HUMAN RIGHTS OF GAY AND TRANSGENDER IN INDIA: A LEGAL UNDERSTANDING OF NAZ FOUNDATION v. GOVERNMENT OF NCT OF DELHI

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INTRODUCTION

“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

-Judge Kennedy while delivering his judgment in Lawrence v. Texas

“Laws enforcing sexual morality may cause misery of a special degree.”

-H.L.A. Hart in Law, Liberty and Morality

The Section 377 of the Indian Penal Code, is an illusion of colonial creation, and has been criminalized as being “unnatural sexual acts” since its application as law in 1862. Homosexuality falls within the ambit of such acts and attracts punitive measures.¹ In the preceding century, legislatures and judiciaries across the globe have upheld laws criminalizing homosexuality and transgender comportment, mitigating them on grounds of public decency and mores. With the dawn of the existing epoch, the crusade against the oppressive and domineering nature of Section 377 propagated exponentially and reached its zenith in Naz Foundation v. Government of NCT of Delhi⁴, wherein the Delhi High Court documented the archaism associated with Section 377 and interpreted it to omit sexual acts between consenting adults, thus decriminalizing homosexuality. Even though the complications are inadequate and may be suppressed by an act of Parliament, the judgment is a landmark in civil liberties litigation and may be stared as one of the treading stones to the deliverance of the sexual minorities in India from totalitarianism and compulsion at the hands of the law.

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This paper is an endeavor to disentangle the implication and far-reaching effects of this judgment in the face of universal abuse of homosexuals and transgenderism, by enforcers of the law under the portico of safeguarding Section 377, prior to this judgment. Further, the constitutional aspects of the judgment shall be deliberated and its application to the rest of India, in light of the Supreme Court’s decision in Kusum Ingots v. Union of India, shall be scrutinized.

VEHEMENCE AND ENNUI TOWARDS SEXUAL MINORITIES BY THE LAW ENFORCEMENT ORGANIZATIONS

Section 377 has been lengthily used by the law enforcers to hassle and feat homosexuals and transgender. Numerous such occurrences have come to light in the recent past. In Jayalakshmi v. State of Tamil Nadu, Pandian, a transgender, was arrested by the police on burdens of theft. He was sexually abused in the police station which eventually led him to slaughter himself in the premises of the police station. Similarly, policemen arrested Narayana, a transgender, in Bangalore on suspicion of theft shorn of informing him of the grounds of arrest or spreading any opportunity to him to defend himself. His diary was seized by the police and he was susceptible with dire consequences if he did not assist in identifying other transgender he was conversant with. Homosexuals have also been at the distressed end of financial extortion by the police in exchange for not close-fitting their identities to society. An uncharacteristic use of Section 377 was seen in Lucknow when workers of Bharosa, a NGO intended at spreading awareness about AIDS, were arrested for circulation of pamphlets providing tips on safe sex to homosexuals.

5 WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2nd July, 2009.
6 (2007) 4 MLJ 849
8 Ibid.
The same agencies of the law have been indifferent towards these sexual minorities in the dominion of their health and safety. When a medical team inspected Tihar Jail, they reported a high incidence of sodomy in the prison and endorsed provision of condoms to inmates to prevent a proliferation of diseases, the Inspector-General of Prisons chose to deny any such providence, discerning it to be a latent confession of rampant homosexual behavior in the prison.\(^9\)

As a result of the inactivity of the prison staff, the AIDS Bhedbhav Virodhi Andolan filed a petition in the Delhi High Court stimulating the official position and the constitutionality of Section 377.\(^9\)

Correspondingly, the Indian Council for Medical Research (ICMR) and Indian Medical Association (IMA) have not prescribed any guidelines for Sex Reassignment Surgery (SRS). This cageyness on the part of the medical domain has led many transgender to approach quacks, putting themselves at grave risk.\(^11\)

From the plentiful instances of abuse and violence against homosexuals and transgender, it is obvious that Section 377 has been exceptionally tainted. It is equally obvious that a judicial change to address this concern was pressing in the face of a law enforcement framework so hostile that mistreatment at the hands of the alleged protectors became a quotidian affair for sexual minorities in India.

**BACKGROUND OF THE CASE**

The Naz Foundation is a non-governmental organization working on HIV/AIDS and sexual education and health since 1994.\(^12\)

In 2001, the organization filed a writ petition in the Delhi High Court, perplexing the constitutional validity of Section 377, claiming that the impugned law was in violation of Articles 14, 15, 19 and 21. A bench encompassing Chief Justice B.C. Patel and Justice Badar Durrez Ahmed dismissed the petition in 2004, succeeding to which the petitioners approached the Supreme Court. The Supreme Court directed the High Court to scrutinize the matter, deeming it worthy of consideration. Consequently, the Delhi High Court measured the petition.

\(^{10}\) Siddharth Narrain, *The Queer Case of Section 377* (http://www.sarai.net/publications/readers/05-bareacts/06_siddharth.pdf; last accessed on 9\(^{th}\) April, 2016).

\(^{9}\) RUTH VANITA, *QUEERING INDIA* 15 (2002).

\(^{11}\) Siddharth Narrain, *Being a Eunuch in India* available at (http://www.countercurrents.org/gen-narrain141003.htm; last accessed on 9\(^{th}\) April, 2016).

\(^{12}\) Available at http://www.nazindia.org/about.htm (last accessed on 8\(^{th}\) April, 2016).
JUDGMENT OF THE HIGH COURT

The judgment of the Delhi High Court is a fertile dissertation in as much as it addressed various concerns associated with the existence of Section 377. The Court appraised the constitutional validity of the impugned law, scrutinizing its compatibility with Articles 14, 15, 19 and 21. Having held that sexual preferences fall within the right to dignity and privacy of the individual, the court held that Section 377 instituted a direct infringement of the aforementioned right and as a consequence, violates the substance of Article 21. To answer the question of violation of Article 14, the court applied the tests laid down by the Supreme Court since the decision in State of West Bengal v. Anwar Ali Sarkar. The court adjudicated that the impugned law begot an arbitrary differentia and there was no reasonable nexus between preventing child sexual abuse or upgrading public health, and the criminalization of consensual sexual relations between adults. The court then went on to interpret the term “sex” in Article 15 to not only signify gender, but to have a wider periphery inclusive of “sexual orientation”. Moving on this perception, the court lined that Section 377 is prima facie discriminatory towards the sexual minorities and is therefore, in violation of Article 15 as well. With the impugned law contravening Article 21 and Article 14, the court instituted it superfluous to entertain the question of violation of Article 19. The court, in a gesticulation of finality, applied the doctrine of severability in order to read down the impugned law only to the extent of decriminalizing consensual sex between adults. The instant reaction to the judgment was of extreme elation from the sexual minorities across the nation while religious leaders condemned it with equal passion. The judgment, if viewed comprehensive of its social impact, is not merely a pronouncement of a court in dry legal jargon but signifies the path to liberation of the sexual minorities, a collective long condemned and discriminated against. It is further noteworthy due to its inclusion of sexual rights of the individual in the arcade of fundamental rights enshrined in Part III of the constitution.

INSINUATIONS OF THE JUDGMENT FOR THE SEXUAL MINORITIES

The judgment is a cause of countless jubilation for the hitherto troubled sexual minorities. It forms a source of rescue on two different planes: it decriminalizes sexual relations between homosexuals and concurrently serves as a source of protection from maltreatment and
disparagement at the hands of the upholders of the law. It also ensures protection of the sexual minorities from various medical afflictions by bringing their condition in the conscience of the authorities. As Justice Michael Kirby observed, the primary cause of high incidences of HIV/AIDS among homosexuals was due to the apathetic tactic of the state towards the welfare of sexual minorities.\footnote{Michael Kirby, \textit{AIDS and Human Rights}, \textit{1 AUSTL. GAY \& LESBIAN LJ} 3 (1992).}

In decriminalizing consensual sex between homosexuals and transgender, the judgment also discourses the proximate concern of health. As observed by the PUCL and eminent gay-rights activists\footnote{Supra, n.5, p.32.}, one of the barricades in tackling the propagation of sexually-transmitted diseases in homosexuals was the criminalization of homosexual activity which made any progression towards sexual education of the sexual minorities a latent desecration of the law. With criminalization a thing of the past, it may now be possible to contest the exponentially growing threat of HIV/AIDS with worthwhile prevention measures and adequate information about sexual practices. The other element of the court’s decision, which truly upholds the ingredient of civil liberties, is the elimination of scope for abuse at the hands of the authorities. Prior to the decision, the sexual minorities had a long history of subjugation at the hands of the authorities. Sexual abuse and financial extortion was the dilemma of homosexuals and transgender on a frequent basis. The inhumanity associated with such acts was further put emphasis on by the fact that the alleged guardians were the true agents of violence and abuse. Section 377, after the ruling of the court, can no longer be a tool of abuse at the disposal of the law enforcement agencies. Thus, it may be asserted that the judgment has liberated the sexual minorities of India at various echelons.

**CONSTITUTIONAL TRAITS TANGLED IN THE JUDGMENT**

Beyond the cautions of its social implications, the constitutional aspects of the judgment form substantial material for pondering too. The court found the impugned law to be in violation of numerous fundamental rights listed in Part III of the constitution. The momentous developments evolve through the judgment are the allowance of equal protection of laws to the sexual minorities, diagnosing the discrimination meted towards them to be in contravention of the right against discrimination and the attachment of sexual preferences in the ambit of the right to life and personal liberty. Each of these shall be scrutinized individually by the author.
SECTION 377 ALONGSIDE THE RIGHT TO EQUALITY

Article 14 operates with a dual approach: it guarantees equality before law and equal protection of laws. The Right to equality lacks an absolutist environment in as much as it permits for classification between individuals,\(^\text{16}\) which consequently relaxes the equal protection of laws to all. In the instant case, the point for examination before the Court was whether a arrangement between heterosexuals and homosexuals was acceptable. As observed by the Court, an arrangement shall be estimated to be reasonable if it stands a two-fold test: it should base itself on a reasonable differentia and should have a direct nexus with the object sought to be achieved through such classification.\(^\text{17}\) Any component of arbitrariness shall be antithetic to the purpose of Article 14.\(^\text{17}\)

In the instant case, the Delhi High Court ruled that Section 377 reproduced class legislation, in disrepute of the LGBT community, and therefore botched the test of Article 14. In the recent case of Lawrence v. Texas,\(^\text{19}\) the Supreme Court of the United States, overruling its preceding judgment in Bowers v. Hardick\(^\text{20}\), followed a comparable stream of reasoning to conclude that Texas’ anti-sodomy law solely battered the homosexual community, and thus violated the functional due process right to equality, flowing from the Fourteenth Amendment. It is submitted that this reasoning labored by the Court is sound in law. The distinction between homosexuals and heterosexuals reposes on a veneer of personal liberty, establishing no reasonable differentia to cause legislation. Sexual preference is as personal to an individual as his/her sense of liberty in practicing religion and selection of food. Consequently, a legislation that differentiates between individuals on the basis of their preference of sexual conduct, infuses class legislation aimed at marginalizing the society, to the obscurity of the homosexual community.\(^\text{21}\) As observed in Shelley v. Kraemer\(^\text{22}\), “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities”.\(^\text{23}\) The spirit pervading Article 14 is that of utilitarian equality and not prescribed equality. Article 14 strives to protect and preserve the rights of the feeble sections of society through its endowment for reasonable classification. Section 377’s criminalization of homosexuality created a setting of authoritarian aggression towards the LGBT community, rather than fostering an extraordinary sense of care for them. Thus, Section 377’s classification, which the defendants wanted to justify on grounds

\(^\text{16}\) State of Bombay v. F.N. Balsara AIR 1951 SC 318
\(^\text{17}\) State of West Bengal v. Anwar Ali Sarkar, Supra, n.12.
\(^\text{17}\) E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3
of Article 14’s implicit provision for classification, breached the fundamental principle of Article 14 and was liable to be quashed for the same.

SECTION 377 ALONGSIDE THE RIGHT AGAINST DISCRIMINATION

Article 15 guarantees the right against discrimination on various grounds, including “sex”. The question for negotiation in Court was whether “sex” was inclusive of “sexual orientation”. The Court responded to the question in the affirmative, referring to the International Covenant on Civil and Political Rights and its interpretation in the case of Toonen v. Australia. Possessing in view the application of the doctrine of strict scrutiny in the cases of Anuj Garg v. Union of India and Ashoka Kumar Thakur v. Union of India, the Court professed that an action that intended to protect vulnerable groups in society was excused from strict judicial scrutiny but a legislation that beleaguered vulnerable sections was to be strictly scrutinized at the altar of Article 15. In Corbiere v. Canada, the Supreme Court of Canada recognized the virulence that was implicit in discrimination towards the sexual minorities at the hands of the law. Such discrimination was never based on any form of intelligible differentia, but on the personal sexual preferences of people. As a result, the discrimination meted out to the sexual minorities constituted a grave deprivation of the right to dignity of the individual.

To read “sex” as inclusive of “sexual orientation” is a transcendental stage in terms of the judicial approach towards sexual minorities. The sexual minorities have always strongminded the existence of a gap between “sex” and “gender”. While sex is the documentation of oneself through one’s physical attributes, gender is a far more personal identification of the self through one’s mental viewing glass. Transgender have faced the fury of the authorities the most, owing to the lack of indebtedness of the sex-gender irreconcilable difference by the authorities. Thus, the ruling of the High Court lays down the path of manumission of the transgender through its recognition of the dichotomy neighboring their lives. Further, a recognition of this dichotomy reveals a shirking of anachronisms allied with judicial thought which by itself begets a hitherto unknown approach of understanding and care towards the sexual minorities.

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18 (2008) 3 SCC 1
19 (2008) 6 SCC 1
20 [1999] 2 SCR 203 (Canada)
21 Harksen v. Lane 1998 (1) SA 300 (CC)
SECTION 377 ALONGSIDE THE RIGHT TO LIFE, PERSONAL LIBERTY AND DIGNITY

The most interesting aspect of the judgment is the weighing by the Court of the impugned statute against Article 21. The challenge on the parklands of violation of Article 21 was that a law that intended to criminalize homosexual conduct was directly infringing the fundamental right to life and personal liberty, a right whose ambit of protection is limitless and all pervading. The Delhi High Court yielded with the petitioners and ruled that the impugned law was in violation of Article 21. The debate arrived into by the Delhi High Court was part of a much superior constitutional debate, a manifestation of which may be witnessed in the writings of Lord Devlin and H.L.A. Hart.

Lord Devlin harangued, “There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government. The suppression of vice is as much the law's business as the suppression of subversive activities.”

H.L.A. Hart was of the estimation that morality was a virtue left to one’s own interpretation and analysis, and a pervasive action of the state constituted a momentous infringement of the individual’s right to liberty and dignity. The debate on state morality against individual rights still furies on, and a illusion of it was witnessed in the instant case. The judgment of the Court on Section 377’s constitutional validity with respect to Article 21 is sound in law. Article 21, being of very wide wariness, gulps the right to dignity and the right to privacy.

Dignity of the individual is one of the nitty-gritties of the constitutional framework in India, and it finds indication in the Preamble. The premise of human dignity is dominant in a constitutional democracy that envisions the welfare of the masses. As the US Supreme Court observed in Lawrence v. Texas, “the choice of sexual orientation is part of the intimate and personal choices and falls under the zone of privacy because it is a choice central to personal dignity and autonomy as well as central to the liberty protected by the Fourteenth Amendment of the American constitution.”

22 Maneka Gandhi v. Union of India (1978) 1 SCC 248
25 Lawrence v. Texas, Supra, n.19.
26 Rachel Sweeney, Homosexuals and the Right to Privacy, 34 CUMB L REV 171.
27 US 113 (1973)
Thus, it is evident that constitutional governance in any nation envisages human dignity to be of supreme status. Dignity does not only embrace the basic necessities of food, clothing and shelter, but infuses the human conscience beyond the veil of physical exhibitions of dignity. Dignity includes the individual’s right to choose his identity in sexual interaction, and this right should be observed akin to the manner in which we view the other rights assured by Part III of the constitution. Similarly, privacy is one of the paramount state of affairs implicit in the right to life and personal liberty. From the celebrated American case of Roe v. Wade\textsuperscript{34} to landmark Indian judgments like Kharak Singh v. State of Uttar Pradesh\textsuperscript{28} and Govind v. State of Madhya Pradesh\textsuperscript{29}, the right to privacy of the individual has been renowned as an element of utmost connotation in a constitutional democracy. Privacy of the individual cannot be permeated by the state to the point where the contravention of the state causes the abridgment of the individual’s right to personal choices. The collective morality of the state should not be obligatory on the individual in a manner that carpets him of his basic rights, but should be enforced in a balanced approach.\textsuperscript{30} As the Constitutional Court of South Africa witnessed in National Coalition of Gay and Lesbian Equality v. Minister of Justice\textsuperscript{31}, “If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.”\textsuperscript{32} Thus, criminalization of homosexual acts constituted a colossal inhibition to the evolution of the absolute right of the sexual minorities to their dignity and privacy. These rights are not only constitutionally surefire but are also implicit in the Universal Declaration of Human Rights and should consequently, enjoy a superior position to other rights. The judgment of the Delhi High Court is a landmark step in creating the superiority of the individual’s right to privacy and dignity over the shared morality of society. To that effect, we may assert that the proposals laid down by H.L.A. Hart have arrived into the Indian judicial conscience, while the schemes of Lord Devlin have been quelled as they reflect rumored quenched in archaic social thought.

\textsuperscript{28} [1964] 1 SCR 332
\textsuperscript{29} (1975) 2 SCC 148
\textsuperscript{30} HLA HART, LAW, LIBERTY AND MORALITY 15 (1963).
\textsuperscript{31} (CCT11/98) [1998] ZACC 15: 1999 (1) SA 6
\textsuperscript{32} Ibid.
REPERCUSSIONS OF THE JUDGMENT ALONGSIDE KUSUM INGOTS V. UNION OF INDIA

The Supreme Court ruled in Kusum Ingots v. Union of India33,

“An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.”

Thus, it is evident that in light of the above-mentioned judgment, the aftershocks of the judgment of the Delhi High Court in Naz Foundation v. Government of NCT of Delhi are not inadequate only to the citizenry of Delhi but are applicable to the sexual minorities of the entire nation. This only intensifies the worth of the judgment. Also, as there exists no inconsistent precedent to overrule, or even differentiate the Delhi High Court judgment, the judgment stands as authority and efficiently decriminalizes homosexual conduct across the nation.

CONCLUSION

The judgment of the Delhi High Court reproduces a sense of ethics and sympathy towards the sexual minorities, sentiments that were hitherto unknown. Section 377, in its criminalization of homosexual activity, was an exploitive measure on the fundamental rights of the LGBT community. The subjugation of anti-homosexuality laws has been predictable by various legal systems in the world. From Lawrence v. Texas34 in the United States to Minister of Home Affairs v. Fourie35 in South Africa, the judicial context of the common law system has documented the rights of homosexuals to their freedom of sexual preference. On a more nonconcrete level, the judgment endeavors to answer the question of shared societal morality against the individual’s liberty. The Court has ranked individual liberty over the idea of collective social morality and thus, has laid the trail for a distinctive approach in judicial decisions. In so far as its insinuations are concerned, the judgment may be superseded by a legislative ration, but it shall stand as one of the foundation rulings in the history of individual rights and constitutional governance in the Indian framework.

33 Kusum Ingots v. Union of India, Supra n.3.
34 Lawrence v. Texas, Supra n.19.
35 (CCT25/03) [2003] ZACC 11: 2003 (5) SA 301 (CC); This case legalised same-sex marriages in South Africa.