³¹ The decision influenced subsequent developments in legislature , including the Transgender Persons (Protection of Rights) Act, 2019, though the Act itself has been criticized for diluting some protections recognized by the judgment.³²

SAME- SEX MARRIAGE AND ITS CURRENT LANDSCAPE

Accounting for the considerable advancement made in decriminalization and transgender rights in India, the courts have recently shown some reluctance to grant full equality to LGBTQIA+ persons, particularly with respect to social institutions like marriage. In the case of *Supriyo @ Supriya Chakraborty v. Union of India (2023)* the Supreme Court, did not recognize same-sex marriage rights under prevailing law, holding recognition would be a matter for the legislature to address, rather than the courts³³. This case exposed distinct fissures within the Court, particularly concerning judicial power to assert rights in the absence of legislative

²⁷ National Legal Services Authority v. Union of India, (2014) 5 S.C.C. 438 (India).

²⁸ *Id.* at ¶ 59.

²⁹ *Id.* at ¶ 129.

³⁰ *Id.* at ¶¶ 130-138.

³¹ Shreya Balasubramanian, *Transgender Identity and the Law in India: Hijras and NALSA*, 11 J. Hum. Rts. Prac. 103, 115-117 (2019).

³² *Id.* at 119-121.

³³ *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 10 S.C.C. 1 (India).

recognition.³⁴ In upholding the rights of LGBTQIA+ community individuals to dignity, equality, and non-discrimination, a majority of the bench recognized that marriage is inherently a legislative institution and that courts cannot require recognition of same-sex marriages under the existing statutory regime as it falls out of its power ambit³⁵ Justice Chandrachud's opinion did not compel same-sex marriage recognition, but repeatedly affirmed the constitutional rights of LGBTQIA+ persons to enter into intimate relations while condemning societal discrimination.³⁶ This judgement led to substantial academic debate surrounding the judicial role in the struggle for LGBTQIA+ rights, as well as the limits of rights-based litigation practices.³⁷ Some commentators felt that the ruling represented a disappointing retreat from the transformative potential of our decision in Navtej Singh Johar, while others saw it as a legitimate instance of judicial deference to legislative processes and democratic legitimacy in respect of complicated choice³⁸. In this rationale, the ruling resonates that judicial advancement of LGBTQIA+ rights still remains a contested space that maintains the already-ongoing negotiation between competing constitutional values and other institutional factors involved³⁹.

CURRENT CHALLENGES AND FUTURE PROSPECTS

While important advances have been made by courts in validating the rights of LGBTQIA+ individuals, there are still ongoing challenges in moving from constitutional protections to real life experiences of equality, dignity, and social inclusion.⁴⁰ Judicial adherence to court order has been uneven, with persistent reports of discrimination against LGBTQIA+ persons in employment, healthcare, education, and in family relations. The difference between constitutional validation and social acceptance remains significant; LGBTQIA+ persons are still victims of stigma, violence, and social marginalization. The Transgender Persons (Protection of Rights) Act of 2019, a response to the judgement in NALSA, has faced criticism for weakening trans people protections by requiring medical certifications as part of gender recognition processes, and for failing to adequately prohibit discrimination and violence. In a

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at ¶¶ 15-35 (Chandrachud, C.J.).

³⁷ Baudh, *supra* note 14, at 143-145.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Divan et al.,

nutshell, there is still an absence of comprehensive anti-discrimination legislation for LGBTQIA+ persons, which presents a critical gap in the legal landscape of LGBTQIA+ rights in India. Future suggestions for judicial advancements with LGBTQIA+ rights include addressing systemic discrimination in various institutional contexts, creation of efficient enforcement mechanisms for constitutional rights and protections, and possibly reconsidering the question of same-sex marriage if social attitudes develop in an unanticipated manner and any further legislative action does not take place. The courts may also need to address emerging issues such as assisted reproductive advancements and innovations for same-sex couples, adoption rights, and protections against discriminatory conversion therapy practices. The judiciary's role in advancing LGBTQIA+ rights must be viewed in a wider context of social development, civil society activism, and progressive cultural change. Judicial decisions both react to and supports social change, establishing a legal foundation for advocacy while at the same time providing a reflection of the unfolding social understanding of the nuances of sexuality, gender, and human dignity.

CONCLUSION

The judicial counterpart has played a significant role in recognizing and safeguarding the rights of LGBTQIA+ community individuals, reshaping the legal landscape along with addressing social prejudices and exclusion through a series of significant decisions and progressive interpretation of the principles of the constitution. From decriminalizing same sex unions through the Navtej Singh Johar judgement to recognizing sexual autonomy and privacy rights via Puttaswamy judgement and self- identified gender recognition and protection ordered in NALSA, the Indian judiciary have empathetically mandated respect for the community along with safeguarding the sexual and gender minority groups. Despite these progressive approaches, the contemporary challenges still persist with regard to transforming these legal safeguards into proper and genuine social recognition and societal acceptance and real- life equality and inclusion. The same- sex marriage issues and lack of legislative framework to answer it accurately exposes limitations of legislative deadlock, need for robust institutional laws and evolving societal recognition and attitude. For future prospects, the courts must grapple with structural discrimination, should continue to foster enforcement of constitutional guarantees, and address new dilemmas that will arise relating to family rights and medical advances. The advancement of LGBTQIA+ community inclusion is a 'work in progress' for which the courts will be sometimes limited by inaction on the part of legislatures, but shall

move towards a light for social progress for a more equitable society with the promotion of human dignity for all.

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