OBERGEFELL AND NALSA: A COMPARATIVE LEGAL ANALYSIS OF DECISIONS IN U.S. AND INDIA ON LGBT RIGHTS

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INTRODUCTION

In a celebrated judgment delivered in June 2015, *Obergefell v Hodges,*[1] the Supreme Court of the United States held that states, that did not recognise marriage between homosexuals, violated the Fourteenth Amendment's Equal Opportunity and Due Process Clause.[2] This judgment came subsequent to decisions in the U.S. that struck down laws that made homosexuality an offence, or otherwise discriminated against homosexuals. The minority opinion has considered the majority opinion led by Justice Kennedy as judicial overreach, impinging on the realm of the legislature. According to the minority, the majority judges had effectively decided to change the definition of marriage by flouting the democratic process and disregarding separation of powers between the legislature and the judiciary.

Strikingly different to what was held in the U.S., the Indian Supreme Court in *Suresh Kumar Koushal v Naz Foundation & Ors.*[3] reversed a decision of the Delhi High Court[4] which had decriminalized homosexuality by reading down the provisions of Section 377 of the Indian Penal Code, 1860 (IPC). This decision was shortly followed by another decision of the Supreme Court, *National Legal Services Authority v Union of India,* (*NALSA*)[5] which legally recognized trans-genders as a third gender, and asked the executive to undertake measures in furtherance of their upliftment. The inconsistency between the two judgments with a bearing upon the rationale of the decisions in the two countries is the focal point of this article. The crux of the matter would essentially boil down to the debate between judicial restraint and judicial activism. While the Indian Courts have usually donned their activist-hat in securing rights for various sections of the society, was it correct for the Supreme Court to shirk away from its responsibility to do

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[1] *Obergefell v Hodges* 576 US 1 (2015).

[2] US Const amend XIV 1868, s 1.

[3] *Suresh Kumar Koushal v Naz Foundation & Ors* (2014) 1 SCC 1.

[4] *Naz Foundation v Govt of NCT of Delhi,* (2009) SCC OnLine Del 1762.

[5] 2014 AIR 1863 (SC).

so in *Koushal*? Moreover, what repercussions would the decision in *NALSA* have upon the future interpretations of Article 14 and 15 of the Constitution of India[6] (The Constitution)?

In a jurisdiction that follows a strict separation of powers doctrine,[7] the Court while interpreting the provisions of the constitution in an unorthodox manner, went on to actively confer rights to homosexuals. On the other hand, in the humble opinion of the author, the Indian Supreme Court failed to give satisfactory explanation for not interpreting Article 14, 15 and 21 of the Constitution in a manner to avoid discrimination on the basis of sexual orientation, and for ensuring dignified treatment of homosexuals. There seem to be glaring contradictions in the Supreme Court's reading of Fundamental Rights in *Koushal* and *NALSA*. In *Koushal*, the Court failed to interpret Fundamental Rights harmoniously to decriminalize homosexuality, which would have allowed homosexuals to lead a dignified life. On the other hand, in *NALSA*, the Supreme Court adopted the harmonious interpretation of Fundamental Rights to give legal recognition to trans-genders. The Supreme Court's judgement in *NALSA* is sufficient to make arguments against the decision in *Koushal*. Homosexuals, akin to trans-genders, should not be subjected to differential treatment only on the basis of their sexual orientation. This is the basis of Article 14 and 15 of the Constitution that seems to have been overlooked by the Supreme Court while deciding *Koushal*.

The first part of the article analyses the decision of the U.S Supreme Court followed by the Indian cases on homosexuality. The next section seeks to undertake a comparative analysis of these two decisions and underline the differences between the two. This is followed by the last section dealing with the general duty of courts to judicially review laws vis-a-vis the responsibility to not impinge upon the legislature's realm while exercising judicial restraint. In conclusion, the article proposes that irrespective of the debates surrounding judicial review and judicial deference, furtherance of the interests of the people is what should be given paramount consideration in order to strike a balance between the functions of judiciary, executive, and the legislature.

OBERGEFELL TO NALSA

There has been a recent trend across jurisdictions to recognise the rights of homosexuals and protect them from discrimination based on their sexual orientation.[8] The decision

[6] The Constitution of India 1950, art 14 and 15.

[7] M P Jain, *Indian Constitution Law* (6th edn, LexisNexis 2010) 16.

[8] *Corbett v Corbett* [1970] 2 All ER 33; *Attorney General v Otahuhu Family Court* (1995) 1 NZLR 603; *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6; , *AB v Western Australia* (2011) HCA 42; *Bellinger v Bellinger* [2003] All ER 593; *Norrie v NSW Registrar of Births, Deaths and Marriages* (2013) NSWCA 145.

of the United States Supreme Court in *Obergefell* went a step further in assuring rights for homosexuals by declaring that all states in the U.S. had an obligation to recognise marriages between homosexuals, even if the laws in that state restricted the definition of marriage only to heterosexual couples. The Court held that not recognising homosexual couples as married violated the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.[9] The right to marry had been recognised in previous cases to be a substantive right capable of being protected under the Due Process and Equal Protection Clauses.[10] With *Obergefell*, this protection was extended to same sex couples, whose marriages might have been legally valid in states that recognised same-sex marriages, but were otherwise not recognised by the laws of other states in the country.

On the other hand, in India, the Supreme Court reversed Delhi High Court decision in *Naz Foundation v Govt of NCT of Delhi*[11] which had decriminalised homosexuality by reading down the provisions of Section 377 of the IPC. The decision of the Supreme Court had attracted criticism from various sections of the society including academicians and eminent lawyers for the lack of coherent reasoning in arriving at its conclusion.

Shortly thereafter, the same court, in *NALSA* recognised trans-genders as a third gender and asked the Government to undertake steps for their betterment including providing for reservation in government jobs. The Court's reasoning was based on the practical understanding that not recognising them as a third gender led to widespread discrimination against the entire transgender community. Article 14, 15, 19 and 21 of the Constitution mandate that trans-genders should be allowed to lead a dignified life and enjoy civil rights which are based on gender identification. Most of all, the main thrust behind the Supreme Court's reasoning was to recognise an otherwise emancipated community in order to remove the stigma attached and to confer on them the right to freedom of expression and the right to live with dignity.

The three decisions, *Obergefell, Koushal* and *NALSA*, illustrate the different interpretations on a similar issue in determining the extent of rights enjoyed by the citizens and the different conclusions that can be reached via recourse to judicial review. An understanding of the decisions in the U.S. and the three judgments in India would be necessary to better appreciate the reasoning adopted by courts in both the jurisdictions and their correctness. We shall first look at the decisions in the United States followed by those in India.

[9] US Const amend XIV 1868, s 1.

[10] *Loving v Virginia* 388 US 1, 12 (1967); *Zablocki v Redhail* 434 US 374, 384 (1978); *Turner v Safley* 482 US 78, 95 (1987); *Goodridge v Department of Public Health* 440 Mass 309, 798 NE 2d 941 (2003).

[11] *Naz Foundation v Government of NCT* [2010] Cri LJ 94.

THE KENNEDY TRIUMVIRATE – U.S. DECISIONS ON HOMOSEXUALITY

Justice Kennedy is remembered for his judgments in the three sexual orientation cases that came up before the Supreme Court of U.S. before the decision in *Obergefell*: *Romer v Evans*,[12] *Lawrence v Texas*[13] and *United States v Windsor*.[14] Much has been written about the treatment of rights of same sex couples under the Equal Protection Clause and the Due Process Clause.[15]

In *Romer*, the Court invalidated an amendment to the Colorado Constitution[16] which repealed local laws that prohibited discrimination on the basis of sexual orientation. Justice Kennedy, writing for the Court, went on to hold that the amendment had only placed a disability on a single group, making it an invalid form of legislation."[17]

Next, in *Lawrence*, a Texas statute[18], which provided for the criminalisation of sodomy performed by same-sex couples was challenged before the Court, on the basis of the Equal Protection and Due Process Clause.[19] In this case, Justice Kennedy noted that an analysis of the case could not be based solely on equal protection grounds. According to him, the rights at issue were also protected by the substantive guarantee of liberty, and a decision based on due process grounds encompassed equal protection interests as well.[20] The Court relied on the dissent by Justice Steven in *Bowers v. Hardwick*,[21] stating that decisions by married persons in their individual capacities about their physical relationship (even in furtherance of procreation) is a liberty that is covered by the substantive component of the Fourteenth Amendment's Due Process protection.[22] The Court ruled that the Texas law[23] did not further any legitimate state interest and made same-sex activity legal in every U.S. state and territory by invalidating the sodomy laws in 13 other states in the same stroke.

[12] *Romer v Evans* 517 US 620 (1996).

[13] *Lawrence v Texas* 539 US 558 (2003).

[14] *United States v Windsor* 133 S Ct 2675 (2013).

[15] Stacey Sobel, 'Windsor Isn't Enough: Why The Court Must Clarify Equal Protection Analysis For Sexual Orientation Classifications' (2014) 24 Cornell Journal of Law & Public Policy 493.

[16] Colo Const amend II 1992.

[17] *Romer* (n 12) 627.

[18] Texas Penal Code 2003, Ann s 21.06(a).

[19] US Const amend XIV, s 1.

[20] *Lawrence* (n 13) 575.

[21] *Bowers v Hardwick* 478 US 186 (1986).

[22] *Lawrence* (n 13) 578.

[23] Texas Penal Code 2003, Ann s 21.06(a).

In the third case, *United States v Windsor*,[24] the Court held that Section 3 of the Defence of Marriage Act, ("*DOMA*") 1996 was unconstitutional on the ground that a limitation on the recognition of marriages only to the union of man and woman resulted in the deprivation of the liberty of homosexuals. This decision also relied on the linkage between protection of liberty by the Due Process clause and the Equal Protection clause. The DOMA had no legitimate purpose, like its predecessors, and did not refer to a specific standard of review which had to be applied to the case at hand. In all the three above mentioned cases, the government's justifications could not satisfy even the lowest standard of review. The Court's decision hinged on the reasoning that no legitimate purpose was being served by the DOMA and the state could not justify its purpose and effect to disparage and injure the personhood and dignity of citizens. However, the judgement does little to clarify the exact hurdle or threshold that the government was required to meet.[25]

THE INCONSISTENT POSITION IN INDIA

The Delhi High Court in *Naz*[26] struck down Section 377 of IPC which made sexual intercourse between two men a crime, as being violative of Articles 14, 15 and 21 of the Constitution. The Court stated that there was no rational basis for differentiating between homosexuals and straight couples and targeting homosexuals as a class. It also stated that the section did not serve any legitimate interest of the State and the provision violated Article 15 of the Constitution, which prohibits discrimination on the basis of sex. The term 'sex' should not solely be restricted to gender, but should be read to include sexual orientation. The impugned provision was also held to be against the right to privacy of homosexual couples and was therefore violative of Article 21 of the Constitution.

On appeal, Apex court considered different sexual conducts that were covered by the impugned provision and arrived at the conclusion that the provision was justified in differentiating between 'ordinary sexual conduct' and 'carnal intercourse against the order of nature'. What is meant by 'ordinary' and what is meant by 'intercourse against the order of nature' has not been clarified on the basis of any scientific, psychological or behavioural study. The term 'ordinary sexual conduct' has been equated with sexual conduct practised by a majority of the population which undermines the foundation of the idea behind protecting minority rights. The judgment creates two different classes, without basing it on any intelligible differentia. Even if an intelligible differentia is

[24] *United States v Windsor* 133 S Ct 2675 (2013).

[25] *United States v Windsor* 133 S Ct 2675 (2013); Laurence H Tribe, 'Lawrence v Texas: The Fundamental Right that Dare Not Speak Its Name' (2004) 117 Harvard LR 1893, 1897-98.

[26] *Naz Foundation v Government of NCT* 2010 Cri LJ 94.

found, there is no rational nexus or legitimate governmental objective behind the differentiation.[27] On this basis alone, the requirements of upholding the provision have not been met.

The Court relied on the doctrine of the presumption of constitutionality of a statute, and held that there was nothing in the section which violated the right to equality or the right to life. However, the judgment lacked convincing arguments to show that the provision did not violate any of the fundamental rights, or reasons to hold that the Delhi High Court was wrong in its approach. There is nothing in the judgement to show why homosexuality is 'carnal intercourse against the order of nature' and not natural. It was the basis of this differentiation which was challenged before the Delhi High Court and the High Court did not find any reasonable classification. A practice by majority of the population of being heterosexual does not automatically mean that anything else should be considered 'against the order of nature.'

Next, the Supreme Court held that Section 377 of IPC was a neutral provision and was not directed against any class or community. By doing this the Supreme Court did not consider the full effect and impact of the provision. The Court should have weighed the real effect and impact of the provision on fundamental rights while deciding its constitutionality in light of its earlier decision in *Minerva Mills v Union of India*.[28]

Finally, the Supreme Court also had a problem with the High Court's reading down of the provision to exclude homosexuality.[29] This, the Supreme Court considered was beyond its powers. However, the doctrine of reading down a provision has been applied by the Indian judiciary in various cases.[30] This was not considered by the Supreme Court in its decision.

Soon after the decision in *Koushal*, the Supreme Court took a progressive stand in *NALSA* in recognising trans-genders as a third gender and asking the Government to undertake steps for their upliftment. The reasoning adopted by the Supreme Court here is quite far-removed, if not contrary to the orthodox stand taken by the Court in *Koushal*. The judgment seems to mirror the decision of the Delhi High Court in *Naz*. The Court

[27] Gautam Bhatia, 'The Unbearable Wrongness of Koushal v Naz Foundation Indian Constitutional Law and Philosophy' (WordPress: Indian Constitutional Law and Philosophy, 11 December 2013.) <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/> accessed 26 October 2016.

[28] *Minerva Mills v Union of India* [1980] AIR 1789 (SC).

[29] *Suresh Kumar Koushal v Naz Foundation* [2014] 1 SCC 132.

[30] *RMD Chamarbaugwalla v Union of India* [1957] 1 SCR 930; *Kedar Nath v State of Bihar* [1962] AIR 955 (SC); *Bhim Singhji v Union of India* [1981] AIR 234 (SC); *State of Andhra Pradesh v National Thermal Power Corporation* [2002] 3 SCR 278.

recognised sexual and gender identity as a component of Article 21of the Constitution and the right to live with dignity. The Court in *NALSA* also considered the right to freedom of expression and held that Article 19(1)(a) includes the freedom to express a chosen gender identity through speech, manners, clothing etc. [31]

Regarding Articles 14 and 15 of the Constitution, the Supreme Court observed that Article 14 does not only ensure equal protection before law but also confers a positive obligation on the State to ensure equal protection by bringing in necessary socio-economic changes. Since the trans-genders had been facing discrimination in all spheres of the society, not recognising their identity would deny them equal protection, especially in the fields of education, health, employment, etc. The Supreme Court also considered Articles 15 and 16 of the Constitution and held that the term 'sex' should also include gender identity and should not be limited to the biological sex of a male or a female.[32] Consequently, the Supreme Court read the Fundamental Rights mutually, harmoniously and in a broader manner in NALSA as opposed to a narrower and more-orthodox view taken by it in *Koushal*.

THE PATH AHEAD OF NALSA

The Supreme Court in *NALSA* held that Article 15 of the Constitution prohibits discrimination on the basis of sexual identity. On the other hand, in *Koushal*the court held that there was no Fundamental Right which had been affected. In light of this contradiction, the decision of the Supreme Court in *Koushal* needs to be re-considered by a higher bench. A peculiar observation could also be noted in this context at paragraph 20 of the judgement in *NALSA* where the Supreme Court has tried to determine the meaning of sexual orientation and trans-genders. The Court notes that sexual orientation is a reflection of a person's physical and romantic attraction to another person. This includes trans-genders, bisexuals, homosexuals, heterosexuals alike.[33] Though the judgement is more focused on the recognition of trans-genders as a third gender, it could be considered as having blurred the distinction between sexual orientation and gender identity. This is not only at variance with *Koushal* but also dilutes the rationale in it.

The thrust of the reasoning in *Koushal* was that there should be a presumption of constitutionality when a statute is challenged. Further, the Supreme Court could not find enough teeth in the arguments made before it to arrive at the conclusion that fundamental rights were indeed being violated by the provision in question. But *NALSA*

[31] *NALSA* (n 5) [71].

[32] *NALSA* (n 5) [66].

[33] ibid [22].

has accepted that sexual identity was a component of human dignity as recognized under the ambit of Article 21[34] and even though trans-genders may constitute a minority, their rights would still have to be protected under the constitution. In addition, *Koushal* did not consider the intersectionality of Article 14, Article 19 and Article 21 of the Constitution. On the other hand, in *NALSA*, the Court construed these rights together to arrive at the conclusion that sexual identity was not only an expression under Article 19(1)(a) but it was also a component of human dignity because gender constituted an integral part of one's identity.

Second, as accepted by the Supreme Court, the term 'transgender', in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative trans-sexual people, who strongly identify with the gender opposite to their biological sex.[35] This includes cross-dressers, eunuchs, castrated men and to a certain extent even homosexuals. The court did clarify that the term 'transgender' for the purposes of the judgment would only be restricted to hijras, eunuchs, Kothis, Aravanis, Jogappas, Shiv-Shakthis, etc.[36] However, the reasonable differentia between homosexuals and trans-genders as understood by the judgement might still be questionable, especially because the degrading treatment meted out to homosexuals is no different from the other classes of trans-genders as referred to in the judgement.

ANALYSIS OF OBERGEFELL VIS-À-VIS KOUSHAL

This section will seek to analyse the reasoning in the U.S decisions on homosexuality vis-à-vis the decisions on homosexuality and trans-genders in India. It may be pertinent to point out here that *Naz* is more closely related to *Lawrence* in the U.S. and the decision in *NALSA* has more resemblance to the decision in *Obergefell*. In *Obergefell*, the petitioners approached the Court to claim active recognition by the state, the logical culmination of the right to marry. Similarly, in *NALSA*, the claim was for a recognition of the fundamental rights of trans-genders by conferring on them legal recognition as the 'third gender'. The decision in *Lawrence*, similar to the decision in *Naz* was more concerned with decriminalising homosexuality as a consequence of being violative of certain fundamental rights. The petitioners did not want a declaration from the Court that they were entitled to a certain right. They merely wanted the Court to recognise that a statute was against the already extant fundamental rights. Therefore, the difference between the two would boil down to the role of the judiciary as a protector of fundamental rights and as an active interpreter and creator of the same. The difference between India

[34] *National Legal Services Authority v Union of India* [2014] AIR 1863 (SC) [20], [68]. .

[35] ibid [11].

[36] ibid [108].

and the U.S., in this context, needs to be analysed with respect to the power of the courts in the two jurisdictions to interpret the constitution in light of the doctrine of separation of powers.

In the Indian context, it has been accepted that there is no rigid separation of powers between the executive, legislature and the judiciary. The fundamental aspect merely remains that each of them should be free from the interference of the other.[37] Three principles of constitutional law are relevant here for the upcoming analysis. First, the Indian Constitution relies more on the system of checks and balances and it has long been accepted that the power of judicial review does not go against the separation of powers but ensures that neither of the wings of the government enjoy unbridled powers.[38] Second, there have been various instances in the past where given the lacunae in law; the Supreme Court in the exercise of its powers under Article 141 and Article 142 has framed guidelines to have the force of law until the government came up with laws to fill in the lacunae.[39] Third, the doctrine of reading down of provisions to make laws more consistent with the changing nature of the society has also been recognised by courts in India. A succinct example may be given with the reference of Section 309 of IPC, which has been read down to decriminalise passive euthanasia.[40]

The U.S. position is, however, slightly different because of the inherent belief in a strict system of separation of powers. Moreover, unlike its Indian counterpart, there is no obligation on the U.S. Government to undertake affirmative action to protect, uplift or confer rights on its citizens.[41] Under the Due Process clause and the Equal Protection clause the traditional understanding had only been to stop the government from impinging upon the rights of the individuals. This has been gradually broadened by the judiciary in the U.S. to include the protection of certain rights as well, but the scope of review in the U.S. still remains narrower as compared to India. The U.S. courts have the power to strike down laws that are against due process and equal protection clause but there is nothing which entitles the courts to confer more rights.[42]

In this backdrop, it is important to note that the Indian judiciary failed to stand by its role as a protector of the constitution when it refused to declare Section 377 of IPC as unconstitutional, despite having the power to do so. The only issues for consideration

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[37] *His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala* [1973] 4 SCC 225; *Bhim Singh v Union of India* [2010] 5 SCC 538.

[38] *Supreme Court Advocates on Record Association v Union of India* Writ Petition (Civil) No 13 of 2015.

[39] *Vishakha v State of Rajasthan* [1997] 6 SCC 241.

[40] *Aruna Shanbaug v Union of India* [2011] 4 SCC 454.

[41] *Obergefell* (n 1) 3 (Alito J), 22 (Roberts CJ).

[42] *Marbury v Madison* 5 US 137 (1803).

before the Supreme Court should have been to determine if there was a right to be protected against discrimination based on sexual orientation and if there was any reasonable classification inSection 377, IPC. If the Court is able to find a reasonable classification, it will still have to consider a legitimate state interest for retaining Section 377 IPC. Additionally, the Court should have considered whether the provision deprived homosexuals of a dignified life, personal liberty and freedom of expression.

The judgment does tend to touch upon these aspects but fails to satisfy the reader with reasons, as to why sexual orientation based discrimination is not *ultra vires* the Constitution and why criminalising homosexuals, does not deprive them of their personal liberty and dignity. Instead, the main and sole focus of the decision is the doctrine of presumption of constitutionality, reflective of judicial restraint. This is in variance with precedents where the Supreme Court ventured beyond its traditional role to recognise new rights under the Constitution and to intervene regularly to monitor their enforcement.[43]

CONCLUSION: ABDICATION V. REVIEW – FINAL TAKEAWAYS

Judicial review has been accepted as a fundamental principle under the Constitutions of both India and the United States.[44] The origin of the principle rests on the assumption that the Constitution of any country is the source from which the executive and the legislature derive their power. Therefore, it is to be treated as the supreme law of the land that cannot be surpassed by any act of the Parliament. The traditional routes of judicial review, therefore, were seemingly rooted in the supremacy of the Constitution, and abrogated laws that went against the fundamental rights.[45] The origin of and the rationale behind judicial review has historically seen different perspectives and theories on them.[46] A common theme present in the application of judicial review in India, U.S. and the U.K. is that courts would strike at the abuse of power and uphold the rule of law.[47]

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[43] *Bandhua Mukti Morcha v Union of India* [1984] AIR 802 (SC); *Consumer Education and Research Centre v Union of India* [1995] 3 SCC 4; *Vellore Citizens Welfare Forum v Union of India* [1996] AIR 2721 (SC); *Vishakha v State of Rajasthan* [1997] AIR 3011 (SC); *Milk Men Colony Vikas Samiti v State Of Rajasthan* [2007] 2 SCC 413.

[44] HM Seervai, *The Position of Judiciary under the Constitution of India* (University of Bombay 1970), William O Douglas, *From Marshall to Mukherje: Studies in American and Indian Constitutional Law* (Eastern Law House1956).

[45] *Marbury v Madison* 5 US 137 (1803).

[46] Harry Woolf and others, *De Smith's Judicial Review* (1st edn, Sweet & Maxwell 2007).

[47] Mauro Cappellati, 'Judicial Review in Comparative Perspective' (1970) 58(5) California LR 1017; Dudley O McGovney, 'The British Origin of Judicial Review of Legislation' (1944) 93(1) UPA LR 1.

DOES EXPANDING THE SCOPE OF RIGHTS AMOUNT TO A LEGISLATIVE FUNCTION?

Judicial review becomes judicial overreach when the courts start reviewing the laws made by the legislature on the basis of intention of the legislature and begin substituting their wisdom for the wisdom of the elected representatives of the people. It is considered prudent to leave law-making powers to those who are directly responsible to the masses. However, Courts should not abdicate their duty of judicial review and shrug off the responsibility of protecting fundamental rights. The Indian Supreme Court's decision in *Koushal*[48] seemed to have done exactly that.

Interpreting new fundamental rights within the ambit of extant fundamental rights is not a legislative function and does not go against the doctrine of separation of powers as has been held in a plethora of precedents in India and the U.S. This law creating function of the judges has been well recognised now.[49] Such an approach reflects the liberal and purposive approach towards judicial review, which takes, into consideration social values and the need to evolve.[50] As long as the judiciary does not go out of bounds while interpreting the Constitution,[51] re-interpreting existing laws to meet contemporary needs of the society should be appreciated.

A BALANCING ACT

The tussle between the judiciary and the executive or the judiciary and the legislature has been long drawn out in different countries. This tussle itself is what gives the democratic process certain character as it emerges in the process of seeking to secure the rights and choices of the individual above everything else. The critics of judicial activism often forget that courts tend to be the last resort for a common man to raise his anguish and displeasure against the government without waiting for the next election season. As pointed out by J. Balakrishnan, the Supreme Court is often criticised for judicial overreach and for usurping power. However, these criticisms overlook the fact that the common man has nowhere to go if the Courts exercise restraint in situations where the other organs of the State do not perform their duties properly. There have

[48] Sujitha Subramanian, 'The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication?' (2015) 47 George Washington International LR 711, 755-58.

[49] PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 Columbia Journal of Transnational Law 561.

[50] *Saurabh Chaudhri v Union of India* [2003] 11 SCC 146; Alfred Thompson Denning, *From Precedent To Precedent* (1st edn, Clarendon Press 1959).

[51] *US v Butler* 297 US 1 (1935).

been constant failures in governance and the courts have a responsibility to correct these failures.[52]

It is, therefore necessary, for not only the judiciary but also for the other wings of the government to strike a balancing act while bearing in mind that the citizens' interests are of paramount consideration. In every country governed by a written Constitution, the supremacy of the constitution is the cornerstone of legislative interpretation and yet there are bound to be interpretative challenges that demand a shift in the law. The legislatures of every country have to bear upon themselves the responsibility of ensuring that the laws of the nation do not become obsolete and are in accordance with the needs of a democratic society. However, history has shown that quite often, the legislature becomes prone to committing errors which are then required to be addressed by the judiciary as the final arbiter, protector and interpreter of rights of the citizens.

The question then arises, as to what extent the courts can go, to remedy the conundrums created by the inaction or misconduct of the legislature. There are proponents of judicial activism and there are those who support judicial restraint, each with meritorious arguments to their aid. But it always has to be kept in consideration by those who govern and those who sit in judgment that intellectual debates on separation of powers, review and abdication should not become a hurdle in assuring the rights of a common man who merely wants to go about the vicissitudes of life without being subject to arbitrary actions by the government and the courts.

In *Koushal*, this is exactly what had happened: two learned judges restrained themselves from remedying a situation that was undoubtedly against the spirit of Part III of the Constitution. This was not done for the lack of power, but merely because the court in its wisdom decided to leave the matter to the legislature, which had consistently avoided the issue in the past. Questions have also been raised about the Supreme Court's entertainment of the appeal when the Government had agreed to the stand taken by the Delhi High Court.[53] On the other hand, the same court, four months later, donned its activist-hat and ordered the executive to accord due recognition to the fundamental rights of a certain section of the population, and further ordered the legislature to enact laws to secure these rights in *NALSA*. While an analysis akin to the reasoning adopted in the U.S. was used in the former, the same seems to have escaped the Court's notice in the latter.

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[52] KG Balakrishnan, 'Inaugural Address at Kerala Legislative Assembly Golden Jubilee Celebrations' (Seminar on Legislature, Executive and Judiciary, Kerala, 26 April 2008) <http://supremecourtofindia.nic.in/speeches/speeches_2008/26%5B1%5D.4.08.legislature-relationship.kerala.pdf> accessed 26 October 2016.

[53] Sujitha Subramanian, 'The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication?' (2015) 47 George Washington International LR 71756-57.

As Gautam Bhatia has pointed out, "every once in a way, the highest Court in the land delivers a judgment that is both constitutionally preposterous, and morally egregious."[54] This had happened once before in the *Habeas Corpus* case[55] and has happened yet again in the case of *Koushal*.

Parallel to the developments in India, in another diverse nation, the highest court of the nation not only protected the rights of a section of the society, but also conferred upon them a right that was not read into any statute or the Constitution by the legislature. This was achieved despite there being a strict separation of powers in the United States, the absence of any specific provisions on judicial review in the U.S. Constitution and the absence of the power to judicially review amendments in the U.S., unlike the position in India.[56] The courts here did not get digressed by debates on the merits and demerits of restraint, activism or abdication, but adhered to its sacred duty of protecting the rights of the people and the supremacy of the Constitution. It is entirely possible that the approach of the Indian Supreme Court, though based on a literal and narrow interpretation of the Constitution, was correct in leaving it on the wisdom of the legislature and the elected representatives in creating a better society based on consensus. But in doing so, the Supreme Court overlooked the principle of 'inclusiveness' as pointed out by Pandit Nehru in the 'Objective Resolution' moved on December 13, 1946. According to this resolution, there is a deeply ingrained underlying tenet of the Constitution, which recognises a role for every person in the society. This goes even to the extent where persons seen as different or deviants would not be socially excluded or ostracised. The Indian society by displaying this inclusiveness would assure a life of dignity and non-discrimination for all.[57]

The question of violation of fundamental rights has not been raised for the last time in the context of homosexuality and Section 377, IPC. The courts will again undoubtedly be faced with similar, if not the same issue, in future. The Supreme Court has already ordered the curative petition arising out of *Koushal* to be placed before a larger Constitutional Bench because questions of public importance had been raised. India has already witnessed a *Bowers*, it can now only be hoped that soon enough there is a *Lawrence* as well which confers basic human dignity upon homosexuals, without waiting for seventeen years, the period it took in the U.S. for the legal position to change.

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[54] Gautam Bhatia, 'The Unbearable Wrongness of Koushal v Naz Foundation Indian Constitutional Law and Philosophy' (WordPress: Indian Constitutional Law and Philosophy, 11 December 2013) <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/ accessed> accesssed 26 October 2016.

[55] *ADM Jabalpur v Shivkant Shukla* [1976] AIR 1207 (SC).

[56] *US v Butler* 297 US 1 (1935); *State of Rhode Island v Palmer* 253 US 350 (1920); *Dillon v Gloss* 256 US 368 (1921); *United States v Sprague* 282 US 716 (1931); *Leser v Garnett* 258 US 130 (1922).

[57] *Naz Foundation v Government of NCT*, [2010] Cri LJ 94, 130-131.