



**COMPARATIVE ANALYSIS OF
LANDMARK JUDGMENTS ON
HOMOSEXUALITY IN INDIA:
SECTION 377**

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Introduction

"The Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."
- *Thomas Jefferson*

The Constitution has always been recognised as a reservoir of our basic rights, an armoury with weapons of protection against arbitrary state action, with the Judges at various level of Judiciary acting as soldiers, guarding the citizens of our country and their fundamental rights.

The Constitutional Assembly understood the significance of separation of powers between the different organs of the State and the overpowering necessity of a system of checks and balances, hence powers awarded by the Constitution also came with certain duties bestowed on these institutions of the state.

The Judiciary's mission since time immemorial has always been to provide justice and due to the diverse nature of Justice, it has also been its greatest strength. It is a kaleidoscope in the hands of the Judiciary, contingent to how the Judiciary decides to rotate it, the reflection that

appears must be in consonance with the constitution of our country.

The responsibility of the Judiciary becomes more pertinent if there is in existence an unreasoned legislation, that incapacitates the constitutionally warranted rights to a certain class of citizens, unrecognised and powerless against the antiquated beliefs of the majority, in the society. The legal maxim, *Justitia neminegandaest*, which means that- Justice is to be denied to no one, reiterates this power of the Judiciary.

This duty of the judiciary had been invoked in the infamous case *Suresh Kumar Koushal & Anr v Naz Foundation & Ors*¹, *But was the Hon'ble Supreme Court, the Sentinel of the Citizens, successful in safeguarding their Fundamental rights? After all, Lex non deficerepotest in justitiaexhibenda* - The Law cannot fail in dispensing justice.

Background

The relationship between a statute and the Constitution of a country is symbiotic, while a statute is created to secure the constitutional notions of *Justice, Liberty, Equality* and *Fraternity*, at the same time, it derives its authority from the supreme law of the land- *The Constitution*.

Hence the Constitution awards a Legislation with both, purpose and power, with the precondition, that the word of the law and the word of the constitution must be in harmony, any discord would result in stripping the law from its power to command. It is rather peculiar, how the

¹ CIVIL APPEAL NO.10972 OF 2013



notorious legislation, within the Indian Penal Code, Section 377 which criminalises sexual activities against *the 'order of nature'*, including homosexual sexual activities, has continued to survive.

Sex has always existed as a taboo within India, a hushed theme within the society begging for attention and acceptance. This extensive blindness to an integral element of human life, has resulted in a significant portion of the population in either suppressing a basic component of their personality or running away from the public eye, to a place where the law can't punish them or protect them.

Sodomy as a crime, finds its origin in the Common Law of England, according to which the punishment was immolation. Acts of sodomy later became officially penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for subsequent criminalisation of sodomy in the British Colonies.

Homosexuality is not a modern day concept or a path selected by the youth to rebel against the society, it has an elaborate history in India, from the pre-colonial era, when it was treated as a mere minor offence, which took a severe turn during the colonial era when it was criminalised by the British, in accordance with their Judeo-Christian beliefs, based on procreative and non-procreative forms of sexual activity. Post-Independence, however the law continued to find shelter in the statute books and soon became a part of the society, as all laws do. Naz Foundation, a Non-Governmental Organisation believed in the struggle of the

LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) community gradually growing in India, while their fundamental rights continue to wither under the shadow of Section 377, Hence they filed a writ petition in the High Court of Delhi, asserting the constitutional infirmity embedded within the law.

It was submitted in *Naz Foundation vs Government Of Nct Of Delhi*², that the number of MSM (Men who have sex with Men) in India, is estimated to be 2.5 million as of 2006, but no definite number can be found out legally, it can only be assumed that the number is increasing and as the number increase, there's a decrement in the power of the constitution to protect.

The High Court of Delhi, in their judgment, given on the 2nd of July, 2009 understood this and decriminalised it, whilst starting a legal revolution for the LGBTI community, which was soon suppressed as are all revolutions in Contemporary India. A number of individuals and institutions rebelled against the judgment given by the Delhi High Court and appealed against it in the Supreme Court of India, which while reversing it, criminalised Homosexuality, once again.

A Comparative Analysis of Judgments in:

- Naz Foundation versus Government of NCT of Delhi and Others (Hereafter referred to as Naz Foundation Judgement)
- Suresh Kumar Koushal and another versus NAZ Foundation and others

² WP(C) No.7455/2001



(Hereafter referred to as the Koushal Judgement)

Liberty and Equality are the golden and silver threads that weave Part III of the constitution into its sustainable self, all fundamental rights find their genesis in the indispensable need for both Liberty and Equality, for every individual in a nation.

Hence these were two essential elements touched upon in the, Naz Foundation Judgement, the two vital Fundamental Rights that form the foundation of the constitutionally created armour for every citizen.

The Petitioners, in the Naz Foundation Judgement, contended that Section 377, violated Article 14- Right to Equality, Article 15- Prohibits discrimination on grounds of Religion, Race, Caste, Sex, Place of Birth, Article 19 (a)-(d) -Right to Freedom, Article 21- Right to Protection of Life and Personal Liberty, of the LGBTI community within India. The Respondents in The Naz foundation Judgement, constantly claimed that there isn't sufficient data to claim that these Fundamental Rights are being infringed in the first place, which was later reiterated by the Appellants in the Koushal Judgement accepted by the Hon'ble Justice G.S. Singhvi. However, the Court has failed to understand the cause behind the lacuna in quantitative data representing discrimination by the law or for the knot tied tightly around their personal liberty. The reason behind that is, because identifying them, equally amounts to incriminating them.

Justice Singhvi, states that Section 377, does not identify a particular community that should be penalised, but instead penalises a

particular conduct or act committed by an individual. However, an important question has been ignored by the Hon'ble Supreme Court, '*What if the act is between consenting adults, in private?*' The court has completely disregarded vital factors, that are relevant while penalising the act, such as age, consent and privacy.

According to the 172nd Report of the Law Commission which has been referred to in both Judgements, the report suggested deletion of Section 377. Paragraph 83, of the Naz Foundation Judgement states that "*In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC.*" It goes on to say that "*Though the Law Commission report would not expressly say so, it is implicit in the suggested amendments that elements of "will" and "consent" will become relevant to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not.*" The Hon'ble Supreme Court stated that the Law Commission merely offered a suggestion in its Report, regardless the law has continued to exist and is free from any constitutional infirmity.

Right to live Life with Dignity

Mahatma Gandhi said that "*To believe that what has not occurred in history will not occur at all, is to argue disbelief in the dignity of man.*"

While it's true that Dignity cannot be given an elaborate legal definition, the Courts all



over the world, have attempted to classify requirements that need to be fulfilled to, lead a life with Dignity. The Canadian Supreme Court, in *Law v. Canada (Minister of Employment and Immigration)* state that *“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.”*³ (Para 53, Pg. 106)

Under the purview of the term “carnal intercourse”, the legislation criminalises sexual acts between consenting homosexual adults, in private. To lead a life with Dignity is to lead a life where an Individual can satisfy one’s basic biological and physical needs and live free from arbitrary state created encumbrances, for example legislations such as Section 377.

Right to Privacy

The Hon’ble Supreme Court, in its landmark Judgement, given in 2017, Stated that *“Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”*⁴ (Part-T, Conclusion, 3(F), Pg. 263)

³Nancy Law v. Minister of Human Resources Development [1999] 1 SCR 497

⁴ Justice K S Puttaswamy (Retd.), &Anr. Vs Union Of India And Ors., W.P. (CIVIL) NO 494 OF 2012

The Naz Foundation Judgement, relying on *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, said that *“privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one’s sexuality is at the core of this area of private intimacy. If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy”*(Para 40, Pgs. 34-35)

The Hon’ble Supreme Court, stated that the Delhi High Court, in its *“anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity”* have *“extensively relied upon the judgments of other jurisdictions”* and that *“they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.”*(Para 52, Pg. 93)

An essential fact though has been overlooked by the Hon’ble Supreme Court, that due to the absence of legislations protecting and recognising the LGBTI community in India, Judgements on such laws and community would therefore also be absent. Most countries have come to accept and legally recognise the LGBTI community, while India continues to choose ‘public morality’ over ‘constitutional morality’.

Right to Health

Right to Health and Medical attention has been considered as an essential element of



an individual's Right to life, the same has been accepted by the Supreme Court in *Paschim Banga Khet Mazdoorsamity Vs. State Of West Bengal*⁵.

Ministry of Health and Family Welfare supported the petition to decriminalise Section 377, they stated that, it is a hindrance in their HIV intervention efforts towards Sexual Minorities, such as the MSM. The National Aids Control Organization, a division of the Ministry of Health and Family Welfare, submitted in the Naz Foundation Case, that "*Section 377 acts as a serious impediment to successful public health interventions. According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them.*"(Para 62, Pg. 51)

The NACO is of the opinion, that it is very important that the MSM and gay community have the right to be safely visible through which HIV/AIDS prevention can be successfully conducted.

Mental Health, is a crucial part of an individual's health in general, the fear created by such a statute obstructs personality development in a gay individual, it creates hatred and lack of self-worth, which eventually leads to depression or an abnormal mental state.

Right to Equality

Article 14 of the Constitution, prohibits unequal treatment but allows the state to make a reasonable classification, while creating a statute. The classification must be based on an intelligible differentia which must have a reasonable nexus with the classification. However, Section 377 is entrenched in arbitrariness, the unreasonableness of the statute begins itself by the indirect unfair classification drawn on the basis of the act condemned by the Statute, without giving due consideration to probability of an absence of harm and the conditions deciding the nature of the act.

The High Court said "*Thus it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14.*"(Para 91, Pg. 75)¹

The Supreme Court, in the Koushal Judgement however dismissed this argument stating that there isn't sufficient data given by the Appellants to prove unfair or discriminatory treatment by State Agencies or even the Society, according to them, there is an absence of any form of classification, at all.

The Supreme Court, however has neglected the fact, that Section 377 is a loaded weapon in the hands of the state, with the word of the law, as a bullet.

Prohibition against Discrimination

⁵1996 SCC (4)37, JT 1996 (6)43



Article 14 gives a general proposition regarding Equality, which is given a particular application on various grounds in Article 15 of the Constitution. Article 15 prohibits discrimination on the ground of sex, The High Court stated *“The argument of the petitioner is that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter.”* It goes on to say that, *“The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning “normal” or “natural” gender roles.”* (Para 99, Pg. 82)

The High Court referring, John Vallamattom v. Union of India said *“The Court held that Article 15's prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.”* (Para 108, Pg. 89)

‘Strict Scrutiny’, was a concept borrowed in the above case from American Jurisprudence, which is to be utilised for the perusal of the consequences of a specific statute. Another concept taken from Canadian and European Jurisprudence was, ‘Proportionality

Review’, which meant that the degree of proportionality between state intervention and purpose of the legislation, should not

unfair or arbitrary, in a modern democratic society.

Right to Freedom

Article 19, guarantees six freedoms, The Delhi High Court hasn’t dealt with this constitutional provision, it states that *“In the light of our findings on the infringement of Articles 21, 14 and 15, we feel it unnecessary to deal with the issue of violation of Article 19(1)(a) to (d). This issue is left open.”* (Para 126, Pg. 101)

However, an organised society is a precondition to all civil liberties and an organised society is created upon the foundation laws and statutes, protecting citizens and communities within the society. Absence of law, leads to an Absence of protection.

Conclusion

It has been 5 years, since the Supreme Court declared Section 377 constitutional, 5 more years in hiding for the LGBTI community, 5 more years the state has chosen to ignore the problem, hoping it will go away. *Is that Constitutionally Correct? Hoping a certain group or community in the society, would cease to exist?*

The revolutionary NALSA judgement came in 2014, where the law acknowledged that gender can no longer be conceived as a binary notion, it was for the first time, that the third gender was given recognition and protection by the law. Justice Radhakrishnan explained that *“Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the*



*laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.”*⁶ (Para 75) One such legislation is Section 377, which takes away a basic biological right we have as human beings, from this community.

spirit and the culture of the Constitution and not only of the society.

In the recent landmark judgement, given by the Supreme Court in August, 2017 declared that *“Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”*⁷ (Para 126, Pg. 124) I believe this is the first step taken by the Supreme Court, in giving this community and its fundamental rights, constitutional recognition and protection.

‘But are we ready? Is the Society ready?’ Are relevant questions that come into our minds, as we move further to this community’s constitutional victory, but we must also ask ourselves, *‘If not now, then when?’* With the societal notions in the past, there was never a good time to abolish untouchability or give women equal rights, but the State must always act in regard to the

⁶ National Legal Services Authority v. Union of India, WP (Civil) No 604 of 2013

⁷ Supra note 4, at Pg. 6