JUDICIAL REVIEW VERSUS POPULAR CONSTITUTIONALISM IN THE LIGHT OF SECTION 377 OF IPC

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INTRODUCTION

The 21st century India is on the phase of transition. It is waking up to and embracing new ideas and ideologies. Perhaps one of the most significant and controversial ideas is the idea of homosexuality, with millions of Indians, struggling both successfully and unsuccessfully, to accept and absorb homosexuality in its culture. Since the last two to three years, India has been a witness to nation-wide campaigns that call for socio-cultural and legal recognition, acceptance and protection of homosexuals and their rights. Quite recently, celebrities like dancer N. S. Johar, business executive Ayesha Kapur and journalist Sunil Mehra moved the Supreme Court of India to quash Section 377 of the Indian Penal Code, 1860, which, they contend, criminalizes homosexual relationships in the country. [2] The objective of this paper is highlight Section 377 and to examine, in its purview, the mechanisms employed by the judiciary to protect the sexual minorities of the nation. For the sake of clarity, it must be pointed out that this paper excludes from its scope an examination of the desirability of Section 377. The scope of this paper merely includes a critical inspection of the mechanism that went into examining the desirability of Section 377 by the apex court.

The Section 377 that was contested in the petitions of the above mentioned celebrities is expounded in the IPC as thus –

Section 377: 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 a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.[3]

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[2] Dhananjay Mahapatra, 'Gay celebs cite Right to Life move the SC against Section 377', (*The Time os India*, 28 June, 2016) Available at http://timesofindia.indiatimes.com/india/Gay-celebs-cite-right-to-life-move-SC-against-Section-377/articleshow/52947920.cms>*(Last* accessed on 15 August 2016)

[3] Indian Penal Code, 1860

While it is not the main quest of this paper to explain the manner Section 377 criminalises homosexuality, yet it is of necessity that one casts a bird's eye view on the meaning and scope of this hot-button provision of the IPC. For the same purpose, it is necessary to go back in history, to the roots of Section 377. Section 377 is a descendent of Clauses 361 and 362 of T.B. Macaulay's first draft of the Indian Penal Code, which prescribes strict penalty for sexual acts committed for gratifying "unnatural lust"[4]. However, what constitutes this "unnatural lust" and what is the justifiability of the prescribed penalty was abhorred from any kind of discussion and debate by Macaulay himself –

Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could have given rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.**[5]**

This lack of justifiability, which suggests these clauses arising out of the discretion and prejudice of Macaulay, also indicates the vagueness of Section 377 of the Indian Penal Code, 1860. As Narrain believes, the vagueness in the language of Section 377, makes it far too less effective to be accommodated in a statute book. [6] Gupta notes that the objective of Section 377 has remained unclear and unsubstantiated. [7] It has been used in several cases in several ways but it was in the case of **Khanu v. Emperor**,[8] which extended a wide scope for Section 377 that later on came to be interpreted differently in every new case. More often than not, the impossibility of conception (thus, against the order of nature) as well as coitus per os (again against the order of nature on the ground that the mouth is not a natural sexual organ) became parameters for identifying sodomy and homosexuality. It is to be noted that both sodomy and homosexuality comes under the realm of individuals' personal lives, thereby making it difficult for the law to arrest such individuals. Hence, as Gupta elucidates, the enforcement of Section 377 has become pervasive and is being implemented against homosexuals in arbitrary manners [9] - a ground on which Naz Foundation Trust, a non-government organization which works for AIDS awareness, petitioned in 2001 to the Delhi High Court to work out a legislation that would favour homosexuals. In **Naz Foundation v.**

[4] Alok Gupta, 'Section 377 and the Dignity of Homosexuals' [2006] Economic and Political Weekly 4815
[5] Report of the Indian Law Commission on the Penal Code, October 14, 1837, 3990,3991
[6] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Books for Change 2004) 49
[7] Supra note 3 at page 4816
[8] Khanu v Emperor 1925 Sind 286
[9] Supra note 3 at page 4819

Government of NCT and Ors[10], hereafter referred to as *Naz Foundation,* the petitioner declared that Section 377, to the extent it penalized sexual acts between consenting adults, violates Acticles14, 15, 19(1)(a)(d) and 21 of the Indian Constitution. Naz Foundation contended that Section 377 is discriminatory against persons having non-procreative sexual relations and that there is no nexus between non-procreative sexual acts and the order of nature. It also contended that Section 377 is a menace on HIV-AIDS prevention and cure because it drives homosexuals underground and hence, the section should be repealed. Although this writ was initially dismissed by the Delhi High Court in 2004, it was taken up again and amid much controversy, accepted. The Hon'ble High Court gave the verdict in favour of Naz Foundation and declared that Section 377 is *ultra vires* to the Indian Constitution. This decision went up in appeal to the Supreme Court of India in **Suresh Kumar Koushal and Anr v. Naz Foundation and Ors**.[11], hereafter referred to as *Koushal. Koushal* attracted quite a large number of interveners like professors in reputed institutions and organizations like the Delhi Commission for Protection of Child Rights, All India Muslim Personal Law Board, Apostolic Churches Alliance etc, all of who claimed to uphold and shield the moral and cultural values of the nation. A panel of two judges namely JJ G.S. Singhvi and JJ S.J.Mukhopadhaya reviewed Section 377 and declared in 2013 that it is not unconstitutional. It overturned the Delhi High Court decision.It is against this backdrop that this writer examines the mechanism employed by the apex court in protecting the sexual minorities of the country; the mechanism clearly being that of the judicial review of legislation.

The crux of this paper resolves around the mechanisms that go into resolving the age old contentious maxim, lex *injusta non est lex,* and the problems that arise out of it. What happens if people believe that the law served to them in causing injustice to them? What happens if people disagree about the objectives and meanings or more specifically, the different legal provisions; in this case Section 377 of IPC 1860. In a democratic society, the people themselves create the laws and give meaning to them. Why then should a few judges be empowered to declare the law as valid or invalid? Why then should a few judges be allowed to clarify the meanings of law when the people are not sure about it? Why then should those judges be empowered to solve the problems that ensue from disagreements about law? Different thinkers answer these questions differently. Some feel that judges are better equipped in interpreting the law than the public is. So, even if the people enact statutory laws through their representatives, it is the judges who should ultimately decide whether those statutes are applicable or not. This mechanism of giving final authority to the judges is what judicial supremacy is. Judicial review of the laws creates a situation where ultimately

[10] Naz Foundation v. Government of NCT and Ors, MANU/DE/0869/2009
[11] Suresh Kumar Koushal and Anr v. Naz Foundation and Ors., MANU/SC/1278/2013

the judges end up declaring the validity and suitability of the laws and gives new meanings to the already existing laws. Opposing this mechanism are some other scholars who believe that the people, the creators of the law, should decide issues of validity and suitability of the laws. It is they who should have the power to give new meanings to the law and modify the already existing meanings. This mechanism of giving the final authority to the people is called popular constitutionalism. Today both these models of controlling the constitution compete with each other. Both these models are passionately defended. This paper compares both the models in the light of *Koushal*.

THE CASE ON JUDICIAL REVIEW

India, as is quite evident, applied the doctrine of judicial review. In this context, Jeremy Waldron brings out the differences between a weak and strong judicial review. While the former depicts a mere scrutiny of statutes by the courts without the authority to deny the application of the statutes or modify their application, the latter depicts the courts' authority to invalidate a statute or modify some of its effects. This i.e. a strong judicial review can be equated with judicial supremacy.[12] Indian High Courts and Supreme Court, by repealing Section 377 and revoking it again, clearly create a situation of judicial supremacy. In such a situation, self-determination of the constitutionality of Section 377, or for that matter, any other provision of any other statute, by self-governments ceases to exist. This author agrees with Waldron when he says that in such a situation, there is a recreation of the Hobbesian idea of sovereign lawgiver to the effect that courts can review legislations but cannot become the sovereign.

One stream of scholarship that defends judicial review, argues that judicial review, which is carried out by judicial reasoning, is centred on issues of rights that present themselves to the judges in the form of individual situations of the litigants. This gives them a greater insight into the issue and makes them better equipped to decide those issues. As Michael More says, "judges are better positioned for moral insight than are legislatures because judges have moral thought experiments presented to them every day with the kind of detail and concrete personal involvement needed for moral insight."[13] However, the practical reality is not always the same. Although *Koushal* is centered on rights, yet there isn't any hint of individual situations of litigants. What we see in its stead, is a movement for the common conditions existing in the lives of a group of litigants; the

[12] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) The Yale Law Journal 1346, 1397
[13] Supra note 11

group being that of the homosexuals of India. Since the issue presents itself as a group issue, judges are no better equipped in greater moral insight than the representatives of the same group. Besides, judges' expertise in "moral thought agreements" that comes from "personal involvement" is not agreeable, considering that morality in itself is understood differently by different groups and that judges are seldom placed in the shoes on the litigants to practically empathize with their situations. Bellamy strongly articulates the idea that judges cannot really make better decisions that is synonymous with morally correct decisions about rights-disagreements. This is simply because of the fact that in a disagreeing society, there cannot possibly be a standard of measuring morality.[14] Hence, the judges sitting at courts may not be the best people for settling these rights. After all, they are some people whose interests will not be at stake. It is quite possible that they will not be sincere in deciding what is just in the circumstances. Besides, by the time judges announce the final verdict, the individual situations of the litigants fade and the issue is addressed in general terms – a fact that has been acknowledged in *Koushal* after taking cue from **State of Madras v. V. G. Row**[15] -

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and to abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases.[16]

It goes without saying that such general terms applicable to all cases form the relevant statute, and thus, it can be held that judgements ultimately become no different than legislations.

Scholars who defend judicial review also hold the view that judicial review is centred on the Constitution in some cases and a Bill of Rights in others. Judicial review is precedent based. This ensures that there is a consistency in the judicial reasoning on constitutional values. Such an establishment is done by a method of systematic judicial reasoning which makes judicial review all the more legitimate. However, this too is a questionable contention. Waldron believes that it propagates a rigid textual formalism. Judicial reasoning thus employed in judicial review becomes a desperate attempt to erect analogies and dis-analogies between the current cases they face and cases prior to them. *Koushal* is an epitome of such desperate attempts because, more than individual examination arising from sound reasoning of JJ G.S. Singhvi and JJ S.J.Mukhopadhaya, what fills up the bulk of the 54 page judgement is a reliance on a plethora of old cases, reports and commentaries, all of which were purposely relied on to meet the pre-determined intent and objective, to establish the constitutionality of Section 377. Besides, the judges' claim of enforcing a

[14] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 166

[15] State of Madras v. V.G. Row MANU/SC/0013/1952: 1952 SCR 597.

[16] Supra note 10 at para 52

legitimately created Constitution through a legitimately enacted Section 377 is flawed, since the Constitution and IPC themselves deflect towards several streams of contentious ideas. Citizens do not commit to a particular view of rights; and when the meaning of the constitution is not clear and people are not sure what they have bound themselves to, then the idea of pre-commitment fails, implying judges do not really uphold the pre-commitment of the people to the Constitution.

Another interesting argument advanced by Jonathan B. Siegel is that judicial review is non-majoritarian. Judicial review is based on claims of rights, even if these are minority rights. Not only this, judicial review is also individualized. This is particularly important when there are constitutional violations of an individual or an overtly small minority group. Siegal illustrates this with the case of the alleged constitution violations that were there in the impeachment of President Nixon. It would be impossible to gather a group of impeached presidents who were sceptical about the Senatorial trial procedures.[17] However, *Koushal* stands in clear contradiction to Siegel's argument. The judgement in *Koushal* was motivated to uphold the majoritarian Indian ideas on sexual acts against the order of nature – again, something that can be illustrated by the *Koushal* judgment –

"In its anxiety to protect the so-called rights of LGBT persons and to declare that 377 Indian Penal Code 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."[18]

For justifying this inapplicability, the Supreme Court relied on **Jagmohan Singh v. State of U.P.**[19], which was adjudicating on the desirability of capital punishment that was prevalent as a penalty for murder in India but abolished in the USA on the ground of violation of the 8th Amendment. In this case, the Supreme Court had observed –

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital

[17] Jonathan R. Siegal 'The Institutional Case for Judicial Review' (2012) 97:4 Iowa Law Review 1147, 1169
[18] Supra note 10 at para 52
[19] Jagmohan Singh v. State of U.P. MANU/SC/0139/1972 : (1973) 1 SCC 20

punishment.[20]

Thus, we see that *Koushal* created a desperate analogy between the case at hand and a case on an entirely different issue to establish that India cannot run the risk of annulling Section 377 for it would be conflictual against opposite values held by other majority Indian groups. Majority opinions are anyhow taken into account through the legislature. While some contend that popular control on constitutional values will lead to tyranny of the majority, yet it is not to say judicial review is not tyrannical. While a system of popular constitutionalism will be tyrannical only when the small group of people whose rights are getting affected aligns to another small group which is participating in deciding those contentious rights, a system of judicial review will always be tyrannical because it tyrannically excludes some people from partaking as equals.[21]

THE CASE ON POPULAR CONSTITUTIONALISM

Larry Krammer, who can perhaps be called the progenitor of popular constitutionalism, takes the view that a democratic society would always be disagreeing about rights. However, these disagreements cannot really be settled. He believes that "all legal systems tolerate some uncertainty and lack clarity. There will be uncertainty and instability even in a regime of perfect judicial supremacy."[22] This means that popular constitutionalism, which will make the laws depend on the legislature, will be equally uncertain and unstable, implying there is no reason to prefer judicial review over popular constitutionalism when it comes down to settlement of laws.

This writer acknowledges that even decisions reached via popular constitutionalism can be inappropriate, or morally incorrect, if at all we agree on a common notion of morality. Popular constitutionalism too will sometimes lead to decision that will be morally incorrect for some people. However, Bellamy says that legislative decisions will have honoured the people with equality and this will be a legitimate reason for the people to adhere to those decisions. On the other hand, in a system of judicial review, judges tend to supersede this equality and preserve certain superiority over the common people when they give more weight to their own opinion on constitutional matters. Judicial review then "seems premised on an unjustified assertion that those on the bench are more equal than the rest"[23] and so it "cannot be other than arbitrary and hence dominating."[24]

[20] Supra note 17
[21] Supra note 11 at page 1397
[22] Larry Krammer, 'Popular Constitutionalism, Circa 2004' (2014) 92 Cal L. Rev 959, 987
[23] Supra note 13 at page 167
[24] Supra

Thus, judicial review is quite against the principles of democracy and republicanism.

Famous legal luminary Louis Fisher advances an important stream of argument in favour of popular constitutionalism. He believes that verdicts of Courts become authoritatively final only as long as the legislature, the executive and the ordinary people subscribe to them. If they are not ready to harmonize with the Courts' decisions, then controversies, debates and protests will arise that will ultimately compel the judiciary to make a decision that accommodates majoritarian ideas.[25] Stephen Griffin[26], argues that it is ordinary politics that ensues from interactions between the legislature, executive and the people that determines connotations of constitutional values at different points of time. Hence, more than the thoughts of lawyers and judges, the thoughts of ordinary people represented in ordinary political struggles give meaning to the Constitution. Fisher's and Griffin's arguments become quite apparent in this context. The decriminalization of homosexuality in *Naz Foundation* was not accepted by the legislature and the ordinary people. With strong impetus thrown by popular pressure and interveners, we see that it was overturned in *Koushal* to accommodate the majoritarian idea of sexual perversion attributed to homosexuals.

Keith Wittington argues on similar lines. She maintains that constitutional law is created outside the judiciary through an overtly political process of "constitutional construction".[27] The constitution, according to her, is just a text that deals with selected issues. However, once it is put into practice, many additional problems sprout, and these problems are often resolved through the "political construction of authoritative norms."[28]This process called 'constitutional construction' get used frequently to define or enhance constitutional norms. Constitution construction, as understood by Warrington, is common to India too. In *Koushal*, the judges themselves presumed constitutionality of the IPC enacted by political means in 1860 and decided not to go against it. The judges state in paragraph 32 –

After the adoption of the Indian Penal Code in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 Indian Penal Code belongs. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the

[25] Supra note 21
[26] Stephen Griffins, *American Constitutionalism: From Theory to Politics* (Princeton University Press 1998) 45 (Google Books Sample)
[27] Supra note 21 at page 968
[28] Supra

provision.[29]

Koushal thus, recognized and legitimized the political construction of Section 377. Yet another fact acknowledged in *Koushal* was-

In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 Indian Penal Code.[30]

We clearly see that *Koushal* ultimately resorted to a popularly and politically construed connotation of Section 377. It would not be wrong to say that the undercurrent running through this judgement was a political one, created in 1860 and maintained since, quite outside the judiciary. Hence, popular constitutionalism becomes inevitable, even in a system of strong judicial review.

Thus, the interpretative authority of Courts is quite limited; whether the limitation comes from political processes, practical institutional problems or socio-cultural bindings. The Courts can never monopolize over constitutional matters in the truest sense. This makes popular constitutionalism appear to be something unavoidable".[31]

CONCLUSION

Albeit it might be seemingly incongruous to the topic under study, yet it is imperative to mention here that we today live in a globalized era where the world is analogous to a global village with the headman in the guise of the United States of America. Along with unparalleled military strength and structural advantages over the global economy, America also has soft hegemonic powers in inspiring ideas, ideologies and cultures across the globe. The concepts of popular constitutionalism and judicial review have been, to a great extent, inspired by America. It is generally believed that judicial review originated in America. Since its birth in 1803, judicial review kept becoming stronger and more influential than ever before. This institution was subsequently adopted by other nations of the world, and as happens with all other institutions, became subject to widespread criticism as well. In fact, the first wave of criticism originated in America itself. This led to the birth of the concept of popular constitutionalism. Although the principles and values that constitute

[29] Supra note 10 at para 32
[30] Supra note 10 at para 51
[31] Supra note 21 at page 973

popular constitutionalism have always been extant, yet popular constitutionalism, as an idea, developed only in 2004 through the works of Larry Krammer. Popular constitutionalism is not a new innovation. It is the humble assertion of this writer that popular constitutionalism is just a new term given to a set of already existing ideas that believed that the public can do a better job than the courts when it comes down to protecting rights.

In the light of the above discussion on *Koushal,* it is clear that Indian judges too are not better equipped in protecting the rights of the people, particularly minorities. Indian courts, more often than not, even during the usage of judicial review, employ majoritarian ideas in interpretation the constitution and constitutionality in statutes enacted by the representatives of the people. There are several arguments which favour judicial review but as we see, the arguments do not cover ground reality. In such circumstances, it is only natural that we question the existing system, take its drawbacks seriously and think of alternatives to do away with its problems. Popular constitutionalism appears to be the natural recourse, for it is something unavoidable. What needs to be done now is to institutionalize popular constitutionalism and give it a proper shape so that even minority voices are heard. With a stronger legislature and committed minority representatives voicing minority concerns, popular constitutionalism can actually end up amending the constitution and statutes the way they deem fit. After all, the constitution and statutes stand for governing all, majorities and minorities alike. Perhaps the idea of representation and election can be modified. In the existing system, common people do not vote on contentious issues about rights. Rather, they vote on the candidates on whom they bequeath a faith to resolve those contentious issues. If the people got to vote on issues that concern them, implying thereby that the majority decides their own issues while the minorities decide their own, then perhaps popular constitutionalism will find its way to the judiciary. Perhaps judicial reasoning as well as judgement then will be more legitimate, more acceptable and more proper. However, what ought to be done is beyond the purview of this work. This writer leaves it for the people to decide. The purpose of this work was to examine the existing mechanism of judicial interpretation and compare with a competing mechanism; and the purpose has been served to a considerable extent.