

GAY AND TRANSGENDER RIGHTS IN INDIA: 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.”

-Justice 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*

Section 377 of the Indian Penal Code, a figment of colonial creation, has criminalised ‘unnatural sexual acts’ since its application as law in 1862. Homosexuality falls within such acts and may attract punitive measures.¹ In the previous century, legislatures and judiciaries across the globe have upheld laws criminalising homosexuality and transgender behaviour, justifying them on grounds of public decency and morality. With the advent of the contemporary epoch, the movement against the repressive and oppressive nature of Section 377 grew exponentially and reached its culmination in *Naz Foundation v. Government of NCT of Delhi*², wherein the Delhi High Court recognized the anachronism associated with Section 377 and interpreted it to exclude sexual acts between consenting adults, thus decriminalising homosexuality. Although the ramifications are limited and may be quelled by an act of Parliament, the judgment is a landmark in civil liberties’ litigation and may be regarded as one of the stepping stones to the emancipation of the sexual minorities in India from tyranny and coercion at the hands of the law.

This paper is an attempt to extricate the significance and far-reaching effects of this judgment in the face of systemic abuse of homosexuals and transgenders, by enforcers of the law under the facade of upholding Section 377, prior to this judgment. Further, the constitutional

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¹ 3 R. A. NELSON, INDIAN PENAL CODE 3738 (S. K. SARVARIA ED., 9TH ED. 2003).

² WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2nd July, 2009.

aspects of the judgment shall be discussed and its application to the rest of India, in light of the Supreme Court's decision in *Kusum Ingots v. Union of India*³, shall be examined.

VIOLENCE AND APATHY TOWARDS SEXUAL MINORITIES BY THE LAW ENFORCEMENT AGENCIES

Section 377 has been extensively used by the law enforcers to harass and exploit homosexuals and transgender persons. Various such incidents have come to light in the recent past. In *Jayalakshmi v. State of Tamil Nadu*⁴, Pandian, a transgender, was arrested by the police on charges of theft. He was sexually abused in the police station which ultimately led him to immolate himself in the premises of the police station. Similarly, policemen arrested Narayana, a transgender, in Bangalore on suspicion of theft without informing him of the grounds of arrest or extending any opportunity to him to defend himself. His diary was confiscated by the police and he was threatened with dire consequences if he did not assist in identifying other transgenders he was acquainted with.⁵ Homosexuals have also been at the aggrieved end of financial extortion by the police in exchange for not revealing their identities to society.⁶ A peculiar use of Section 377 was seen in Lucknow when workers of Bharosa, a NGO aimed at spreading awareness about AIDS, were arrested for distribution of pamphlets providing tips on safe sex to homosexuals.⁷

The same agencies of the law have been apathetic towards these sexual minorities in the realm of their health and safety. When a medical team inspected Tihar Jail, reported a high incidence of sodomy in the prison and recommended provision of condoms to inmates to prevent a proliferation of diseases, the Inspector-General of Prisons chose to deny any such providence, thinking it to be a latent confession of rampant homosexual behaviour in the prison.⁸ As a consequence of the inactivity of the prison staff, the AIDS Bhedbhav Virodhi Andolan filed a petition in the Delhi High Court challenging the official position and the constitutionality of Section 377.⁹ Similarly, the Indian Council for Medical Research (ICMR) and Indian Medical Association (IMA) have not prescribed any guidelines for Sex

³ AIR 2004 SC 2321: (2004) 6 SCC 254

⁴ (2007) 4 MLJ 849

⁵ People's Union for Civil Liberties (PUCL) Report on Rampant violation of rights of Sexual Minorities, p.14 (2000).

⁶ Ibid.

⁷ Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, in HEALTH AND HUMAN RIGHTS 153 (2004).

⁸ Siddharth Narrain, *The Queer Case of Section 377* (http://www.sarai.net/publications/readers/05-bare-acts/06_siddharth.pdf; last accessed on 13th August, 2009).

⁹ RUTH VANITA, QUEERING INDIA 15 (2002).

Reassignment Surgery (SRS). This reticence on the part of the medical sphere has led many transgenders to approach quacks, putting themselves at grave risk.¹⁰

From the numerous instances of abuse and violence against homosexuals and transgenders, it is evident that Section 377 has been grossly misused. It is equally obvious that a judicial move to address this concern was exigent in the face of a law enforcement framework so hostile that exploitation 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 organisation working on HIV/AIDS and sexual education and health since 1994.¹¹ In 2001, the organisation filed a writ petition in the Delhi High Court, challenging the constitutional validity of Section 377, claiming that the impugned law was in violation of Articles 14, 15, 19 and 21. A bench comprising Chief Justice B.C. Patel and Justice Badar Durrez Ahmed dismissed the petition in 2004, subsequent to which the petitioners approached the Supreme Court. The Supreme Court directed the High Court to examine the matter, deeming it worthy of consideration. Consequently, the Delhi High Court considered the petition.

JUDGMENT OF THE HIGH COURT

The judgment of the Delhi High Court is a prolific discourse in as much as it addressed various concerns associated with the existence of Section 377. The Court evaluated the constitutional validity of the impugned law, examining 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 constituted 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*¹². The court adjudged that the impugned law begot an arbitrary differentia and there was no reasonable nexus between preventing child sexual abuse or ameliorating public health, and the criminalisation of consensual sexual relations between adults. The court then went on to interpret the term 'sex' in Article 15 to not only denote gender, but to have a wider periphery inclusive of

¹⁰ Siddharth Narrain, *Being a Eunuch in India* (<http://www.countercurrents.org/gen-narrain141003.htm>; last accessed on 13th August, 2009).

¹¹ <http://www.nazindia.org/about.htm> (last accessed on 13th August, 2009).

¹² AIR 1952 SC 75: [1952] SCR 284

‘sexual orientation’. Moving on this perception, the court ruled 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 found it superfluous to entertain the question of violation of Article 19. The court, in a gesture of finality, applied the doctrine of severability in order to read down the impugned law only to the extent of decriminalising 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.¹³ The judgment, if viewed inclusive of its social impact, is not merely a pronouncement of a court in dry legal jargon but represents the path to liberation of the sexual minorities, a collective long condemned and discriminated against. It is further significant due to its inclusion of sexual rights of the individual in the precinct of fundamental rights enshrined in Part III of the constitution.

IMPLICATIONS OF THE JUDGMENT FOR THE SEXUAL MINORITIES

The judgment is a cause of great jubilation for the hitherto oppressed sexual minorities. It forms a source of deliverance on two different planes: it decriminalises sexual relations between homosexuals and simultaneously serves as a source of protection from maltreatment and vilification 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 approach of the state towards the welfare of sexual minorities.¹⁴

In decriminalising consensual sex between homosexuals and transgenders, the judgment also addresses the proximate concern of health. As observed by the PUCL and eminent gay-rights activists¹⁵, one of the barriers in tackling the proliferation of sexually-transmitted diseases in homosexuals was the criminalisation of homosexual activity which made any progression towards sexual education of the sexual minorities a latent violation of the law. With criminalisation a thing of the past, it may now be possible to combat the exponentially growing threat of HIV/AIDS with efficacious prevention measures and adequate information about sexual practices.

¹³ Nirimesh Kumar, *Delhi High Court Strikes Down Section 377 of the IPC*, THE HINDU, 2nd July 2009, New Delhi.

¹⁴ Michael Kirby, *AIDS and Human Rights*, 1 AUSTL. GAY & LESBIAN LJ 3 (1992).

¹⁵ *Supra*, n.5, p.32.

The other element of the court's decision, which truly upholds the substance 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 oppression at the hands of the authorities. Sexual abuse and financial extortion was the plight of homosexuals and transgenders on a frequent basis. The inhumanity associated with such acts was further accentuated by the fact that the alleged guardians were the true perpetrators of violence and abuse. Section 377, after the ruling of the court, can no longer be an implement 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 levels.

CONSTITUTIONAL ASPECTS INVOLVED THE JUDGMENT

Beyond the circumspections of its social implications, the constitutional aspects of the judgment form substantial material for deliberation too. The court found the impugned law to be in violation of various fundamental rights listed in Part III of the constitution. The significant developments evolve through the judgment are the extension of equal protection of laws to the sexual minorities, recognizing the discrimination meted towards them to be in contravention of the right against discrimination and the inclusion of sexual preferences in the ambit of the right to life and personal liberty. Each of these shall be examined individually by the author.

SECTION 377 AND 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 nature in as much as it permits for classification between individuals,¹⁶ which consequently relaxes the equal protection of laws to all. In the instant case, the point for scrutiny before the Court was whether a classification between heterosexuals and homosexuals was permissible. As observed by the Court, a classification shall be deemed 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.¹⁷ Any element of arbitrariness shall be antithetic to the purpose of Article 14.¹⁸

¹⁶ State of Bombay v. F.N. Balsara AIR 1951 SC 318

¹⁷ State of West Bengal v. Anwar Ali Sarkar, Supra, n.12.

¹⁸ E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3

In the instant case, the Delhi High Court ruled that Section 377 reflected class legislation, in disfavour of the LGBT community, and therefore failed the test of Article 14. In the recent case of *Lawrence v. Texas*,¹⁹ the Supreme Court of the United States, overruling its previous judgment in *Bowers v. Hardick*²⁰, followed a similar stream of reasoning to conclude that Texas' anti-sodomy law solely targeted the homosexual community, and thus violated the substantive due process right to equality, flowing from the Fourteenth Amendment.

It is submitted that this reasoning employed by the Court is sound in law. The distinction between homosexuals and heterosexuals rests on a veneer of personal liberty, forming no reasonable differentia to cause legislation. Sexual preference is as personal to an individual as his/her sense of liberty in practising religion and choice of food. Therefore, a legislation that differentiates between individuals on the basis of their preference of sexual conduct, permeates class legislation aimed at marginalising the society, to the disfavour of the homosexual community.²¹ As observed in *Shelley v. Kraemer*²², “*Equal protection of the laws is not achieved through indiscriminate imposition of inequalities*”.²³

The spirit pervading Article 14 is that of substantive equality and not formal equality. Article 14 strives to protect and preserve the rights of the weaker sections of society through its provision for reasonable classification. Section 377's criminalisation of homosexuality created an environment of authoritarian hostility towards the LGBT community, rather than fostering an extraordinary sense of care for them. Thus, Section 377's classification, which the defendants sought to justify on grounds of Article 14's implicit provision for classification, contravened the fundamental premise of Article 14 and was liable to be quashed for the same.

SECTION 377 AND THE RIGHT AGAINST DISCRIMINATION

Article 15 guarantees the right against discrimination on various grounds, including 'sex'. The question for deliberation in Court was whether 'sex' was inclusive of 'sexual orientation'. The Court answered 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*²⁴.

¹⁹ 559 US 538 (2003)

²⁰ 478 US 186 (1986)

²¹ A similar observation was made by the US Supreme Court in *Romer v. Evans* 517 US 620 (1996).

²² 334 US 1 (1948)

²³ *Ibid*, at p.22.

²⁴ No.488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994.

Keeping in view the application of the doctrine of strict scrutiny in the cases of *Anuj Garg v. Union of India*²⁵ and *Ashoka Kumar Thakur v. Union of India*²⁶, the Court declared that an action that aimed to protect vulnerable groups in society was exempt from strict judicial scrutiny but a legislation that targeted vulnerable sections was to be strictly scrutinized at the altar of Article 15.

In *Corbiere v. Canada*²⁷, 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.²⁸

To read 'sex' as inclusive of 'sexual orientation' is a transcendental step in terms of the judicial approach towards sexual minorities. The sexual minorities have always determined the existence of a gap between 'sex' and 'gender'. While sex is the identification of oneself through one's physical attributes, gender is a far more personal identification of the self through one's mental looking glass. Transgenders have faced the wrath of the authorities the most, owing to the lack of appreciation of the sex-gender dichotomy by the authorities. Thus, the ruling of the High Court lays down the path of emancipation of the transgenders through its recognition of the dichotomy surrounding their lives. Further, a recognition of this dichotomy reveals a shirking of anachronisms associated with judicial thought which by itself begets a hitherto unknown approach of empathy and care towards the sexual minorities.

SECTION 377 AND 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 grounds of violation of Article 21 was that a law that aimed to criminalise homosexual conduct was directly infringing the fundamental right to life and personal liberty, a right whose ambit of protection is limitless and all pervading.²⁹ The Delhi High Court acquiesced with the petitioners and ruled that the impugned law was in violation of Article 21.

²⁵ (2008) 3 SCC 1

²⁶ (2008) 6 SCC 1

²⁷ [1999] 2 SCR 203 (Canada)

²⁸ *Harksen v. Lane* 1998 (1) SA 300 (CC)

²⁹ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

The debate entered into by the Delhi High Court was part of a much larger constitutional debate, a manifestation of which may be witnessed in the writings of Lord Devlin and H.L.A. Hart.

Lord Devlin opined, *“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.”*³⁰

H.L.A. Hart was of the opinion that morality was a virtue left to one's own interpretation and analysis, and a pervasive action of the state constituted a grave infringement of the individual's right to liberty and dignity. The debate on state morality versus individual rights still rages on, and a figment 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 circumspections, imbibes the right to dignity and the right to privacy.

Dignity of the individual is one of the foundations of the constitutional framework in India, and it finds mention in the Preamble. The premise of human dignity is paramount in a constitutional democracy that envisages the welfare of the masses.³¹ As the US Supreme Court observed in *Lawrence v. Texas*³², *“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”*.³³

Thus, it is evident that constitutional governance in any nation envisages human dignity to be of supreme importance. Dignity does not only include the basic necessities of food, clothing and shelter, but permeates the human conscience beyond the veil of physical manifestations of dignity. Dignity includes the individual's right to choose his identity in sexual interaction, and this right should be viewed akin to the manner in which we view the other rights guaranteed by Part III of the constitution.

Similarly, privacy is one of the paramount conditions implicit in the right to life and personal liberty. From the celebrated American case of *Roe v. Wade*³⁴ to landmark Indian judgments

³⁰ PATRICK ARTHUR DEVLIN, THE ENFORCEMENT OF MORALS 15 (1965).

³¹ Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, at p.529.

³² Lawrence v. Texas, Supra, n.19.

³³ Rachel Sweeney, *Homosexuals and the Right to Privacy*, 34 CUMB L REV 171.

³⁴ 410 US 113 (1973)

like *Kharak Singh v. State of Uttar Pradesh*³⁵ and *Govind v. State of Madhya Pradesh*³⁶, the right to privacy of the individual has been recognized as an element of utmost significance in a constitutional democracy. Privacy of the individual cannot be pervaded by the state to the point where the infringement of the state causes the abridgment of the individual's right to personal choices. The collective morality of the state should not be enforced on the individual in a manner that strips him of his basic rights, but should be enforced in a balanced approach.³⁷ As the Constitutional Court of South Africa observed in *National Coalition of Gay and Lesbian Equality v. Minister of Justice*³⁸, "If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy."³⁹

Thus, criminalisation of homosexual acts constituted a colossal impediment to the evolution of the absolute right of the sexual minorities to their dignity and privacy. These rights are not only constitutionally guaranteed but are also implicit in the Universal Declaration of Human Rights and should therefore, enjoy a superior position to other rights. The judgment of the Delhi High Court is a landmark step in establishing the superiority of the individual's right to privacy and dignity over the collective morality of society. To that effect, we may assert that the propositions laid down by H.L.A. Hart have entered into the Indian judicial conscience, while the propositions of Lord Devlin have been quelled as they reflect thought dowsed in archaic social thought.

IMPLICATIONS OF THE JUDGMENT IN LIGHT OF KUSUM INGOTS V. UNION OF INDIA

The Supreme Court ruled in *Kusum Ingots v. Union of India*⁴⁰,

"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 aforementioned judgment, the reverberations of the judgment of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* are not limited only to the citizenry of Delhi but are applicable to the sexual minorities of the entire

³⁵ [1964] 1 SCR 332

³⁶ (1975) 2 SCC 148

³⁷ HLA HART, LAW, LIBERTY AND MORALITY 15 (1963).

³⁸ (CCT11/98) [1998] ZACC 15: 1999 (1) SA 6

³⁹ Ibid.

⁴⁰ *Kusum Ingots v. Union of India*, Supra n.3.

nation. This only heightens the significance of the judgment. Also, as there exists no contradictory precedent to overrule, or even distinguish the Delhi High Court judgment, the judgment stands as authority and effectively decriminalises homosexual conduct across the nation.

CONCLUSION

The judgment of the Delhi High Court reflects a sense of conscience and empathy towards the sexual minorities, emotions that were hitherto unknown. Section 377, in its criminalisation of homosexual activity, was a repressive measure on the fundamental rights of the LGBT community. The repression of anti-homosexuality laws has been recognized by various legal systems in the world. From *Lawrence v. Texas*⁴¹ in the United States to *Minister of Home Affairs v. Fourie*⁴² in South Africa, the judicial framework of the common law system has recognized the rights of homosexuals to their freedom of sexual preference.

On a more abstract level, the judgment attempts to answer the question of collective societal morality against the individual's liberty. The Court has prioritized individual liberty over the idea of collective social morality and thus, has laid the path for an individualistic approach in judicial decisions.

In so far as its implications are concerned, the judgment may be overridden by a legislative measure, but it shall stand as one of the cornerstone judgments in the history of individual rights and constitutional governance in India.

⁴¹ *Lawrence v. Texas*, Supra n.19.

⁴² (CCT25/03) [2003] ZACC 11: 2003 (5) SA 301 (CC); This case legalised same-sex marriages in South Africa.