The Supreme Court of India in the landmark judgment of *National Legal Services Authority v. Union of India*¹ (referred to as the NALSA judgment) recognised the right of transgenders to identify themselves as the “third gender”, thereby intending to put an end to the persisting discrimination leveled against them in society. The Supreme Court interpreted various international conventions and the Yogyakarta Principles to reach at this judgment. On one hand, the Supreme Court has held that fundamental rights are not a negative duty alone but require positive interventions by the state to ensure that its citizens enjoy a better life of dignity. On the other hand, it has refused to declare Section 377 of the Indian Penal Code, 1860—provision that continues to violate the rights of lesbians, gays and bisexuals—as unconstitutional.²

The cultural relativism debate seems to form an overarching part of the reasoning in the Koushal judgment. Non-admissibility of foreign law and, more so, the principles of international human rights law, which have received a near universal status, not only defies the progressive human rights movement world over but also India’s obligation to the international framework under Article 253 of the Indian constitution.

**An Incomplete Saga: The Koushal Case versus the NALSA Case³**

The apex court in the judgment of *Suresh Kumar Koushal v. NAZ Foundation*⁴ reversed the Delhi High Court judgment⁵ that had decriminalised private consensual sexual intercourse between adults of the same sex. Section 377 of the Indian Penal Code was under challenge before the Supreme Court and it was held to be constitutionally valid. The constitutional validity judgment coming from the apex court has not gone well down with the lesbian, gay and bisexual community (Baxi 2013). In the *Suresh Koushal* case, the court decided to stick to the presumption of constitutionality, leaving the ball in the legislature’s court to address changing social demands, and showed restrain.
There appears to be an incongruity in the views taken in both these cases by the Supreme Court and, therefore, there is a need for an analysis.

While recognising the rights of transgender persons, the apex court welcomed India’s obligation to international conventions and validated the Yogyakarta Principles, thus recognising the rights to sexual orientation and gender identity, which are accepted universally. However, in the case of Suresh Koushal v. Naz Foundation, the court seems reluctant to recognise the same international principles. The NALSA judgment is an example of granting rights to minorities and recognising individual rights that do not harm any public good but lead to attainment of individual perfection. Reluctance to read down Section 377 to preclude an act of consensual sexual intercourse between same-sex adults on the ground that only a miniscule population is being affected by it mocks at the universal recognition of human rights that guarantee equal status, opportunities and protection under law to each individual.

The apex court’s unwillingness to hold Section 377 as violative of Article 14 and thereby declaring the classification between natural and unnatural sexual intercourse as valid and reasonable, as it does not affect any class of people but only punishes certain acts as offence, is against the jurisprudence it adopted in the NALSA judgment. In the judgment of the case, under paragraph 55, the court has held that right to equality means equal and full enjoyment of all rights and freedom by each individual and has subsequently held that discrimination based on the grounds of sexual orientation or gender identity to be violative of Article 14.6

It is surprising that the court uses the terms “sexual orientation” along with gender identity while rejecting to read down Section 377 being discriminatory on the grounds of sexual orientation in Koushal. The root cause of discrimination is generated from the presence of Section 377, which distinguishes between natural and unnatural sexual intercourse based on colonial Judeo-Christian values. Section 377 targets a particular class of persons solely on the basis of the nature of their sexual acts, irrespective of whether it is consensual or not. The argument for striking down section 377 revolves around consensuality and not whether particular sexual acts are natural—it in fact questions the natural–unnatural dichotomy.

The judgment is also blind to the fact that gender identity cannot be fulfilled without freedom to choose one’s sexual identity. Persons who identify with a gender other than their biological sex and refuse to undergo sex realignment can also be penalised for their sexual orientation under
Section 377. This forces members of the transgender community to undergo sex realignment or continue to live discreet lives. The NALSA judgment perpetuates discrimination against the third gender/transgender persons without understanding the realm of rights it deals with.

In the NALSA judgment, the focus is on “right of choice” in this “age of rights”. The Supreme Court speaks about respect for the human rights of individuals as the root for development and explains that the concept of democracy is based on recognition of individuality and dignity of man. Protecting each individual`s dignity is held to be the true measure of development and not mere economic progress. On the other hand, in the Suresh Koushal case, the apex court refuses to read down section 377 on the grounds of misuse of the provision by the police and other authorities leading to harassment of the lesbian, gay, bisexual and transgender (LGBT) community, by arguing that since the number of such cases recorded are a few, it cannot be a sound ground to decide the constitutional validity of a provision. This hits at the concept of individual protection of human rights and exposes the contradictory interpretations made by the court in both these cases. The upholding of dignity and human rights in the NALSA judgment is turned on its head in Koushal. How the apex court will reconcile both these stands is unclear till date.

The decision in Suresh Koushal brings forth a restraining attitude of the judiciary, which comes after an era of social judicial activism. Restricting individual freedom of choice and realisation of individual self by expressing one`s sexual orientation do not stand the test of time and the changing values of the society. The apex court`s reluctance to interpret foreign cases and international principles in favour of the LGBT community, branding them as not standing true in the Indian context is a stark refusal to open one`s eyes to the changing contours of society.

Whether, a few or a large section of the population is affected by Section 377 should be immaterial because as a modern welfare state, there is a positive obligation on the state and all its wings to uphold the rights and freedom of each individual. The obligation is enshrined in constitution and in the international human rights framework. There cannot be cherry picking by the apex court so as to accept the framework as and when it pleases them. The cultural relativism debate is being used with impunity to violate the rights of the citizens. The next section highlights the human rights frameworks and discusses how the apex court uses it for its convenience.
The Contours of Right to Gender Identity without Right to Sexual Orientation

Gender identity in India has been perceived in binary terms of male and female. Variance from the established notions of gender has been met with stark refusal and non-recognition. For years, as a society, we have condemned transgender persons, refusing them social identity and leaving them prone to discrimination in all spheres of society like in education, employment and healthcare. They have also been denied equal access to public places like hotels, cinemas and public toilets, thereby leaving them vulnerable to harassment, violence and sexual assault in public spaces, at homes, in jails and also by the police. This violates Article 14 of the Indian constitution, 1950, which guarantees equality to all its citizens irrespective of their gender identity.\textsuperscript{7}

Transgender persons in India, as explained by the two-judge bench in the NALSA judgment, are neither male nor female. Their biological anatomy or their own perceived gender identity does not correspond with the biological gender attributed to them at birth. The term “transgender” means “beyond the gender”. Among the communities that have traditionally played the role of serving deities are some transgender communities such as hijras, eunuchs, Jogtas, Aravanis, Shiv Sakthis and Kothis. Gender identity comprises both a biological element and a psychological element. Identifying with a gender is a question of self-identity and perception.\textsuperscript{8} The honorable Supreme Court has explained gender identity as

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms.\textsuperscript{9}

Gender identity is, therefore, integral to one’s personality and is one of the most basic aspects of self-determination, dignity and freedom. The Supreme Court while interpreting the rights of transgender persons has delved into various international conventions. The two-judge bench of Supreme Court held that India has certain responsibilities to fulfill the international obligations as a result of being a signatory to such conventions and declarations. Some of the relevant provisions are discussed hereunder.

Article 6 of the Universal Declaration of Human Rights, 1948 (UDHR) and Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) recognise that every human being has an inherent right to live,
which cannot be arbitrarily taken away. Every human being has a right of recognition as a person before law. Similarly, Article 17 of ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks. Article 1 of the UDHR also states that every human being is born free and equal in dignity and rights.

Para 21 of the United Nation`s Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (dated 24 January 2008) states that states are obliged to protect from torture or ill-treatment all persons regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of state custody or control.

The Yogyakarta Principles (2010) known as principles on the application of the international human rights law in relation to sexual orientation and gender identity are persuasive guidelines for states to incorporate in their legislations to secure equality and non-discrimination and to protect the human rights of the LGBT community and individuals having different preferred sexual orientation or gender identity. The Yogyakarta Principles clearly outline that all human beings are born free and equal in dignity and rights and that sexual orientation and gender identity are integral to every person`s dignity and humanity and must not be the basis for discrimination or abuse.

The objective behind the Supreme Court interpreting these human rights principles is that they are being followed by various countries in the world and are aimed to protect the human rights of transgender people. Transgender/transsexual persons often face serious human rights violations, such as harassment in workplaces, hospitals, places of public conveniences, market places, theatres, railway stations and bus stands.\textsuperscript{10} In absence of any legislation in India to protect the rights of the transgender community, the apex court was of the opinion that the international conventions, whether binding or not, should be given respect.

In absence of such legislation, courts cannot be mute spectators to violation of the rights of transgender persons, who though a minority, have attained universal recognition and acceptance of their rights. Therefore, by virtue of reading together Article 51 and Article 253 and relying on earlier precedents of \textit{Visakha v. State of Rajasthan}\textsuperscript{11} and \textit{Apparel Export Promotion Council v. A. K. Chopra},\textsuperscript{12} the apex court stated that any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into the
provisions of Articles 14, 15, 19 and 21 of the constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. International conventions and the Yogyakarta Principles, as discussed in the context of transgender persons, were not found inconsistent with the various fundamental rights guaranteed under the Indian constitution and, therefore, must be recognised.\(^\text{13}\)

The same Supreme Court in *Koushal* refuses to look into the Yogyakarta Principles and its own human rights obligations by stating inapplicability of foreign law because of its inappropriateness in the Indian context. The stand is so confusing that there is no clarity as to the future use of foreign law in Indian jurisprudence. The court refuses to even acknowledge its treaty obligation, which the Naz Case had dealt with. International human rights obligations find no place in the Koushal judgment even when the respondent argues them.

In its anxiety to protect the rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

The court then cites extracts from a case based on the legitimacy of death penalty back in 1973\(^\text{14}\) and on an undue influence case in marriages,\(^\text{15}\) which had earlier dismissed the use of foreign law, thereby stating the inappropriateness of the use of foreign law in this case (*Koushal*) without citing any reason in relation to the facts of this case. Unlike the NALSA case, the court refuses to even mention human rights obligations and international treaties or the universal character that the rights of LGBTs has achieved in the past years. The Naz Foundation case discusses the international obligation and the United Nations (UN) framework in support of LGBT rights, which is discussed next.

The Delhi High Court expanded the fundamental rights of LGBT persons, taking into account international human rights obligations and the universal recognition that LGBT rights have achieved. The court cited Article 12 of UDHR, which refers to privacy, and Article 17 of ICCPR, which again India is a party to and which restricts arbitrary and unlawful interference with privacy, family, home and unlawful attacks on one`s honour and reputation. The court also recognised the growing jurisprudence and law-related practices
that recognise the application of human rights law for the protection of rights of people with diverse sexual orientations primarily through the UN and its treaties.\textsuperscript{16}

The minimal standards that these human rights legal doctrines identify are: non-discrimination, protection of privacy rights, and ensuring human rights protection to all regardless of their sexual orientation and gender identity. The court also recognises global trends in the protection of privacy and dignity rights of homosexuals. It relies on the statement endorsed by the UN General Assembly at New York, 18 December 2008, wherein 66 states around the world called for an end to discrimination based on sexual orientation and gender identity, condemning torture, harassment, exclusion, stigmatisation, arbitrary arrests, and deprivation of economic, social and cultural rights. The court reasons that such statements indicate a trend towards reaffirming the existence of protection for sexual minorities under human rights in international law. Along with judgments which uphold equal rights for sexual minorities from across various jurisdictions like \textit{Lawrence v. Texas} (US), Canadian courts and the European Court of Human Rights and National Coalition (South Africa), the court placed reliance on the decision of the Human Rights Committee under the ICCPR in the case of \textit{Toonen v. Australia}.\textsuperscript{17} Though India has not ratified the optional protocol under which the jurisdiction of the committee exists, still being a signatory to ICCPR makes it mandatory for India to not act in contradiction to the established standards of human rights required by the treaty. In the Toonen case, the committee held that the continued existence of anti-sodomy laws was violative of the privacy clause under Article 17 of ICCPR.

Even if it was unenforced like it was argued in Koushal’s case, nevertheless the existing fear of prosecutions among sexual minorities is a direct and continuous interference of privacy. In the same case, the committee clarified that Article 2 of ICCPR, which states that “the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social region, property, birth or other status”, prohibits discrimination based on sexual orientation which was read into ‘sex’ for purposes of Article 2, paragraph 1, and Article 26.\textsuperscript{18} The committee also notes that non-interference in domestic matters on morality grounds cannot be an exception to Article 17 of ICCPR.

In the name of morality and cultural relativism, nation states cannot do away with their obligations under the International Bill of Human Rights to protect the basic human rights of sexual minorities. The Indian Supreme
Court goes cherry picking, wherein it embraces all treaty obligations and universal trends in the NALSA case, while rejecting or overseeing those in the Koushal case. Human rights obligations are not open to cherry picking or seeking light whenever one wants—these are obligatory across rights, jurisdiction and persons.

**International Human Rights Law and LGBT Rights: Does India Have an Obligation to Conform?**

The LGBT rights movement has been active differently across various jurisdictions. While in USA, it has been a civil rights movement, across Europe, it has been a human rights issue (Mertus 2007). This paper argues that a movement towards universalisation of human rights without classification of rights/negative exceptions for any group or class can be the only framework to ensure non-discrimination and end this targeted violence of sexual minorities.

As discussed earlier, in the Toonen case, there exists no international obligatory document that recognises the right of sexual orientation other than the International Bill of Human Rights, whose provisions have been expanded to accommodate right to non-discrimination, right to privacy, and right against torture and cruelty on the grounds of sexual orientation. Post-Toonen in 1994, the conversation regarding LGBT rights did not spark off any debates in the UN till 2004. The issue was discussed in the garb of sexual rights and reproductive rights with the omission of the term “sexual orientation” in the final written documents in the Cairo and Beijing World Conferences.  

In the meanwhile, a series of statements were issued by General Assembly to end extrajudicial, summary and arbitrary executions by member states, which included a reference to sexual orientation. In 2003, Brazil moved a resolution in the UN Commission on Human Rights to discuss the universal application of human rights regardless of sexual orientation. The resolution was stalled, being unable to gather the required votes. Next, Norway presented a joint statement on human rights violation on the grounds of sexual orientation and gender identity on behalf of 54 states, which was followed by an opposition statement backed by more than 60 states in 2008.

It was in 2011 that a resolution was passed to enable the UN High Commissioner on Human Rights to draft a report to document the discriminatory practices and violence perpetrated against individuals based on sexual orientation and gender identity. Two reports in 2012 and 2015 have been presented
with recommendations for member states to protect individuals from homophobic violence and investigate all cases, prevent torture, cruel, inhuman and degrading treatment, repeal laws criminalising homosexuality, prohibit discrimination based on sexual orientation and safeguard freedom of expression, association and peaceful assembly for all LGBT people.\textsuperscript{22}

An independent expert has been mandated through Human Rights Council resolution 32/2, 2016, to assess the implementation of existing international human rights instruments with regard to the ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity and to identify the root causes of violence and discrimination. Country visits are also mandated along with annual reports submitted to the General Assembly.

With no binding resolutions or treaties on rights of sexual minorities, the core human rights obligation lies in the International Bill of Human Rights and under other treaties as interpreted by various resolutions. In such a scenario, claims of member states like India are often on the legality of these rights and their existence in the core international law instruments. Often, sexual orientation is argued to be a matter of “cultural sovereignty” and of traditional values. It is also seen as a Western imposition on local cultural values (Saiz 2004).

There is, however, an effort to recast the rights of sexual minorities in the language of universal human rights by advocacy groups. UDHR, ICCPR and ICESCR (International Covenant on Economic, Social and Cultural Rights) have laid down the foundations of human rights law that are non-negotiable. Violence, torture, imprisonment, arbitrary arrest, and so on, based on any ground is impermissible under these treaty obligations. There is an implied obligation on all states to protect their citizens irrespective of their orientation or identities. Culture and moral values do not triumph human rights. Violence, torture and cruelty based on sexual orientation are a violation of the minimal standards of human rights agreed upon under the international framework. However, states violate these with impunity. With no compulsory adjudication mechanisms, all violations go unpunished.

**Conclusion**

Much of the human rights framework works on consensus by member states and the political will of other member states to enforce the standards and call out tyrant states. Unfortunately, there has been no consensus on the human rights of homosexuals. Most countries, like India, deny their obligation to
human rights and will continue to do so with impunity unless there is a
binding responsibility for the protection of LGBT, with mechanisms for
enforcing adjudication and dispute resolution.

A curative petition has been filed against the judgment of *Suresh Kumar
Koushal v. NAZ Foundation* and is pending in Supreme Court since 2014. The
Supreme Court in 2016 agreed to hear the arguments afresh by a five-judge
constitutional bench. The positive judgment in the *National Legal Services
Authority v. Union of India* has hopes still alive for the LGBT community for
the recognition of their rights and breaking away from the archaic notions of
the “unnatural” theory imposed on them. The inconsistency of the Koushal
judgment with the NALSA judgment has been argued at the admission stage.
It is hoped that this time around, the apex court values individual rights
over popular cultural and morality questions. In recent hearings before the
nine-judge bench of the Supreme Court deciding whether right to privacy is
a fundamental right, J Chandrachud has observed that the Naz Foundation
judgment would be vulnerable if privacy was held to be a fundamental right
(*The Telegraph* 2017). The judgment will have a lot of repercussions on the
rights of LGBTs in India if privacy were upheld to be an aspect of Article
21. With little hope in international politics to reach any binding obligation
soon, it is the judiciary that has hopes hooked on it in India.

**End Notes**

1 Decided by the two-judge bench of J Radhakrishnan and J Sikri. W. P (Civil) No.400 of 2012
(Supreme Court, 15/04/2014).

2 *Suresh Kumar Koushal v. NAZ Foundation*, Civil Appeal No. 10972 of 2013 (Supreme
Court, 11/12/2013).

3 *National Legal Services Authority v. Union of India*, W. P (Civil) No.400 of 2012 (Supreme
Court, 15/04/2014).

4 Civil Appeal No. 10972 of 2013 (Supreme Court, 11/12/2013).

5 Naz Foundation v. Govt. of NCT of Delhi, 160 DLT 277 (Delhi High Court, 2009).

6 The court has in many instances used the phrase “sexual orientation and gender identity”
together. This seems very intriguing as the Shreus Koushal judgment was delivered in 2013.

7 See para 55 of the judgment in *National Legal Services Authority v. Union of India*, 2014.

8 Secretary, Department of Social Security v. “SRA”, (1993) 43 FCR 299.

9 See para 19 of the judgment in *National Legal Services Authority v. Union of India*, 2014.

10 See para 48 of the judgment in *National Legal Services Authority v. Union of India*, 2014.


13 See para 53 of the judgment in National Legal Services Authority v. Union of India, 2014.
16 See Para 42 of the Naz Foundation judgment.
18 See Toonen v. Australia, Para 8.7.
19 Mention of “sexual orientation” was not agreed even in paragraphs that were merely statements of fact about the barriers women face to the realisation of their rights. See Girard.
20 Available at http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx
21 Available at http://www.reuters.com/article/us-un-homosexuality-idUSTRE4BH7EW20081218

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