DECRIMINALIZING THE ACT: PROJECTING INDIVIDUALS AS KINGS WITHOUT SCEPTRE TO RULE?

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Abstract

Through the landmark verdict pronounced in the case of Navtej Johar and Ors. v. Union of India[1] ("***Navtej Johar***"), *on 6th September, 2018, the Hon'ble Supreme Court read down Section 377 of the Indian Penal Code, 1860 to the extent that it criminalised consensual sexual acts between adults. In the process, the court overruled the judgment in Suresh Kumar Kaushal and Another v. Naz Foundation and Others*[2] ("***Suresh Kaushal***") *and upheld the judgment rendered by the Delhi High Court in Naz Foundation v. Government of NCT of Delhi and Others*[3] *("**Naz**"). The judgment assumes great significance in the light of the principles of constitutional jurisprudence relied upon by the judges and the analysis of fundamental rights.*[4] *An even more important aspect of the*

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[1]AIR 2018 SC 4321.

[2]AIR 2014 SC 563.

[3](2009) 160 DLT 277.

[4]The Constitution of India, 1950.

judgment is the scope and extent of its application in the peculiar socio-legal scenario of India and its consequences thereof. This paper examines the judgment from a critical perspective by looking into the historical developments of Section 377, the applicability of various doctrines invoked in the judgment, the cascading effect of the judgment on the laws in force and the intense role of the legislature.

I. INTRODUCTION

For a comprehensive understanding of the 5-judge bench's judgment, it is important to produce the relevant extract of Section 377:

"*377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished.*"[5]

It is important to note that the following ingredients of Section 377 were examined in the challenge:

Voluntarily - The provision, in its original form, criminalised the acts of carnal intercourse against the order of nature even if they were committed by two adults with free consent i.e. voluntarily.

Against the order of nature- The challenge was regarding the determination of what is natural and unnatural for the purposes of this provision. This challenge was neutralised by Chief Justice Dipak Mishra a statement of wide ambit, that an individual's sexual orientation is a natural attribute.

[5]The Indian Penal Code, 1860, § 377.

The distinction between 'natural' and 'unnatural' is blurred and it strengthened the challenge to this provision as it led to the direct invocation of the tool of intelligible differentia in checking constitutional adherence of a legal provision with Article 14. Justice Chandrachud throws light on this challenge and says in Para 29:

"If it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid," (Chandrachud J., Paragraph 29).[6]

Carnal - Justice Chandrachud summarises this ingredient of the provision and gives a legal definition of carnal and explains it as follows:

"29. ....The expression 'carnal' is susceptible to a wide range of meanings. The word incorporates meanings such as: "physical, bodily, corporeal and corporeal and of the flesh."

II. CRITICAL ANALYSIS OF THE VARIOUS DOCTRINES AND CONCEPTS APPLIED IN NAVTEJ JOHAR

The judgment in the *Johar* case is not only important for widening the ambit of fundamental rights, but is also important for providing a substantial progression in the academic-legal development on the subject matter. In order to understand the scope and extent, it is important to briefly understand the doctrines and concepts of constitutional law evolved and applied by the Hon'ble court in this

[6]AIR 2018 SC 4321.

case. The court mainly relied upon the following doctrines and concepts:

Doctrine of Progressive Realization of Rights- The rationale behind the doctrine of progressive realization of rights is the dynamic and ever-growing nature of the Constitution under which the rights have been conferred to the citizenry. His lordship emphasized the application of this doctrine by relying upon *Manoj Narula v. Union of India*("***Manoj Narula***")[7] and *Government of NCT of Delhi v. Union of India* ("***Govt. of NCT Delhi***").[8] He also referred to the classic statement made by Chief Justice Marshall in *McCulloch v. Maryland*[9] which was also followed by Justice Brennan in *Kazenbach v. Morgan.*[10] The said observation reads thus- "*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"(Dipak Mishra C.J., Paragraph 178, 183)

Concept of Transformative Constitutionalism-Relying upon *State of Kerala & Anr. v. N.M. Thomas and Ors.* ("***N.M. Thomas***"),[11] Chief Justice Dipak Mishra asserted that the concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Succinctly put, the concept of transformative Constitution is not alien to the Constitution of India and in its essence, refers to the potential of

[7]Manoj Narula v. Union of India, (2014) 9 SCC 1.
[8]Government of NCT of Delhi v. Union of India, (2018) SCC 661.
[9]17 US 316(1816).
[10]384 US 641(1966).
[11]State of Kerala and another v. N.M. Thomas and Others, AIR 1976 SC 490.

the Constitution to behave in a fluidic and adoptive manner in accordance with the changing circumstances in the society. It is a manifestation of the organic nature of the Constitution and is an integral characteristic of all comprehensive constitutions.

The sacred concept of transformative constitutionalism finds its origin in the transformative nature of the society itself. John Rawls' theory of basic structure finds relevance at this point, which states that the basic structure of the society is the first subject of justice.[12] The application of transformative constitutionalism in justifying the challenge to Section 377 is based on the presumption (which in the humble opinion of the author is 'flawed') that the basic spirit and essence of the Indian society has so transformed from *Suresh Kaushal*[13] to *Navtej Johar,*[14] that new expressions could be infused into the rights. There seems to be no qualitative analysis behind imputing the label of transformation to the society.

Concept of Facial Neutrality-Justice Chandrachud referred to the *Naz* judgment for building upon his argument on facial neutrality or indirect discrimination through the provision.

In para 94, the *Naz* judgment reads: *"Section 377 IPC is facially neutral and it apparently targets not identities but acts, but in its operation, it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class".* Justice Chandrachud also relied on the

[12]Reidy, D., *Basic structure of society*. In J. MANDLE& D. REIDY (EDS.), THE CAMBRIDGE RAWLS LEXICON 55-58,(Cambridge: Cambridge University Press, 2014.
[13]*Id.*
[14]*Id.*

South African case of *City Council of Pretoria v. Walker*[15] to advance his argument on indirect discrimination and stated thus:

"The concept of indirect discrimination … was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria."

III. IS IT SOUND TO APPLY THIS CONCEPT TO SECTION 377?

One could argue that the theory of facial neutrality or indirect discrimination to Section 377 does not fall in line with the historical basis of the provision. The provision was enacted in a time when the proportion of individuals indulging in homosexual acts was miniscule and the object was not to create a framework of discrimination for future purposes. Rather, the clear object was to prevent the commission of certain acts in the society, irrespective of whether they come from heterosexuals (in the form of oral sex) or homosexuals (in the form of MSMs) or bisexuals (in either of the preceding forms). Therefore, the author finds the application of this concept troublesome in the light of the fact that the intention of the legislature at the time of its inclusion was completely different from the presumption undertaken by His Lordship while applying the concept to the *Navtej Johar* case.

Bentham's Utilitarian Theory- Justice Chandrachud, in Para 129, relied upon Bentham's theory of utilitarianism and stated that homosexuality, if viewed outside the realms of morality and religion, is neutral behaviour which gives the participants pleasure and does

[15](1998) 3 BCLR 257.

not cause pain to anyone else.[16] He placed further reliance on Bentham's tests of sodomy laws. Bentham tested such laws on three main principles: (i) whether they produce any primary mischief, i.e., direct harm to another person; (ii) whether they produce any secondary mischief, i.e., harm to the stability and security of society; and (iii) whether they cause any danger to society.[17] He argued that sodomy laws do not satisfy any of the above tests, and hence, should be repealed.

The application of Bentham's theory in *Navtej Johar* case is problematic on at least two counts:

Firstly, Bentham's rationale for the failure of the second limb of the test propounded above was devoid of practical considerations and was largely influenced by his presumptions with regards to the society. He was placed in a different set-up when he gave his theory and based his argument on the idea that 'since two individuals are deriving pleasure out of an act, why should the society be apprehended by the same?' This theory is devoid of an understanding of the nature of criminal law. In criminal jurisprudence, mere conspiracy without any overt act of harm to another person or society is considered as an offence because of the principle of inchoate offences, whereby the ultimate to the society is not necessary in its physical form. Contrary to Bentham's opinion, not every act wherein two parties derive personal pleasure can be said to be incapable of harm to the society. Thus, this theory runs contrary to the theme of inchoate offences and thus, does not provide a safe guideline for the purposes of this case.

Secondly, Bentham based his entire philosophy on the theory of pleasure and pain. According to this theory, any act which leads to pleasure ought to be validated by law and that which leads to pain

[16]JEREMY BENTHAM, OFFENCES AGAINST ONE'S SELF (Louis Crompton Ed.), Columbia University.
[17]*Id.*

ought to be invalidated accordingly. This theory has been criticised on various fronts; however, such criticism would be beyond the scope of this work.

Application of the Harm Principle-Justice Chandrachud also placed reliance on the harm principle propounded by John Stuart Mill.[18] In Para 131 of the judgment, he applies Mill's theory to Section 377 which needs reproduction:

"Mill created a dichotomy between "self-regarding" actions (those which affect the individual himself and have no significant effect on society at large) and "other-regarding" actions (those which affect the society). Mill proposed that "all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation" should be free from state interference."

The harm theory also poses an equally blurred picture when it is applied to practical jurisprudence of the criminal law as it stands in India. The distinction between self-regarding actions and others-regarding actions finds some ground in the fundamental right to privacy and right to live with dignity. However, a blanket protection to each and every self-regarding action goes against the reasonable restrictions found in Part III of the Constitution.

[18]JOHN STUART MILL, ON LIBERTY, (Elizabeth Rapaported, Hackett Publishing Co, Inc, 1978).

IV. SURVIVAL OF CONSTITUTIONAL MORALITY WITHOUT SOCIAL MORALITY

Justice V.R. Krishna Iyer, in *NM Thomas*,[19] has rightly said - "*Law, including constitutional law, can no longer go it alone' but must be illumined in the interpretative process by sociology and allied fields of knowledge*." Constitutional rights, though high sounding, suffer from an inherent overdose of abstractness when they are exercised in a tangible sense. One could understand this by an isolated perusal of the fundamental right to life and personal liberty under Article 21 without the legislative safeguards incorporated under the Code of Criminal Procedure to make that right meaningful, in a tangible sense. Similarly, merely removing the tag of 'illegality' from a certain act does not provide an express legitimacy or guarantee the exercise of that act in a smooth manner. The broader question to be asked here is: Is there a distinction between socially accepted behaviour and legally accepted behaviour?

What could be legally acceptable in a society might not be socially acceptable. This is where the pragmatic aspect comes in. The author believes that constitutional morality holds a limited ground in front of social morality in the Indian society because the ultimate exercise of any right is tested on at the stage of the society. Post the judgments in *Justice K. S. Puttaswamy (retd.) and Anr. v. Union of India and Ors.* ("***Justice Puttaswamy***")[20] on the right to privacy and *National Legal Services Authority vs Union Of India &Ors.* ("***NALSA***")[21] on gender identity, the outcome in *Navtej Johar* was mechanical and a necessary corollary and therefore, it fails to appear as historic if looked beyond the academic value that it holds. Contrary to the public perception of

[19]State of Kerala &Anr.v. N. M. Thomas &Ors, AIR 1976 SC 490.
[20](2017) 10 SCC 1.
[21](2014) 5 SCC 438.

the verdict, the constitutionality of a legislative provision is tested on the anvil of settled principles and the courts are usually unconcerned with the societal norms on the same subject matter. For instance, the verdict may not render a certain section of the populace as criminals but at the same time, it does not guarantee societal legitimacy of those acts either. Therefore, it is absolutely incorrect to state that the court has provided legitimacy to a certain set of acts. At this juncture, we need to understand and draw a fine line between bare rights and meaningful rights. It is the latter which finds its origin in the conscience of the society.

V. UNDERSTANDING THE VERDICT AND ITS CASCADING EFFECT

The operative part of the judgment merely removes the label of criminality from certain acts and does not provide an express recognition to any act. Moreover, it does not utter a word, in line with the affidavit submitted by the Union of India, on allied rights like marriage, adoption, employment, special provisions etc. to provide any meaning to such rights in the real sense. More succinctly put, the apex court has merely stated that homosexuality is natural and anything which is natural ought not to be criminalised. Nothing more, nothing less. Moreover, in Paragraph 253(i), the Hon'ble Chief Justice has also emphasized that protection is granted only for such behaviour that is in accordance with constitutional norms and values or principles. Therefore, any act which is devoid of consent, flouted in public, performed with an animal, performed with a non-competent individual (example- minors) or which goes against the laws related to obscenity[22] and public nuisance would not be 'constitutionally

[22]The Indian Penal Code, 1860, § 292.

permissible' and shall call for punishment under the municipal law.It is a clear reflection of how the ultimate purpose of the law is to balance societal interests with individual interests by putting restrictions on the unregulated flow of impermissible human conscience.[23] At this step, the legislature comes into the picture.

VI. NEED FOR ACT OF BALANCING BY LEGISLATURE

In our constitutional scheme, the ultimate authority to legislate vests with the legislature, which essentially comprises of the *'representatives of the people'* and is rightly influenced by the larger public thought. The verdict, in complete fairness, can at best be described as a 'delicate solution'. But as in Graham Bell's words, "*when one door closes, it opens another*", this verdict has rather opened a Pandora's box handling which would require a great deal of social transformation, and not just constitutional transformation. Today, for this judgment to produce any tangible effect on the ground, we need a chain of laws including extension of rape laws to males, applicability of sexual harassment laws in case of adult males, questions of free consent etc.

VII. LEGAL ANALYSIS OF THE CASCADING EFFECT OF THE VERDICT

The judgment, though it did not venture into the arena of substantive rights for members of the LGBTQ community, would have a wide impact on the efficacy of existing laws in the form of a cascading

[23]BAUJARD, ANTOINETTE (2010), Collective interest v. individual interest in Bentham's Felicific Calculus, Questioning welfarism and fairness, European Journal of the History of Economic Thought.

effect. In order to understand the true scope and extent of the judgment, it is important to analyse such effect:

A. Marriage

In light of the *Johar* case, homosexuals are now free to choose their sexual partners, and consequently, one fails to see any reason as to why they wouldn't wish to get married to each other subsequently. Let us look at various laws which are currently operative in India relating to the solemnisation of marriages

Hindu Marriage Act, 1955- According to the relevant part of Section 5, HMA:

"*5. Condition for a Hindu Marriage- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*

(iii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;"

Section 5(iii) contemplates the minimum ages of both, the bridegroom and the bride which implicatively conveys that both the Hindus must be of opposite genders in order to solemnise their marriage under the HMA, 1955. Therefore, the law does not recognize any prospect of marriage between two adults of the same sex under the Hindu law. In a recent development in *Arunkumar v. The Inspector General of Registration, Chennai*,[24] the Madras High Court has permitted the registration of marriage of a trans-couple under the Hindu marriage Act by expanding the meaning of the expression "bridegroom". Observing that "*time has come when they are brought back from the margins into the mainstream. This is because even though the transgender community is having its own social institutions, the stories we hear are horrendous*", Justice Swaminathan recognised the

[24]AIR 2019 Mad. 265.

need for the pressing need for the corresponding change in matrimonial laws after the *Johar case*.

Moreover, another question that has arisen before the lawmakers is the setting of minimum age for the LGBTQ+ to get married. As Section 5(iii) provides two different ages for the bridegroom and bride respectively as the minimum age to get married, being a third gender, the age of LGBTQ+ members will have to be decided after a rigorous research which encompasses different aspects relating to this class, be it physiological, social, mental or marital.

Special Marriage Act, 1954

The Special Marriage Act also falls short of addressing the matrimonial concerns of homosexual couples. Section 4 of the Act reads thus:

"*Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:--*

(a) neither party has a spouse living;

(b) neither party--

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

Explanation.-- In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied--

(i) that such rule has been continuously and uniformly observed for a long time among those members;"

In the main paragraph of the section, the expression used is "*a marriage may be solemnized between two persons*" and not between a male and a female. However, in clause (c) dealing with the age of the parties to the marriage, the words "male" and "female" are expressly used. One could interpret it in a manner that the specification of male and female does not mean a marriage has to be between a male and female, as age could also be specified for two males or two females marrying each other. But this interpretation falls flat on a perusal of Section 15 of the Act. Clause (a) of Section15, the expression used is:

"*(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;*"

The above expression also conveys the idea that the subjects of the Special Marriage Act are also male and female and a wedding

between two homosexuals has not been contemplated in this Act. Therefore, the lacunae being manifestly clear, the need for corresponding changes in law is imperative for infusing life into this judgment.

B. Rape

The offence of rape is incorporated in Section 375 of the Indian Penal Code, 1860, the relevant extract of which unequivocally states:

"*375. Rape- A man is said to commit "rape" if he—*

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

Firstly, against her will.

Secondly, without her consent.

Thirdly, with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is

another man to whom she is or believes herself to be lawfully married.

Fifthly, with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, with or without her consent, when she is under eighteen years of age.

Seventhly, when she is unable to communicate consent.

Explanation 1.For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.A medical procedure or intervention shall not constitute rape.

Exception 2.Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

It can be observed that the provision envisages only the possibility of rape against a woman and is not gender neutral in nature. This conveys the meaning that in India, rape laws are not gender-neutral yet, unlike USA where the word used is "person" and not man or woman, as produced below:

"*10 U.S. Code § 920 - Art. 120.*

Rape and sexual assault generally-

"(a)Rape- Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person..."

By establishing the feature of *progressive realization of rights* in the Indian society, the Hon'ble Court has laid onus upon the state to keep the laws dynamic and abreast to repeal the old archaic laws and replace them with ones that can stand the test of time. It becomes crucial in the light of the abovementioned offence of rape as the underlying notion of rape is based on the conventional idea of intercourse without the presence of consent. Section 376, as it stands today, only covers with situations wherein the intercourse is forced upon a woman. Even the meaning of consent is explained with respect to women, thereby conveying a bizarre meaning that a forced intercourse performed upon a man or on any individual of a self-perceived identity, without his consent, shall not afford him any remedy in the law except under Section 377, which again, is not rape and does not provide similar punishment.

C. Adoption

Under Indian law, adoption is a legal coalition between the party willing to adopt and the child. It forms the subject matter of 'personal law' where Hindus, Jains, Sikhs or Buddhists, by religion, can opt for a legal adoption. In India there are no separate adoption laws for Muslims, Christians and Parsis, so they have to adopt under the Guardians and Wards Act, 1890 for legal adoption. Post *Shabnam Hashmi v. Union of India*[25] judgment, a person of any religion,

[25]AIR 2014 SC 1281.

including Muslims, can adopt a child under the secular provisions of the Juvenile Justice (Care and Protection of Children) Act.

Under the Juvenile Justice Act, a transgender cannot walk into an adoption centre or orphanage seeking to adopt a child. The Central Adoption Resource Agency (CARA), however, in its affidavit filed in the Bombay High Court on 2nd December' 2015, has refuted the allegation that gays, lesbians and the transgenders cannot adopt children as per the new adoption guidelines. The CARA deputy director Binod Kumar Sahum, in his affidavit has stated: "*Prospective parents should be physically, emotionally and mentally stable, financially capable, motivated to adopt a child and should not have a life-threatening medical condition. Adoption, in general, is hard for any single man or woman, so considering the social norms in the country; one can only imagine how painstaking this task could be for a member of the third gender.*"[26]

D. Maintenance

The concept of 'maintenance' in India is covered under both under Section 125 of the Criminal Procedure Code, 1973 as well as the personal laws. This provision originally stems from Article 15(3), reinforced by Article 39, of the Constitution of India, 1950 (the 'Constitution').

As per Indian law, the term 'maintenance' includes an entitlement to food, clothing and shelter, being typically available to the wife, children and parents as these marginalized groups are believed to be the ones that need support from the earning members of the family. The idea of dependency of one individual on another for sustenance

[26]Ahona Pal, *Fundamental right to adopt a critical analysis of competency of persons in adoption process*, IPLEADERS (Last visited on Feb. 26,2020,7:00 PM), https://blog.ipleaders.in/fundamental-right-to-adopt-a-critical-analysis-of-competency-of-persons-in-adoption-process/.

can emanate in homosexual couples also who can naturally co-habit after the decriminalisation of homosexuality now. But, in the absence of corresponding changes in ancillary laws like maintenance, wouldn't the status of a homosexual couple be on a different footing in the eyes of law as compared to heterosexual couples?

The relevant extract of Section 125 of the Criminal Procedure Code, 1973 states:

"Order for maintenance of wives, children and parents— (1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife..."

In the light of the *Navtej Johar* judgment, the conventional nomenclature of 'husband' and 'wife' would pose legal challenges in the coming times. When two homosexuals marry (assuming that a law to legally solemnise their marriage comes into existence), who would be called a husband and who would be called a wife, and in line with the same argument, in case of any disruption in the domestic environment of such homosexual couple, would the dependent partner ever find a resort in law to sustain his/her livelihood?

E. Domestic Violence

There are 2 major laws against domestic violence currently applicable in India:

The Protection of Women from Domestic Violence Act, 2005

Section 3 of this act defines domestic violence as:

"*Definition of domestic violence— For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—*

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security;"

The aforementioned Section 3(b) and 3(c) by using the word 'her' for an aggrieved person impliedly suggest that only a woman and any person by way of relation to her can be subjected to domestic violence. This is one major lacuna in this law in force as according to this, only women can approach the court as victims of domestic violence. One major shortcoming that would prevent even a woman from getting her case registered is the preliminary requirement that the accused and victim must be married to each other for domestic violence to be inflicted upon the victim. This could work in cases of lesbian couples when both the partners are women (provided they get the right to marry), but the cases involving gay men and transgenders fall beyond the purview of this act and the recent Supreme Court judgement hasn't addressed this aspect of their relationship.

Indian Penal Code, 1860

Section 498A deals with cruelty against a woman by her husband. The relevant extract of the provision states:

"498. Husband or relative of husband of a woman subjecting her to cruelty— Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

Section 498A also falls short in redressing the grievances of those victims who do not identify themselves as females. The above

analysis reveals that at each point, one gets to see terminologies like 'woman', or 'her', which defeat the claim of any other person who is not a woman. Therefore, if a true effect has to be given to the judgment in the *Navtej Johar* case, the law needs to undergo drastic changes in multiple spheres to accommodate all the rights of homosexual couples which straight couples enjoy. However, as the author argued above, the likelihood of such changes is dependent upon the will of the legislature, which is influenced by the will of the people in a democratic setup.

With the decriminalization of Section 377, members of the LGBTQ+ community have become direct stakeholders in this domain of law. Therefore, need would arise to protect the LGBTQ+ community from social ostracism prevailing at workplaces. Creation of an environment that is conducive to their participation would be a foundational step for the community to become a part of the mainstream. It would also play a pivotal role in getting the members of this community out of menial works including begging, dancing on streets to fetch money, etc.

VIII. LAW BEYOND THE LAW: THE CONCLUSION

Ehrlich, a noted jurist of the Sociological school, draws a distinction between the written law and law as perceived by the society. He refers to the former as the formal law and to the latter as the 'living law'. According to him, the institutions of marriage, domestic life, inheritance, contract etc. govern the society through 'living law' which dominates human life.[27] He further provides that the centre of gravity of legal development in the present time or the past, lies

[27]DR. N. V. PARANJAPE, STUDIES IN JURISPRUDENCE AND LEGAL THEORY at 99(Central Law Agency, 8th ed. 2016).

neither in juristic science nor in judicial decisions, but in society itself.[28]

It is this distinction which poses the biggest challenge to this verdict. The formal law, as laid down by the Hon'ble Court, varies significantly from the 'living law', as practised in the Indian society. As far as decriminalisation is concerned, it is well within the domain of a constitutional court for securing the fundamental rights of each citizen without looking into their sexual orientation. But when it comes to giving them substantial rights, it cannot be done by the mere framing of guidelines by the Court. Any such act of laying down guidelines of general application would be a purely legislative act which shall remain incomplete till the representatives find sufficient backing of the society that they represent. Strictly speaking, the gap between the prevailing sense of constitutional morality and social morality looms large in this issue and this gap shall continue to delay the conferment of substantive rights upon the LGBTQ+ community. It is only the legislative body of any country which can sense the 'living law' of the society through social behaviour and then formulate a formal law on that basis so that it may not only be better implemented but also better internalised in the society.

The biggest challenge, now, is to establish harmony between the two. The Hon'ble Supreme Court, in its constituent powers, can merely interpret the law as per constitutional standards. In its constituent powers, the apex court has removed the label of criminality from same sex consensual adults. Consequently, are we to say that, as a society, we have legitimised homosexuality?

The legal development in *Navtej Johar* has raised fresh concerns with respect to the rights of homosexuals. The judgment removes the taint of criminality from their sexual acts and provides them certain rights.

[28]C. K. ALLEN, LAW IN THE MAKING at 28(7th ed.1964).

However, the judgment falls short of providing them substantive rights in the matters of marriage, maintenance, adoptions, domestic violence etc. In the scheme of the Constitution, such rights can be granted through material amendments to be undertaken by the legislature. The legislature responds to the wishes of the society as a whole, therefore, it remains to be whether the legislature waits for the command of social morality, or responds to the constitutional morality as vested in this judgment. Experience tells us that we can't make an effective law by forcing it onto the society. If we are really concerned to give substantive rights to the LGBTQ+ community with full social acceptance then it is only possible through legislative means and consensus building with thorough regard to the sociological school of jurisprudence. It would be better if we let our legislature decide on these things so that meaningful substantive rights can be rendered to our LGBTQ+ members and the law, as it stands today, finds the life and force of a 'living law'.

This judgment has opened doors for enormous challenges, including challenges to the existing gender-specific laws in force like marriage, divorce, adoption, maintenance, sexual harassment, rape etc. As discussed in the paper above, constitutional challenges depend to a great extent on the stand taken by the government of the time. Conscience of the government played a crucial role in this outcome as this challenge could have been comfortably averted had the National Democratic Alliance ("**NDA**") government also taken a stand as that taken by the then United Progressive Alliance ("**UPA**") government in *Suresh Kaushal* case.

In the words of Chief Justice himself, what comes naturally to an individual is natural. In complete conformity with the aforementioned remark, we must not forget that what comes naturally to a society is also natural for the society.

It is this nature of the society which differs heavily from the nature attributed by this judgment. The judgment is a welcome progression

in the development of fundamental rights jurisprudence. However, attributing a greater meaning to the same would not only be wrong in law, but wrong in fact also. Moreover, one must also question the extent to which the Hon'ble Court can apply the doctrines and concepts of foreign jurisprudence to subject matters that are society-specific in nature and cannot be looked from a universal perspective. Lastly, the ultimate onus to make the rights recognized in *Navtej Johar* case meaningful, lies upon the legislature comprising the voices of the public at large.