

Changing Gender Perspective Via Judicial Interpretation

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Introduction

‘Laws enforcing sexual morality may cause misery of a special degree.’ -
H.L.A. Hart in Law, Liberty, and Morality

The principle of gender justice is enshrined in the Preamble of the Indian Constitution, Fundamental Rights, Fundamental Duties and in Directive Principles of State Policy as well. And from the time of its enforcement, the Constitution has guided the State in recognising the binary gender in the society and to adopt special measures like positive discrimination in favour of women so to confirm with gender justice¹.

And just like the Indian Constitution, the Judiciary has also within the domain of the powers conferred upon it, played a dynamic role in delivering gender-based justice. The contribution of the judiciary towards interpreting the constitution and protecting rights of the people and ensuring that justice is done to the downtrodden, has resulted in some indispensable judgements being delivered over the years. And through the policy of judicial review, it reviews the constitutionality of the acts and legislations drafted by the

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¹ Akanksha Mishra, ‘Third Gender Rights: The Battle for Equality’, Christ University Law Journal, 5, 2 (2016), 9-21 ISSN 2278-4322, <https://core.ac.uk/download/pdf/236436832.pdf>, last seen on: 10/07/2022

government. It also protects the basic guidelines and provisions mentioned in the Constitution so that they are not violated.

The value of judicial law-making is so high that it provides a proper guidance for future courts or private parties who are lacking such guidance due to incomplete constitutional or legislative enactments. Often the drafters of the statutes and constitutional provisions are unable to anticipate every situation that might arise at the time when such enactment is applied in practice. Therefore, in such circumstances the judges are given the power to fill the gaps in law or provide a broader definition to various statutory and constitutional concepts through judicial law-making, because this process permits various legal norms from being applied more consistently and with greater notice to the parties governed by them².

Moreover, in majority of the judgements passed by the Judiciary, it has quashed the gender discriminatory provisions that are an evil for the evolution of mankind in today's world. These abrogated provisions have not only breached the right to equality amongst the genders but have also permitted the exercise of intolerant behavior by a larger section of society towards the minority members of the society in India since independence. Therefore, it has always been evident that the judiciary while deciding these sensitive issues has opted for the widest interpretation possible by taking into consideration the present societal needs. One such recent instance where the judiciary, through its interpretation has quashed the gender discriminatory provisions is by pronouncing that Section 377 of Indian Penal Code, 1860 is

² Chethan Bohra, Role of Indian Judiciary in Women Empowerment, International Journal of Pure and Applied Mathematics, Volume 120 No.5 2018, <https://acadpubl.eu/hub/2018-120-5/2/167.pdf>, last seen on: 10/07/2022

partially unconstitutional³. This move of the Supreme Court is an exhibition on how it matured over the years in light of gender jurisprudence. This bold move towards securing gender justice also indicates the optimistic, progressive, and activist attitude that the Court has adopted towards gender-specific issues⁴.

Upholding a gender- just society through judicial law-making process

All law courts apply the legal rules which are formulated by the legislative bodies, though the procedures are different between the common law and civil law countries. However, in the process of application of the said rules, Courts must interpret them by transforming the rules from generalities to specifics and sometimes by filling the gaps to face situations that have never been addressed by the lawmakers when the legislation were drafted.

As courts decide disputes in individual cases, they create an important by-product beyond peaceful settlements. In other words, for the purpose of deciding future cases, courts often develop rules. And the judicial decisions

³ Alok Gupta, 'Section 377 & Dignity of Indian Homosexuals', *Economic & Political Weekly*, Vol. 41, No. 46 (Nov. 18-24, 2006), pp. 4815-4823 (9 pages), https://www.jstor.org/stable/4418926?searchText=section+377+IPC&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dsection%2B377%2BIPC&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3A5b3f6689c97968a5aa00ba28832f6b2d, last seen on: 12/04/2023

⁴ Ravi Narain Soneja, *Judiciary, playing a pivotal role in empowerment of women in India*, *International Journal of Research in all Subjects in Multi Languages*, Vol.6 Sp. Issue:3, http://www.raijmr.com/ijrsm/ wp-content/uploads/2018/05/IJRSML_2018_vol06_Sp_issue_3_48.pdf, last seen on: 10/07/2021

representing these rules then become controlling for future cases, sometimes to the extent that they virtually supplant the legislative enactments themselves. Such decisions are under the common law system known as Precedents which are called *Stare Decisis*. And it is in fact these rules and policies which hold an authority that is like a law passed by the legislature. Thus, we can say that law is not only made by the legislatures but also by judges of the Law Courts⁵.

In common parlance, judges are expected to follow earlier decisions, not only to save themselves from the effort of working on fresh solutions for similar problems but rather because the ultimate motive of the law is to render uniform and predictable justice to all. This goal of uniform justice simply implies that if one individual is being dealt in a certain way today, then another individual who is engaged in a similar situation must also be dealt in same manner. Thus, in simple terms, the principle of precedent means treating similar cases alike as it would uphold the principles of equity and justice⁶.

⁵Jagat Narain, 'Judicial Law Making & the Place of DPSP in Indian Constitution', Vol. 27, No. 2 (April-June 1985), pp. 198-222 (25 pages), https://www.jstor.org/stable/43950914?searchText=Judicial+Law+making&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DJudicial%2BLaw%2Bmaking&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3A122c5b4e9a52a505f6f52615dabe8f77, last seen on: 13/04/2023

⁶A. S. Anand, 'The Indian Judiciary in the 21st Century', India International Centre Quarterly, Vol. 26, No. 3 (MONSOON 1999), pp. 61-78 (18 pages), https://www.jstor.org/stable/23005468?searchText=judiciary+and+its+importance+and+functions+in+india&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Djudiciary%2Band%2Bits%2Bimportance%2Band%2Bfunctions%2Bin%2Bindia&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Ad504e35eee46402f52e631968cf447b9, last seen on: 11/04/2023

In addition to rendering decisions that authoritatively interpret the statutes, the law courts of common-law countries have also created vast body of laws without any statutory foundation. In other words, whenever judges are confronted with a dispute for which there is no pre-existing or a clear statutory interpretation to rely on, then the judiciary must render decisions in accordance with their own conceptions of justice. And when subsequently judges follow these connotations or rulings to pronounce a justified decision in a similar case, then it becomes a precedent. Similarly, judges also distinguish similar decided cases when dissimilar factors are discovered in the cases presented before them for consideration. The later cases also become precedents to be followed in the future cases presenting substantially similar patterns of fact. This means that several precedents are likely to be relevant to a particular case, though they may in reality be in conflict with each other. And the total accumulation of all these judicial decisions results in judges deciding cases and justifying the laws through their reasons⁷. However, it is a universal fact that since in a democratic form of governance, the judiciary is not subject to democratic accountability, the courts should not claim for unrestricted legislative power.

However, while talking about judiciary's attempt to uphold a gender-just society, it may be noted that they opted for judicial creativity, because many courts had a common view that the process of judicial law making cannot be expounded to such a limit that it overpowers the legislators right to make

⁷ Anita S. Krishnakumar, 'Textualism & Statutory Precedents', *Virginia Law Review*, Vol. 104, No. 2 (April 2018), pp. 157-233 (77 pages), https://www.jstor.org/stable/44863678?searchText=significance+of+precedents&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dsignificance%2Bof%2Bprecedents&ab_segments=0%2Fbasic_search_gsv%2Fcontrol&refreqid=fastly-default%3A5fb183a36dd586944b9500ad87c3c6d3, last seen on: 9/04/2023

laws. Thus, in *A.K. Singh v. Uttarakhand Jan Morcha*⁸, the Supreme Court said that “no doubt the role of judiciary has been expounded in recent years but that is no justification for using their judicial powers for the purpose of imposing unbearable burden on the State.” Similarly, in *Indra Sawhney v. Union of India*⁹, Supreme Court observed that the permissible judicial creativity in tune with the constitutional objectivity is essential for interpretation of constitutional provisions so that the dominant values may be discovered and enforced.

Another classic illustration where the courts have utilised judicial creativity for the purpose of creating a gender just society is through the decision of *Mohd. Ahmad Khan v. Shah Bano Begum*¹⁰ case. In the said matter the court by using its tool of judicial process for the first time interpreted that every Indian woman is having the right to live with human dignity irrespective of the caste they belong to.

Protecting gender equality through judicial law-making process

India is a country where patriarchy is deep rooted in the society. As a result of this system, women have always been subjected to a lot of injustice in every stage of their life. They were rarely recognised as an important human being who also possess equal rights and freedoms like that of men who are their counterparts in a just society. Moreover, due to lack of recognition women in India had to fight their own battle for respect and also contest against the societal atrocities they were being subjected to. To support their struggle of

⁸ *A.K. Singh v. Uttarakhand Jan Morcha*, Civil Appeal No. 3027 of 1999

⁹ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

¹⁰ *Mohd. Ahmad Khan v. Shah Bano Begum & Other*, 1985 SCR (3) 844

recognition and respect, the Indian Judiciary has played a vital role by making laws that would recognise and safeguard their rights and thereby allow them to live a dignified life with equal opportunities to grow and develop.

A classic example of judicial law-making process which has contributed towards raising the standards of women in the society and protecting them from societal atrocities is the *Vishaka & Others v. State of Rajasthan & others*¹¹. In this case a lady was gang raped for doing her duty honestly and stopping the performance of a child marriage from taking place. Following this incident, the Supreme Court, framed certain guidelines for protecting the women employees by identifying that sexual harassment at or during the course of employment is a form of gender discrimination which violates a woman's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. Based on these guidelines the legislators framed India's first legislation that was specifically addressing the issue of workplace sexual harassment. The act was known as The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act") was enacted by the Ministry of Women and Child Development, India in 2013. And the first case before the Supreme Court after the enactment of the POSH Act, was *Apparel Export Promotion Council v. A.K Chopra*¹². In the said matter, the Supreme Court restated the guidelines pronounced in the *Vishaka* judgment and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty for sexually harassing a subordinate female employee at the workplace. Thus, through this judgment, the Supreme Court widened the definition of sexual harassment by ruling that physical contact was not essential for an act

¹¹ *Vishaka & Ors. v. State of Rajasthan & Ors*, AIR 1997 SC 3011

¹² *Apparel Export Promotion Council v. A.K. Chopra*, 1997 IVAD Delhi 646

to be the act of sexual harassment¹³. With the pronouncement of this decision, Vishaka judgement became a judicial precedent in the A.K. Chopra case.

Similarly, another classic example is the *Githa Hariharan & Another vs. Reserve Bank of India & Another*¹⁴, where Githa Hariharan decided to challenge the relevant sections of the Hindu Minority and Guardianship Act, 1956 and the Guardian and Wards Act, 1890, after discovering that she was not the natural guardian of her then minor son. She argued that the provision of these legislation violates the equality promised by Articles 14 and 15 of the Indian constitution. Indira Jaising and the Lawyers Collective filed a writ petition in the Supreme Court on behalf of Githa Hariharan and her husband, Mohan Rao. The case was heard together with the case *Vandana Shiva v. Jayanta Bandyopadhyay*, where the bench held that under Hindu law, the mother is also the lawful guardian of her minor children along with the father¹⁵.

Thus, the above stated judgements help us in understanding on how the judiciary has exercised their power of judicial law making and helped the legislators in identifying and framing a legislation in light of the changes taking place in the society¹⁶.

¹³Nishitha Desai, Legal and HR Considerations, Prevention of Sexual Harassment at Workplace, Dec.2020, https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf, last seen on: 10/07/2022

¹⁴ *Githa Hariharan & Ors. v. Reserve Bank of India*, AIR 1992, 2 SCC 228

¹⁵ Parag Agarwal, The Gita Hariharan Judgement, Jus Dicere, <https://www.jusdicere.in/the-githa-hariharan-judgement-still-a-long-way-to-go/>, last seen on: 10/07/2022

¹⁶ Sonali Khatri, Understanding Jurisprudence of Judicial Legislation, Legal Services India.com, <http://www.legalservicesindia.com/article/1660/Understanding-Jurisprudence-of-Judicial-Legislation-on%20Sexual-Harassment-of-Women-at-Workplace-in-India.html>, last seen on: 1/03/2023

Judiciary as an agent in recognizing a third gender

The conventional distinction of human gender, which is based on biological design of their genitalia, divides them into male and female, though, there are people who do not recognise themselves as per this custom and defy the biological existence. And it is these individuals who are recognised as “transgender” people in the society, where binary gender is the natural biological design¹⁷. It may be noted that, "transgender" does not merely signify a gender that crosses the borderline, but rather it is a broader term which is often misinterpreted and indicates all members of the society who live a major portion of their lives manifesting an innate sense of gender which deviates from suppositions of their birth sex.

In India, there are some regional terms that are used to represent the community. For example, the term kothi signifies a range of feminine identified people, who have been assigned male gender at birth. Similarly, other prominent regional and trans-regional identities representing this community are hijras, aravani, jogtas, and shiv-shakti. This rambling constitution of “transgender” subsumes many regional terms and identities but lacked a legal identity¹⁸.

¹⁷ The Economical & Political Weekly, ‘The Third Sex: Transgender persons in India want to be treated as citizens. Is this too much to ask for?’, Vol. 48, No. 43 (OCTOBER 26, 2013), p. 9 (1 page), https://www.jstor.org/stable/23528827?searchText=transgender+in+indian+society&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dtransgender%2Bin%2Bindian%2Bsociety&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3A47c69a5bae81f8de4e9fa6aa51d788d3, last seen on: 4/04/2023

¹⁸ Francesca Trianni, ‘Men, Women and Hijras: India Recognises Third Gender,’ Time.com, April 15, 2014 3:46pm, <https://time.com/63801/men-women-and-hijras-india-recognizes-third-gender/>, last seen on:08/07/2022

Hence, in 2014 the longing for designing a rigid definition, led to the pronouncement of the NALSA¹⁹ judgment, in which the court has defined the term transgender in the following words, ‘a transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex.’ Thus, it can be said that the term transgender is not only limited to persons whose genitals are intermixed but rather it is a blanket term used to refer to persons whose identities do not get along with the strict dual categories of man and woman and whose gender identity and expression differs from the conventional norms expected from their birth sex.

And finally after years of discrimination and hostility, the transgender persons were finally in a position to wear the legal costume of a separate identity due to the famous NALSA²⁰ judgement, that was adjudged on April 15th, 2014, where, the Supreme Court allowed to hear a petition which was placed on behalf of the country’s transgender community and finally busted the bubble of binary gender structure of man and woman and granted equal rights and protection to transgender persons under the constitutional principles of Article 14, 15 and 16. The court rightly observed that in Article 14 of the Indian Constitution, which deals with equality before law, the term person does not restrict itself to the dual concept of man and woman²¹. Thus,

¹⁹ NALSA v. U.O.I, AIR 2014 SC 1863

²⁰ Supra 17

²¹ Govindasamy Agoramoorthy, Minna J. Hsu, ‘Living on the societal edge: India’s transgender realities’, *Journal of Religion and Health*, Vol. 54, No. 4 (August 2015), pp. 1451-1459 (9 pages), <https://www.jstor.org/stable/24485502?searchText=recognition+of+transgender+by+indian+court&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Drecognition%2Bof%2Btrans>

Hijras/transgender persons who are neither male nor female, also fall within the expression “person” are entitled to legal protection of laws in all spheres of State activity. Furthermore, while deciding the matter, the Court has also adopted a purposive approach of interpretation, and held that “sex” here does not only refer to biological attributes but also includes “gender.” Hence, it was held that discrimination on the ground of “sex,” also included discrimination based on gender identity²². Thus, the Madras High Court, in *Arun Kumar & Anr. v. Inspector General of Registration & Ors*²³, held that the word ‘bride’ under Section 5 includes transgender persons as well. The basis of this judgement was Article 21 of the Indian Constitution, the *Puttuswamy* judgment and the *NALSA* judgment.

Additionally, the court has also within its legal capacity directed the government to give legal recognition to the third gender, so that such individuals would be able to identify themselves as male, female or third gender. Furthermore, the central and state governments were also directed to implement necessary measures to remove the social stigma, promote transgender-specific health programs, and grant them equal legal protection by classifying them as socially and educationally backward class of citizens²⁴.

gender%2Bby%2Bindian%2Bcourt&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&ref reqid=fastly-default%3Ae0ff0a643392e055a4a490391c5b8d1d, last seen on:2/04/2023

²² *NALSA Judgement analysis*, Soth Asian Trans Law Database, <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>, last seen on: 10/07/2022

²³ *Arun Kumar & Anr. v. Inspector General of Registration & Ors*, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

²⁴ Geetanjali Mishra, ‘Decriminalising Homosexuality in India,’ Vol. 17, No. 34, *Criminalisation* (November 2009), pp. 20-28 (9 pages), https://www.jstor.org/stable/40647442?searchText=homosexuality+in+india&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dhomosexuality%2Bin%2Bindia&ab_segments=0

Based on the above information, it can be said that the judiciary has exercised its power of law-making in the right direction. And this liberal and broad interpretation adopted by the judiciary in the process of introducing a new gender was in light of the spirit of the Indian Constitution, which strives to ensure that equal opportunity is provided to every citizen to grow and attain their potential, irrespective of their caste, religion or gender. The court in its judgement said that, recognition of transgenders as a third gender was necessary to alleviate the conditions of the transgender people in India which can be done through ensuring equal access to welfare programs, employment opportunities and education²⁵. Moreover, the court has righteously justified that the “right to life, liberty, dignity and autonomy requires that our legal understanding of sex should be founded solely on a person’s self-identification, that is, their own perception of their gender.” Biological characteristics are therefore irrelevant. This is new in India, although Argentina has adopted a similar approach²⁶.

Judicial interpretation on homosexuality in india

The theory of Gender Justice infers to the basic level of human right that seeks to deliver justice to every individual irrespective of their gender and ensures

[%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Aa20f66979acaa455480e5bd89f89f121](#), last seen on: 3/03/2023

²⁵ The Third Gender and Hijras, Harvard Dignity School, Hinduism Case Study-Gender 2018, <https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras> , last seen on: 08/07/2022

²⁶ NALSA Judgement Analysis, Global Freedom of Expression.com <https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india/>, last seen on: 08/07/2022

a dignified life. The Constitution of India tried to deliver gender justice through several constitutional measures like the Preamble, Fundamental Rights, DPSP etc. and these ideals are implemented through various schemes and policies by the Indian legislature. Right from the Abolition of Sati Act (1829), Widow Remarriage Act (1856), during British period to Dowry Prohibition Act (1961), the Domestic Violence (Prohibition) Act along with measures like Gender Budgeting, 33% reservation of seats for women in Panchayat bodies, 1/3rd reservation for women in Lok Sabha and state legislative assemblies²⁷, and schemes like Sukanya Samridhhi Abhiyan, Ujjwala Yojana, Surrogacy Act all seeks to address the issue of gender parity in India²⁸.

Like the Indian State the judiciary of the nation also played a vital role in delivering gender-based justice. The judiciary being the protector of the constitutional rights of the people and ensuring justice to the downtrodden has given some indispensable judgments over the years. The judiciary, through the policy of judicial review, reviews the constitutionality of the acts and laws of the government. It also protects the basic guidelines and provisions mentioned in the Constitution so that they are not violated. Besides, the Indian Judiciary also played a pivotal role in ensuring gender justice while addressing various cases like *Gita Hariharan v. Reserve Bank of*

²⁷ Livelaw News Network, President Grants Assent To Constitution Amendment Providing Women Reservation In Lok Sabha & Assemblies, 29th Sept. 2023, <https://www.livelaw.in/top-stories/president-grants-assent-to-women-reservation-bill-239003>, last seen on: 29/09/2023.

²⁸ Anjaneya Das, *Gay and Transgender Rights in India: Naz Foundation v. Govt. of NCT of Delhi*, [Womenslinkworldwide.org](https://www.womenslinkworldwide.org), <https://www.womenslinkworldwide.org/en/files/1264/article-gay-and-transgender-rights-in-india-naz-foundation-v-government-of-nct-of-delhi.pdf>, last seen on: 10/03/2023

India²⁹, to the recent order regarding Sabarimala issue, or their decision on equal role for Indian Army etc.

From the above it can be said that earlier the policies and Acts were mostly concerned about the upliftment of the social position of women, but with the changing time and society new issues are gaining momentum like property and economic rights of women, health issue, women and political representation, women and environment along with issues related to the LGBTQ community. Moreover, since the last decade, there has been a visibility of LGBTQ members in the public sphere and in the courts asking and demanding for rights. There have been a series of judgements that paved the way for LGBTQ rights in India. The judiciary, both the High Courts and the Supreme Court, have been receptive to the issues raised by the NGO groups, groups consisting of members of LGBTQ members and allies³⁰.

However, it must be noted that the year 2018 has been a glorifying year for India with the pronouncement of the historical judgement in which the 5-judge constitution bench of the Supreme Court has partially struck down the provisions of the Section 377 from the Indian Penal Code and decriminalized consensual same sex relations³¹. The judgment was pronounced in consideration of several petitions which were agitating against the Suresh Kumar Koushal v. Naz Foundation³² judgement, where the apex court had upheld the validity of the said Section in question. This petition challenging the

²⁹ Ms. Githa Hariharan & Anr v. Reserve Bank of India & Anr, AIR 1999, 2 SCC 228

³⁰ Tanuj Modi, Analysis of Section 377 of IPC, 1860, [legalserviceindia.com, http://www.legalserviceindia.com/legal/article-679-analysis-of-section-377-of-indian-penal-code-1860.html](http://www.legalserviceindia.com/legal/article-679-analysis-of-section-377-of-indian-penal-code-1860.html), last seen on: 09/03/2023.

³¹ Navtej Singh Johar v. U.O.I, Writ Petition (CRIMINAL) No. 76 of 2016

³² Suresh Kumar Koushal v. Naz Foundation, Civil Appeal No. 10972 of 2013

2014 judgment was filed in 2016 by an activist/dancer called Navtej Singh Johar, who belonged to the LGBTQ community. He sought for the protection of the rights like right to sexuality, right to sexual autonomy and the right to choose a partner. The 5-judge bench headed by Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud, Justice R.F. Nariman and Justice Indu Malhotra found that Section 377 discriminates against individuals based on their sexual orientation and/or gender identity, violating Articles 14 and 15 of the Constitution. While pronouncing his decision, Justice Chandrachud has said that “sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their identity, inseparable from their autonomy and at the heart of their privacy”. Similarly, Justice Indu Malhotra opined that sexual orientation is not a matter of choice since it is an innate attribute of one’s identity which manifests at an early adolescence. Furthermore, Chief Judge Dipak Mishra, opined that natural and human rights are available to all human beings which definitely includes the citizens belonging to the LGBT community who rightfully possess the same human, fundamental and constitutional rights as the other citizens of the society. Thus, he added that if consensual carnal intercourse between a heterosexual couple is not rape, then such intercourse between a homosexual couple shall not be categorized as an unnatural offence under Section 377 IPC³³.

In light of these reasonings and findings, the judges ruled that Section 377 IPC, not only violates the right to life, dignity and autonomy of personal choice embodied under Article 21 of the Indian Constitution, but also constrains an LGBT individual from realizing and expressing their identity, which indeed is a

³³Apurva Vishwanath, Homosexuality not mental illness, The Print.in, 06th Sept. 2018, <https://theprint.in/india/governance/homosexuality-not-mental-illness-what-the-5-judges-said-while-striking-down-section-377/113241/>, last seen on: 10/02/2022

gross violation of the constitutional right of freedom of expression under Article 19(1)(a). In recognition of these rulings, the apex court in *Shakti Vahini v. Union of India*³⁴ held that an individual has the right to marry a person of his/her choice irrespective of their caste, gender, sex, and other discriminatory grounds. The court further stated that the very filing of this case in the highest court of the country indicates that an individual's right to choose their partner irrespective of the gender is squeezed on the grounds of discrimination due to the mindset of the so-called hypothetical society.

Conclusion

According to the World Economic Forum's Global Gender Gap Report 2020³⁵, gender equality in India ranked 112th out of 153 nations, as it underperformed in parameters like women's economic participation, education, health and political empowerment. The spending in gender specific schemes has also diminished over the time. Hence there is a need to spend more in the better performance of these parameters along with effective and timely implementation of the policies, schemes of the government and proper justice delivery by the courts in a sustainable way. But despite the measures taken by the Governments, Courts, and the legislators to curb this evil of gender inequality in our society a great amount of discrimination still persists even though there is social acceptance of sexual orientation and gender identity rights. The only difference in the fight for gender justice today is that, today the recognition of the LGBT community has replaced the

³⁴ *Shakti Vahini v. The Union of India*, (2018) WP (civil) No. 231 of 2010

³⁵ World economic forum, 'Global gender gap report, 2020', 16th Dec. 2019, https://www3.weforum.org/docs/WEF_GGGR_2020.pdf, last seen on: 02/04/2022

struggle of women (as a gender) in the process of fighting for gender equality³⁶.

Thus, when the issue of decriminalising homosexuality was placed before the apex court of India, the court recognised that the sexual activities between two adults of the same sex who have consented to the said act should not be regulated by a law as it violates their fundamental rights. Court has stated that the State firstly cannot interfere with a person's sexual choice and secondly cannot regulate the acts of their personal choice. They further observed that Section 377 IPC has been used as a legal tool to abuse and to brutalize individuals belonging to the LGBT community rather than protecting their rights³⁷. Moreover, it is need of the hour to accept that popular morality is distinct from constitutional morality which is derived from constitutional values and these values are based on shifting societal notions of right and wrong. And as of today, fortunately a large population of the elite class is in favour of the LGBT rights, indicating that the State is not going by the popular

³⁶ Sumit Saurabh Shrivastava, 'Disciplining the 'Desire': 'Straight' State & LGBT Activism in India', *Journal of Indian Law Institute*, Vol. 63, No. 3 (September-December 2014), pp. 368-385 (18 pages), https://www.jstor.org/stable/43854980?searchText=homosexuality+in+india&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dhomosexuality%2Bin%2Bindia&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3A2ba647598bae7d8151e8bb7a4d036f, last seen on: 1/04/2023

³⁷ K.I. Vibhute, 'Consensual Homosexuality & The Indian Penal Code: Some Reflections on Interplay of Law & Morality,' *Journal of Indian Law Institute*, Vol.51, No.1 (January-March 2009), pp. 3-31 (29 pages), https://www.jstor.org/stable/43953422?searchText=homosexuality+in+india&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dhomosexuality%2Bin%2Bindia&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Af2009cdaff16ce651d0fddfae1dca124, last seen on: 4/04/2023

morality rather following its own morality and if there is any type of morality that can pass the test of compelling State interest, then it should be constitutional morality.