

## **Accepted, But Not Accepted: The Stigmatisation of LGBT People in India Post Navtej Singh Johar**

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### *Abstract*

*It has been more than a year since the historic judgment of the Hon'ble Supreme Court for the LGBTQ community. It was the duty of every state to ensure that the judgment should travel to the remotest areas of the country. Has this been really done? Article 1 of the Universal Declaration of Human Rights clearly states that the world is made up of different countries, cultures and peoples yet despite of these differences we have one thing in common. All human beings are born free and equal in dignity and rights. The Constitution of India also has provisions regarding the equality of the people. But how far is this applicable to the LGBTQ community.*

*Despite the judgment the said community has been facing problem till date in India. The discrimination is still going on and the community is still facing problem. We talk about equality every now and then but this community remains excluded. Being born in a world which is rigidly divided into male and female, they struggle to find their identity post the landmark judgment.*

*The mainstream society should recognise non-heterosexual conduct/relationship. The problem lies in the common people and not on the LGBTQ community. Until and unless we people change these community will continue to be discriminated.*

**Key Words:** *LGBTQ Community, Transgender, Human Rights, Exclusion and Social Transformation.*

### **I. An Overview**

LGBT is an abbreviation of Lesbian, Gay, Bisexual and Transgender respectively. According to "Oxford Advanced Learner's Dictionary of Current English:", Lesbian means homosexual women. "Gay" means homosexual person and "homosexual" means person sexually attracted only to the people of same

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sex as oneself. Clearly the term homosexual denotes both the homosexual man and the homosexual women. But, after the recognition of homosexual women as lesbian in the beginning of the 19th Century on the name of SAPPHO and her place of birth Greek Island "Lesbos", where she wrote poems largely about her emotional relationship with young women, the term gay is generally used to refer to homosexual man." Bisexual indicates two senses- (1) person, sexually attracted to both men and women and (2) person, having both male and female sexual organ. In the second sense, it is synonymous with word "hermaphrodite" that means person or animal that has both male and female sexual organs or characteristics.<sup>2</sup>

TRANSGENDER is generally described as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex.<sup>3</sup> People who are identified as transgender are usually the people who are born with typical male or female anatomy, but feel as if they have born into the wrong body. For example, a person identified as a transgender may have typical female anatomy, but feels like a man and seeks to become male by taking hormones or selecting to have reassignment surgery. The researchers have revealed that brain differences are responsible for the complexity in the behaviour of Transgender and brain changes in response to hormone-treatment. Transgender, transsexual and *hijra* are synonyms.<sup>4</sup>

The first widely used term, homosexual, carries negative connotations. It was replaced by homophile in 1950s and 1960s, and subsequently gay in 1970s the latter term was adopted first by the homosexual community.

## II. International Scenario of Homosexuality

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<sup>2</sup>Dr. Anil Kumar Dubey, *Homosexuality in India: The Socio-Legal Perspective and Judicial Approach*, IBR XLIII(4), 153 (2016).

<sup>3</sup>Dr. Poonam Verma, *Sorrows of Transgenders, Judiciary and our Society*, IBR 137 XLII (2015).

<sup>4</sup>Dr. Anil Kumar Dubey, *Homosexuality in India: The Socio-Legal Perspective and Judicial Approach* XLIII(4) IBR, 154 (2016).

The human rights of homosexuals as recognised in other jurisdictions, will help the Indian citizens to arrive at an informed judgment and destigmatise a significant segment of our population. The American Psychological Association has opined that "despite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or 'disorder'. But obviously, neither it is simply a matter of deliberate personal selection. Homosexual orientation may well form part of the very fibre of an individual's personality." And the European Court of Human Rights, while deciding a case from Ireland, notified that "exclusive homosexuality can be congenital or acquired." Some are born with long noses, big ears, or blond hair, so it could be with the homosexual.

In England homosexual behaviour between consenting adults, in private, was decriminalised in 1967 pursuant to the Wolfenden Committee report.<sup>5</sup>

### **III.I. LGBT Rights in England**

Lesbian, gay bisexual and transgender (LGBT) rights in the United Kingdom of Great Britain and Northern Ireland have evolved dramatically over time. Before and during the formation of the United Kingdom, Christianity and Homosexuality clashed. Same-sex sexual activity was characterised as 'sinful' and under the Buggery Act 1533, was outlawed and punishable to death. LGBT Rights first came to prominence following the decriminalisation of sexual activity between men, in 1967 in England and Wales, and later in Scotland and Northern Ireland. Sexual activity between women was never subject to the same legal restrictions. Since the turn of the 21st Century, LGBT rights have increasingly strengthened in support. Some discrimination protections have existed for LGBT people since 1999, but were extended to all areas under the Equality Act 2010. In 2016, Her Majesty's Arms Force removed its ban on LGBT individuals serving openly with the Armed Forces Act 2016, though it had adopted a policy of non-enforcement in 2000. The age of consent was equalised, regardless of sexual orientation, in 2001 at 16 in England, Scotland and Wales. The age of consent was lowered to 16 in Northern Ireland in 2009, previously it was 17 regardless of sexual orientation. Transgender people have

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<sup>5</sup>Kuljit Kaur and Divya Sharma, *Section 377 of the Indian Penal Code: A Revival of Hart Devlin Debate on Legal Moralism*, IBR, 116 XLIII(2)(2016).

had the right to change their legal gender since 2005. The same year, same sex couples were granted the right to enter into a civil partnership, a similar legal structure to marriage and also to adopt in England and Wales. Scotland later followed on adoption rights for same-sex couples in 2009 and Northern in 2013. Same-sex marriage was legalised in England, Wales and Scotland in 2014, but remains unavailable solely as a civil partnership. However, the UK Parliament legislated for marriage equality in Northern Ireland providing that the Northern Ireland Executive is not restored by 21 October 2019. The LGBT community continues to fight for equality and social acceptance.<sup>6</sup>

## II.II. LGBT Rights and the Americans

Laws governing LGBT rights are complex in the Americans, and acceptance of LGBT persons varies widely. Same-sex marriages have been legal in Canada (nationwide) since 2005. In Argentina since 2010, in both Brazil (nationwide) and Uruguay since 2013, in the United States (nationwide) since 2015, in Colombia since 2016 and in Ecuador since 2019. In Costa Rica, it will become legal in 2020 at the latest in Mexico, same-sex marriage are performed in Mexico City and in the States of Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Hidalgo, Jalisco, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla Quintana Roo and San Luis Potosi, as well as in certain municipalities in Guerrero, Queretaro and Zacatecas. Those unions are recognised nationwide. The legal status of LGBTQ rights remains murky. As the movement has gained cultural momentum, activists have largely moved away from a posture of compromise - they believe they can win full protection for LGBTQ people in any context, without exceptions.<sup>7</sup>

## II.III. Laws Relating to LGBT in Nepal

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<sup>6</sup>Steven Dryden, *A Short History of LGBT Rights in the UK*, BRITISH LIBRARY (Nov, 2019, 20.45PM) <https://www.bl.uk/lgbtq-histories/article/a-short-history-oflgbt-rights-in-the-uk>.

<sup>7</sup>Emma Green, *America Moved On From Its Gay-Rights Moment - And Left a Legal Mess Behind*, THE ATLANTIC (Oct, 2019, 21:15PM), <https://www.theatlantic.com/politics/archive/2019/08/lgbtq-rights-america-arent-resolved/596287/>.

The Nepali Government following the end of monarchy legalized homosexuality across the country in 2007 along with the introduction of several new laws. "Social pollutants" was the term which once openly derided to the members of the Nepal's LGBT community. But now enjoy social and political rights including legal recognition and of the third gender that put the country leagues ahead of much of the rest of the world.<sup>8</sup> These new laws explicitly include protection on the basis of sexual orientation. The Nepalese Constitution approved by the Constituent Assembly on 16 September 2015, includes several provisions pertaining to the rights of LGBT people. These are the right to have their preferred gender displayed on their identity cards, a prohibition on discrimination on any ground including sex or sexual orientation by the State and the private parties, eligibility for special protections that may be provided by law, substitution of gender-neutral terms for the previous 'male', 'female', 'son' and 'daughter' and the right of access to public services for gender and sexual minority. Nepal was the world's first country to include third gender on its federal census. And in 2015, the Government started issuing passport that recognized three genders. The same year, it became the world's 10th country to specifically protect LGBT people in its constitution.<sup>9</sup>

### III. Indian Scenario Pre-Naz Foundation Judgement

The Indian Lesbian, gay, bisexual and transgender (LGBT) movement is truly a rainbow of many fascinating hues. This movement is gradually bringing to light, documenting and representing the rich diversity of genders and sexualities that have existed in our cultures since thousands of years. It is advocating that this diversity should be respected and discrimination against LGBT people should be stopped.<sup>10</sup> Discrimination is still present in rural areas, where LGBT people often face rejection from their families and forced opposite-sex marriage. In

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<sup>8</sup>Kyle Knight, *How did Nepal Become a Global LGBT Right's Beacon?*, WORLD POLITICS REVIEW (Nov, 2019, 10:15PM), <https://www.how.org/news/2017/08/11/how-did-nepal-become-golbal-lgbt-rights-beacon>.

<sup>9</sup>Kyle Knight, *How did Nepal Become a Global LGBT Right's Beacon?*, WORLD POLITICS REVIEW (Nov, 2019, 10:15AM), <https://www.how.org/news/2017/08/11/how-did-nepal-become-golbal-lgbt-rights-beacon>.

<sup>10</sup>Saikat Roy, "Human Rights and LGBT Movement in Kolkata after Supreme Court's verdict of December 2013: Nature and Consequences", 5 No.2 IJLJ 179 (2014).

2018 the Supreme Court of India decriminalised homosexuality by declaring Section 377 of the Indian Penal Code unconstitutional. Homosexuality was never illegal or a criminal offence in ancient Indian traditional codes but was criminalised by the British during their rule in India. India's Supreme Court had struck down Section 377, a colonial-era law that outlawed same-sex relations, sparking hopes of equality for the country's lesbian, gay, bisexual and transgender population.<sup>11</sup>

As an organised political movement the Indian LGBT movement is still quite young, having taken its steps only in the early 1990s. However, it is not as if the movement started overnight. Rather it was a result of several visible and invisible developments taking place over the years in the world and Indian contexts. As of current knowledge these developments in modern time India can be traced back to the early 20th century, though even these boundaries are likely to be constantly pushed back. Till perhaps categories such as modern time and earlier India blur and merge with each other. As some people argue developments whether in the past, present or future are all part of a single continuum and linked in both obvious and unexpected ways.

One of the overarching problems that has been identified through the interviews and the existing body of knowledge is that of 'discrimination' faced by transgender in society. Using the theory of Foucault and Garfinkel, where both argue that society has certain 'constructed images of gender' which all individuals must adhere to. In order to understand transgender and their perception of society, it is inferred that the theories of Foucault and Garfinkel have an effect in their perception. It is however important to understand the root cause of these perceptions and how they are constructed and how discrimination causes a change in their identity formation. In order to conform to the identity which is seen as normal or as to 'constructed' notions of gender, transgender are faced with a need to act or be like one of the two 'normal' genders of the society. They are forced into adopting a certain level of conformity to ensure that they are not

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<sup>11</sup>Annie Banerji, *One Year after Landmark Ruling For LGBT+Rights in India, Challenges Persist*, REUTERS (Sep, 2019, 10.05 PM) <https://www.reuters.com/article/us-india-lgbt-idUSKCN1VR256>.

marginalised from the society around them.<sup>12</sup>The discrimination to these people i.e., the transgender people are faced initially from the home itself, followed by the school and later on in their work place. They are not exempted anywhere. It begins from the home and carries on wherever they go. It follows them as if its a shadow. Hence, for them to survive in this society they either cover up their 'trans' behaviours and only show their true identity in their community or they fully develop their social identity by starting living in with similar people in the form of a community. Sometimes re-establish into original family may happen even after the disclosure of sexual orientation but the lack of social norms relating to acceptance of 'trans' force the families to push child to act 'normal' in the society around them so that they are not questioned about their children and hence not marginalised or made fun of.<sup>13</sup>The main reason of discrimination is that the society thinks the said community as an outsider and this is the main reason for the discrimination of the said community. They face problems while working together in the society with other people. Working together has always been a problem as if they are some kind of criminals and the thinking of the people are so remote that the LGBT community people face lots and lots of problem each and every day of their life. This is one of the main problem they are to work as a sex worker or they are left with no option rather that to beg on the streets. Even if they are hired by any of the employer or a company they are sexually abused or they are treated in a wrong manner as if they are trying to be such in a state purposely but the people do not understand that they are helpless and that they cannot change even if they try, even if they wanted to, because they are born that way and there is no shame is such. It is natural and they cannot help it and even if they belong to such a community they should not be treated in any abusive of wrong manner because they also deserve all the rights and the Government is also trying to help them. But the actual change will come that day when the thinking of the common people will change and that they will never be discriminated for what they are and how they are.

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<sup>12</sup> Sonakshi Anand, Chandra Prakash Bhakuni and Rahul Anthwal, *Redefining Gender and Identity Formation Among Sexual Minorities* 10SLR 57 (2014).

<sup>13</sup> Sonakshi Anand, Chandra Prakash Bhakuni and Rahul Anthwal, *Redefining Gender and Identity Formation Among Sexual Minorities* 10SLR 58 (2014).

The community had kept their identity underground for decades but the bold move of the few people of these community have helped in the up-liftment of the community.

On July, 2009 in the case of *Naz Foundation v. National Capital Territory of Delhi*, the High Court of Delhi struck down much of Section 377 of the Indian Penal Code, 1860, as being unconstitutional. The Court held that to the extent Section 377 criminalized consensual non-vaginal sexual acts between adults, it violated an individual's fundamental rights to equality before the law, freedom from discrimination and to life and personal liberty under Article 14, 15 and 21 of the Constitution of India. The High Court did not strike down Section 377 completely - it held that the Section was valid to the extent if related to non-consensual non-vaginal intercourse or to intercourse with minors and it expressed the hope that parliament would soon legislatively address the issue. The eight year long legal proceedings ended with the Delhi High Court legalizing gay sex among consenting adults and again Supreme Court of India criminalized Section 377.<sup>14</sup>

#### **IV. Constitution and LGBT Rights**

Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before law or the equal protection of the law within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution.

Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including the Transgender may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only

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<sup>14</sup>Saikat Roy, *Human Rights and LGBT Movement in Kolkata after Supreme Court's verdict of December 2013: Nature and Consequences*, 5 No.2 IJLJ 183 (2014).



to male and female. Hijras/Transgender persons who are neither male/female fall within the expression 'person' and hence, entitled to legal protection of laws in all spheres of state activity, including employment, healthcare, education as well as equal civil and citizenship rights as enjoyed by any other citizen of the country.

Despite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail also by the police. Sexual assault including molestation, rape forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activity. Furthermore, non-recognition of identity of Hijras/Transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/Transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls, etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilets facilities for Hijras/Transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.<sup>15</sup> Article 15 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of sex. Discrimination on grounds of religion, race, caste, sex or place of birth is also prohibited under Article 15 and equality of opportunity in matters of public employment is guaranteed in Article 16 of the Constitution of India.

Article 19(1) of the Constitution guarantees certain fundamental rights subject to the power State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognised and

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<sup>15</sup>Dr. Poonam Verma, *Sorrows of Transgenders, Judiciary and our Society*, XLII IBR 144 (2015).

guaranteed as a natural rights inherent in the status of the citizen of a free country. Article 19 (1) (a) of the Constitution of India states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identity gender. Self identified gender can be expressed through dress, words, action or behaviour or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19 (2) of the Constitution of India.<sup>16</sup>

Article 21 which reads as - No person shall be deprived of his life and personal liberty except according to procedure established by law.<sup>17</sup> Article 21 is regarded as the heart and soul of the Constitution of India which speaks of right to life and personal liberty. Article 21 or the right to life is one of the basic fundamental right of every individual and no one has the right to violate this right. Not even the State. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender as already indicated, constitutes the core of one's sense of being as well as an integral part of the person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under the Constitution. Article 21 as already indicated guarantees the protection of 'personal autonomy' of an individual. In *Anuj Garg v. Hotel Association of India*(2007), the court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self- discrimination of gender is an integral part of personal autonomy and self expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

## V. Indian Scenario Post Naz Foundation Judgment

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 insofar as it applied to the consensual sexual conduct

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<sup>16</sup>Dr. Poonam Verma, *Sorrows of Transgenders, Judiciary and our Society*, XLII IBR 147 (2015).

<sup>17</sup>INDIA CONST. art 21.

of adults of the same sex in private. Section 377 was titled Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.<sup>18</sup> The issue in the case originated in 2009 when the Delhi High Court in the case of *Naz Foundation v. Govt. of N.T.C. of Delhi*, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex. In 2014, a two-judge-bench of the Supreme Court, in the case of *Suresh Kumar Koushal v. Naz Foundation*<sup>19</sup>, overturned the Delhi High Court decision and granted Section 377 "the stamp of approval". When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge-bench of the Supreme Court opined that a larger bench must answer the issue raised. As a result of that a five-judge bench heard the matter. The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as a part of the LGBT community, filed a Writ petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Article 21 of the Constitution of India. Furthermore, he sought a declaration that Section 377 was unconstitutional. The petitioner also argued that Section 377 was violative of Article 14 of the Constitution because it was vague in the sense that it did not define "carnal intercourse against the order of nature" There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that Section 377 was violative of Article 15 of the Constitution since it discriminated on the basis of the sex of a person's sexual partners, Section 377 had a chilling effect on Article 19 since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of a certain choice or a manner of living.

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<sup>18</sup>K.D. GAUR, TEXTBOOK ON THE INDIAN PENAL CODE 599 (Universal Law Publishing Co. Pvt. Ltd., New Delhi 4th edn., 2009).

<sup>19</sup>*Suresh Kumar Koushal v. Naz Foundation*(2014) SCC 1 (India).

The respondent in the case was Union of India. Along with the Petitioner and Respondent, certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case. The Union of India submitted that it left a question of the Constitutional validity of Section 377 to the wisdom of the Court. Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the Constitutional concept of dignity, that such acts would be detrimental to the institution of marriage and that it may violate Article 25 of the Constitution of India.

The five-judge bench of the India Supreme Court unanimously held that Section 377 of the Indian Penal Code, 1860 insofar as it applied to consensual conduct between adults in private was unconstitutional. With this the Court overruled its decision in *Suresh Koushal v. Naz Foundation*<sup>20</sup> that had upheld the constitutionality of Section 377.

It's been more than a since the historic judgment in the case of *Navtej Singh Johar v. Union of India* but the said community is still facing lots of problems. The judgment has its impact but the impact is not as expected. The Supreme Court ensured that the judgment should travel even to the remotest part of the country but except for few cities the judgment has no impact. The change one had thought, that the judgment of September 6th 2018 would bring about in the thinking of the people has not been truly as expected because there is still discrimination done and the people are still facing problems.

## VI. A Sum-Up

On 6th September 2018, the Supreme Court issued its verdict. The Court unanimously ruled that Section 377 is unconstitutional as it infringed on the fundamental rights of autonomy, intimacy and identity, thus legalising homosexuality in India. The Court explicitly overturned its 2013 judgment.

Criminalising carnal intercourse is irrational, arbitrary and manifestly unconstitutional.

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<sup>20</sup>Koushal v. Naz Foundation A.I.R. 2014 SCC 1(India).

-Chief Justice Dipak Mishra

History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right of dignity and free of discrimination. Consensual sexual acts of adults are allowed for the LGBT community.

-Justice Indu Malhotra

It is difficult to right a wrong by history. But we can set the course for the future. This case involves much more than decriminalizing homosexuality. It is about people wanting to live with dignity.

-Justice Dhananjay Y. Chandrachud

After the judgment on 6th September 2018 only few things have changed. Yes the impact of judgment is there but it does not have a severe effect. This is true because only the decriminalisation alone will not help. Specific law should also be enacted so that an equality can be brought among all the people as guaranteed by the Constitution of India. One year on from the Supreme Court's historic Section 377 judgment which decriminalized homosexuality and had a hope that it would bring about a change in the thinking of the common people but the discrimination is still being done and it is still there. The change in the laws due to the judgment has fallen short or has not lived up to the expectation. There should be specific adoption rights and this laws should come into force as soon as possible. People who are born as LGBT shall not change because they are born this way and need not change. The change that is to be brought is in the mind of the common people.