

Naz Foundation v. Govt. of NCT of Delhi — A Critique

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On 4-11-2008, when incumbent President of the United States Barack Obama gave his much celebrated victory speech in California, he mentioned that the “change” in the US democracy is the result of the answer spoken by all people collectively; that they were the change. He said it is the answer spoken by the people who are rich, poor, Black, White, Hispanic, gay, straight, Democrats, Republicans and so on. Certainly, he played his cards right by highlighting the “equality” principle in an undertone stating that America does not discriminate between race, colour, age, sex, political philosophy and with special emphasis, sexual orientation. The possibility of such a political fervour and statement being made in India seems rather bleak.

Nevertheless, the Hon’ble Delhi High Court on 2-7-2009, while delivering Naz Foundation v. Govt. of NCT of Delhi¹, has shown dissidence to the societal and legal views of condemning acts falling within the purview of same-sex relations and has authoritatively redefined and reinterpreted Section 377 of the Penal Code, 1860 penalising such activities. Through this historic judgment, the Hon’ble High Court has redefined the contours of Section 377 to provide for consensual penile non-vaginal sex between adults in private, a move dynamic enough to provide impetus to the ongoing fight for equality.

Background of the provision Speaking jurisprudentially, the existence of every prevalent law can be disputed with the varied theories. However, to conform to the view of the judgment, one finds recourse in the theories of the thinkers of the Analytical School of Jurisprudence who propounded the distinction between expository and censorial jurisprudence i.e. the difference between law what it is and what it ought to be.¹ When Austin and Bentham² defined this, they had a clear idea of a particular law in mind. According to them; Laws, even though morally outrageous, were still laws.³

Prior to the coming in force of this judgment, Section 377 remained in the Penal Code in its original form as was inserted in 1860 in the backdrop of the English legislation penalising buggery, initially enacted in 1533 AD. The English Law however underwent fundamental changes in its implementation from the abolition of death penalty for the crime of buggery to the enactment of the Sexual Offences Act, 1967 which decriminalised homosexuality. Section 377 nevertheless remained unchanged.

The marginal note to Section 377 speaks of “unnatural offences” but fails to actually define the confines of the “offence” contained in the wide ambit of voluntary carnal intercourse against the order of nature. Clearly, this section is inclusive of acts of bestiality and sodomy⁴ but is wide enough to include any act of penile non-vaginal, finger vaginal, finger non-vaginal, object vaginal/anal, etc. The biggest challenge posed to us, when the 105⁰page long judgment is analysed, is to determine the scope and ambit of this section.

Fact and law The instant petition dealt with the validity of Section 377 IPC penalising penile non-vaginal acts. The petition filed by Naz Foundation, an NGO working for the rights of homosexuals and in the field of HIV/AIDS, sought to amend (not repeal) this section so as to decriminalise such sexual acts between consenting adults. The petitioner’s submission, that the provision is draconian in nature, became the sole issue in this case. Along with the Government of NCT of Delhi, the Union of India was also impleaded as a respondent through the Ministry of Home Affairs, the Ministry of Health and Family Welfare and National Aids Control Organisation (NACO). Respondents 6 to 8 were individuals and NGOs impleaded on request, who in turn complemented the petitioner’s plea. The Government of NCT of Delhi and the Union of India denied the submissions of the petitioner vehemently stating that the amendment of Section 377 will cause harm to the society by evoking grounds of the spread of HIV/AIDS, rampant homosexuality, sexual perversity and obscenity and opposition to public morals.

The sole issue in this case was whether the said provision is bad in law? The petitioner submitted that the impugned provision is unreasonable and arbitrary within the ambit of Part III of the Constitution. The Hon’ble Court, while dealing with the petitioner’s submission, dealt with this singular issue from various aspects:

- (1) Whether the impugned provision should be interpreted to decriminalise penile non-vaginal sex between consenting adults;
- (2) Whether the fundamental rights of equality, life, liberty, privacy, dignity, and freedoms are violated by the impugned provision (Articles 14, 15, 19 and 21);
- (3) Whether the impugned provision acts as an impediment to the implementation of HIV/AIDS control measures; and
- (4) Whether the decriminalisation of the impugned provision is opposed to societal views and public morality? Judicial interpretation — A win-win situation

The problem with law lies in its interpretation, rest all is logic. The effect of this judgment is on the interpretation of Section 377, not on its implementation. In the past 50 years, there have been no cases of private homosexual conduct wherein this section has been put to use. The ones in knowledge did not make it to trial.⁵ Even though the operational part of the judgment declares “unconstitutional” the penalisation of consensual penile non-vaginal acts, in effect, this section remains in the statute books to fill the lacunae in the deficient drafting of rape laws, primarily used to protect women and child abuse (a plea raised by the respondents). In fact, in the opinion of the researcher, the Ministry of Home Affairs could have made a better argument had it used the premise of child abuse

more.6

The argument of the petitioner was not to remove Section 377 from the penal statute but to harmonise it with changing times by evolving an interpretation allowing the recognition and non-discrimination of subdued marginalised populations of men who have sex with men (MSM), gays, lesbians, transgenders and bisexuals (LGBTs) and allowing them equals rights and representation in society. Their plea was to reinterpret Section 377 so as to exclude from its purview consensual sexual (penile non-vaginal and other) acts done in private.

The Hon^{ble} Court was entrusted with an enormous task of harmonising the interpretation of Section 377 to bring it in consonance with the evolving interpretation of fundamental rights, the constitutional doctrines, the wants and needs of the progressing society, the intention of the legislators, etc. The flow of reasoning in the judgment begins with a succinct but appropriate analysis of the historical evolution of Section 377 which provides a platform for the discussion of a plethora of cases ranging from different jurisdictions of the United States, England, Canada, Australia, Cyprus, Ireland, South Africa⁷ and even Nepal. Along with discussing the constitutional and statutory provisions of other countries, the judgment points out in pertinent part international conventions, speeches, declarations, principles, and various reports of the Wolfenden Committee, the Yogyakarta Principles, the Law Commission, etc.

As a result of this judgment, the interpretation and not the implementation of this section has been changed. The Court opined that though it might be difficult to completely agree with the suggestions of the 172nd Report of the 42nd Law Commission⁸, the Court decriminalised consensual sexual acts in private places. The Court agreed to the submissions that such a draconian provision leads to cases of harassment and abuse to the LGBT community causing their detachment from the society which hampers the implementation of HIV/AIDS prevention measures.⁹

While upholding the spirit of the Constitution, the Court interpreted the 'right to privacy' (using ample precedent) as the right to be let alone, not only as a negative concept of occupying a private space but a positive right of sexual intimacy, sexual orientation and gender equality. The Court pointed out that breaching this privacy on grounds of public morality does not fall within the ambit of 'compelling State interest'. Further, by weighing Article 14 on the legendary twin test of intelligible differentia¹⁰ and also making use of recently evolved doctrines of 'strict scrutiny' and 'proportionality'.¹¹ The Court said that the classification of LGBTs on the basis of their sexual preferences is unreasonable and arbitrary violating their dignity and liberty in Article 21. Article 15 and its horizontal application of rights in Article 15(2) have also been interpreted to include within their ambit of 'sex' biological attributes of sexual orientation.

In opposition, the arguments of the Ministry of Home Affairs (MHA) were fallible, so much so that the stands of MHA and that of the Ministry of Health & Family Welfare (MHFW) differed tangentially. While MHA argued for the retention of the section in its exact terms to prevent rampant homosexuality, indecency and HIV/AIDS, MHFW contradicted by saying that Section 377 serves as an impediment to the successful implementation of HIV/AIDS prevention measures (a plea similar to that of the petitioner).

The learned Additional Solicitor General advanced arguments on public health, child abuse and morality, all of which were vehemently rejected by the Hon^{ble} Court with reasons. The Court differentiated the concepts of public and constitutional morality¹² and emphasised that that section continues to remain in the penal statutes for the purpose of protecting child abuse. The Court was rather startled with the lack of the basic constitutional acumen and conceptualism of ASG when the learned counsel attempted to falsify the power of the Court to declare a provision unconstitutional.¹³

In effect, the judgment has envisaged a win-win situation by letting the implementation of the section remain for the purposes of child and women abuse but changing the interpretation for the purpose of decriminalising consensual same-sex sexual activities of 'adults' above the age of 18 in private. The section continues to remain in the statute books to penalise non-consensual penile non-vaginal and penile non-vaginal sex relating to minors.

Exploiting the loopholes Even though various references to judgments of Lord Devlin¹⁴ go against the concept of same-sex relations, jurisprudence is yet in favour of privacy of the individual, like that highlighted by H.L.A. Hart.¹⁵ This judgment has nonetheless been lauded by many jurists and the media. It provides a wide array of legal positions, statutes, judgments and juristic opinions of the act and punishment of homosexuality and facilitates an analogy to the Indian position. Again, the premise of such an analogy is what law ought to be.

Achieving a flawless exposition of law in a judgment is impossible. Similarly, this judgment encompasses various loopholes which can be exploited by the displeased party and which, in the opinion of the researcher, need to be addressed more effectively. The anomaly that this section poses lies in its generality. A lucid explanation of the section is lacking as a consequence of which, the ambit of this section is widely misconstrued.

Generality of section causing concerns Some areas of concern, which the judgment ought to have clarified, can be understood as follows:

(a) 'Whoever' and 'voluntary' The word 'whoever' used in the section is singular in character. It denotes one person, while the counsel for the petitioner has misled the Hon^{ble} Court by stating that 'whoever' signifies both the a

as well as the passive partner. In cases of animals, the consent of the passive partner is irrelevant (for brevity, the interpretation of voluntary consent is divided into bestiality and sodomy).¹⁶ In the opinion of the researcher, the order of the Court declaring the "voluntary" aspect of the section unconstitutional will only hold effect if the interpretation of the word "whoever" is clearly defined. Section 39 IPC defines "voluntary" to include the intention of a singular person. If it is construed to include both the parties, then a consensus is required to obtain "voluntariness" of the act by both the parties, whereas if "whoever" is singular in nature, then a "voluntary" act by the active partner becomes the consent. In cases it is against the consent of the passive partner, it will lead to rape or sodomy again attracting the provisions of Section 377. In essence, the deletion of the word "voluntarily" deepens the generality of this section causing varied interpretations of "consensual" penile non-vaginal sex.

(b) Extent and application The long list of authorities, precedent and convention cited in the judgment seems to be deviating from the main point of view, the extent of the section. The application of this section and judgment includes such individuals who prefer to indulge in same-sex relations, bringing into its gamut the "minority" groups of MSM and LGBTs, but in essence, nowhere in its true sense, is the section worded to exclude individuals with normal sexual orientation to indulge in anal and oral sexual activities or sexual activities through other orifices¹⁷. The judgment permits carnal intercourse when the act is consensual, and it clarifies that the section will still govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. Where the judgment lacks and is myopic, is in defining the generality of the application of the section to all people with every sexual orientation. Activities involving anal sex, oral sex, mutual masturbation, thigh sex, finger vaginal/non-vaginal sex are such which can also be indulged into by individuals with normal sexual orientation. Again the generality of this section leads to this flaw.

There seems to be a general pattern of analysis followed by the Hon'ble Court in redocumenting the ambit of this section. Even though "marginalised groups" or "minority groups" have become the platform for discussion, the judgment mainly revolves around a bias in favour of homosexuals. Though it might not be the intent of the Court to do so but it is evident that it is compelled to since in practice this section has been widely abused to cause harm to homosexuals.

This leads to the solidification of the term "homophobia".¹⁸ Though the latter part of the judgment¹⁹ clarifies that the effect of Section 377 is that it perceives homosexuals as a class, but does not clarify the true extent of Section 377 as a result of which, the inclusion of individuals of all other sexual orientations i.e. this section applies to homosexuals as well as heterosexuals.

So glaring is the generality that in the opinion of one author²⁰, the inclusion of lesbians in Section 377 becomes irrelevant as the section contemplates "penetration" as one of the essentials of "penile" non-vaginal sex. Such lacunae posed by the generality only solidify the contention of the petitioner in the Apex Court. In suggestion, the judgment could have had used a neutral platform of "gender inequality" and "sexual orientation" to redefine Section 377.

(c) Deliberate omission: The biggest cry about the judgment has been made by religious groups citing religious scriptures and the inconsonance of the judgment to their personal laws. Even though in the undertone the ruling Government welcomes the judgment, yet it mentions that its stand in the Apex Court is undecided, mainly because of the vote-politics²¹. Islamic seminaries²² and Hindu devotees²³ have filed petitions to remedy the situation asking a reversal of the order. Justice Kannan of the Punjab & Haryana High Court has, in his opinion,²⁴ provided instances of various Hindu, Islamic, Christian, Buddhist and Jain scriptures which outrightly condemn homosexuality and same-sex relations. On the contrary, there is also evidence in form of Khajuraho temple carvings and the Kamasutra which permit the same.

What is surprising to note in the judgment is the "deliberate"²⁵ omission of the relation of homosexuality to religion. At the very outset the topic seems perilous but the dogma attached to religion and how in the changing times, our country has evolved to a level of acceptance, is not addressed. This omission has actually become a substantial ground for appeal in the Supreme Court quoting the preservation of sentimental values of secular India. Indeed, it is irrefutable that religious texts are important sources of law and social practices. To that extent, law will follow religious prescriptions, but it is also true that zeal for reformation has taken the breadth of law to traverse beyond the confines of religion.²⁶

It is pertinent to note here, in the opinion of the researcher, that even though The Bible²⁷ specifically condemns such behaviour, foreign jurisdictions²⁸ have still decriminalised sodomy laws to support the change in attitudes of society.

(d) Other loopholes Before the advent of this historic judgment, the enforcement of this section was widely misused by public authorities.²⁹ The absence of any guidelines to the authorities as to the determination of homosexual conduct were and are still missing. One author points out three shocking instances³⁰ where the police authorities persecuted individuals for "suspicious" and "apparent" homosexual behaviour and were denied bail. In substance, the judgment though barring its enforcement against consensual homosexual acts, does not clarify whether the "appearance" of homosexuality can be taken as a ground under Section 377 and entrusts the enforcement upon the whims and narrow definition of morality of the public authorities.

Upon further analysis, in the opinion of the researcher, the use of the term "minority" is misapplied for these sections of the community. The connotation of "minority" revolves around complex issues of special recognition whereas in essence, the purpose of this judgment is to depolarise these groups and cause their integration into the society.

The issue of the determination of appropriate age for the purpose of consent also causes concern since the judgment defines such age as 18 but a "marriageable" age for consensual sex remains at 21.³¹ However, in the opinion of the researcher, this question is of trite importance as once the age of majority (18 years) is attained, want of consent should not be an issue.

Conclusion "Opening the Pandora's Box" The effect of this judgment goes against the jurisprudential theory propounded by Rousseau that the General Will prevails over that of the individual. Even though Lord Devlin vehemently argued that such prevalence of individual will lead to negating the State's right to suppress a social vice³², the conclusion remains that such has become the law of the land. What this judgment should have clarified is the extent of application of this judgment.

Uncertainty looms over the application of this judgment within the jurisdictions of other High Courts. Jurisprudence says the application of this judgment should apply to all jurisdictions since it is a question of constitutional interpretation decided in a writ petition. The Seventh Schedule highlights a dichotomy between matters of public order (measures of enforcement done by public officials prescribed in List II i.e. within the exclusive powers of the State) and matters relating to criminal law including IPC (interpretation/application of criminal law as per the needs of the Centre and the State prescribed in List III i.e. the concurrent list). Accordingly, since the officials of a State (matter of exclusive State jurisdiction) respond to the jurisdiction of their respective High Courts, this judgment cannot apply elsewhere. On the contrary, precedent says this judgment will have effect in the entire country.³³

There lies a difference in the position of rule versus ruling³⁴ i.e. the position of law versus the application of law. An expansive interpretation to Article 226(2) provides for application of the declaratory order made even outside the territories of the High Court.³⁵ However, this position will only be laid at rest when the Apex Court adjudicates upon this matter.

The matters posted in the Hon'ble Supreme Court³⁶ also highlight and exploit the various loopholes. The petitioner in the Apex Court has highlighted that the effect of this judgment has served as the opening of the Pandora's box by providing a legitimate platform for same-sex marriages,³⁷ and nullifying the effect of the Immoral Traffic (Prevention) Act, 1956.³⁸

In conclusion, though this judgment is well researched and reasoned and certainly requires a deserving mention in the annals of history, some abovementioned inconsistencies may erode the true spirit and intention of the judgment and render its effect incongruous.

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- (2009) 160 DLT 277 (Del)

- Dias: Jurisprudence (5th Edn. 1985), pp. 336-37.

- Bentham's utilitarian theory of "utility" and "pleasure and pain" has also been equated with the situation analysed by an eminent jurist, Shri Ram Jethmalani on his blog at <http://www.ramjethmalani.com/blog/>.

- David Dyzenhaus and Arthur Ripstein (Edited), Law and Morality: Readings in Legal Philosophy, (2nd Edn., University of Toronto Press, 2001, p. 45).

- Buggery as is known under the English Law, namely, Section 12(1) of the Sexual Offences Act, 1956.

- Examples of these have been provided in the judgment in paras 7, 18, 21, 22, 50, etc. dealing with the cases of police oppression not reaching the stage of trial. Also, there are only two reported cases which took place in 1920 and 1930 in which private homosexual acts of individuals were penalised as pointed out in "Section 377 and the Dignity of Indian Homosexuals", Alok Gupta, Economic and Political Weekly, 18-11-2006.

- Amod K. Kanth, "Legalising Homosexuality: A Counter View", Institute of Juvenile Justice, September 2008. This article pointed out that from a survey of 18,200 children taken in the National Study on Child Abuse, 51.9% victims of various forms of sexual abuse including sodomy were male children.

- The judgment fails to provide a reference to the Constitution of the Republic of South Africa where, for the first time, a constitutional acceptance of non-discrimination of people with different "sexual orientations" was provided.

- This report recommended the rewording of "rape laws" and changing them in toto including the laws relating to rape and sodomy and making them more gender neutral. Paras 83 and 84 of the judgment.

- Para 94 of the judgment also highlights that this section has the effect of branding every member of the LGBT community as "criminals".

- Para 88; Budhan Choudhry v. State of Bihar, AIR 1955 SC 191 : 1955 Cri LJ 374 ; Deepak Sibal v. Punjab University, (1989) 2 SCC 145 : 1989 SCC (L&S) 284.

- Para 105; Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.

- Justice J.S. Verma, Retd. Chief Justice of India, in his opinion stated that there was no need to differentiate between public and constitutional morality in the judgment.

- Para 116; the learned ASG tried to point out the difference between judicial review and judicial self-restraint.

- Anil Kumar Sheel v. Madan Mohan Malviya Engg. College, AIR 1991 All 120, para 15; Kailash v. State of Haryana, 2004 Cri LJ 310 (P&H), para 8.

- Hart has argued that the "right of undisturbed performance of private consenting acts is more important than the

immorality of the act" (H.L.A. Hart, (1963): Life, Liberty and Morality, Oxford University Press.

- V. Elanchezhian, "In Defence of Section 377 IPC: A Constitutional Auditing", published in the articles section on .
- Oral sex and sexual activities through other orifices have been included by precedent in "unnatural offences"; Para 4; see also, R. v. Jacob, 1817 Russ & Ry 331 : 168 ER 830 (CCR); Govindarajula, In re, (1886) 1 Weir 382; Lohana Vasantlal Devchand v. State, AIR 1968 Guj 252; Calvin Francis v. State of Orissa, (1992) 2 Crimes 455; Brother John Antony v. State, 1992 Cri LJ 1352 (Mad).
- In popular language it means fear and dislike of homosexuality and of those who practice it. The word, which may have been coined in the 1960s, was used by K.T. Smith in 1971 in an article entitled "Homophobia: A Tentative Personality Profile". In 1972, George Weinberg's book Society and the Healthy Homosexual defined it as "the dread of being in quarters with homosexuals".
- Para 94 of the judgment.
- P.S.A. Pillai, Criminal Law (9th Edn., Lexis Nexis Butterworths, p. 735).
- In the recent hearing in the Supreme Court on 17-9-2009, the Attorney General has left it upon the Supreme Court to decide the stand rather than provide a definite stand themselves.
- "Government Resolve to act on Section 377, Hits Deoband Hurdle (Moily's U-Turn on Anti-Gay Law)", The Times of India, New Delhi, 30-6-2009.
- The special leave petition in the Hon'ble Supreme Court has been filed by Suresh Kumar Kaushal, who is the spokesperson of Baba Ramdev, Suresh Kumar Kaushal v. Naz Foundation, SLP (C) No. 15436 of 2009.
- <http://mnkkannan.blogspot.com/search/label/Homosexuality>.
- Shri Ram Jethmalani on his blog mentions that the omissions seem "deliberate", <http://www.ramjethmalani.com/blog/>.
- <http://mnkkannan.blogspot.com/search/label/Homosexuality>.
- There are innumerable references and hence to state a few: Leviticus 18:22, 20:13; Deuteronomy 23:17.
- Jurisdictions having predominantly Christian base like United States, England, Australia, Canada, etc. have decriminalised sodomy laws either by specific legislations or judicial interpretation.
- Evidence of this has also been provided in parts of the judgment of instances of police harassment, Paras 21 and 22 highlight the Lucknow and the Bangalore incident; supra, n. 5.
- Queen Empress v. Khairati, ILR (1884) 6 All 204, Nowshirwan v. Emperor, AIR 1934 Sind 206; D.P. Minwalla v. Emperor, AIR 1935 Sind 78.
- Section 5(iii) of the Hindu Marriage Act, 1955.
- Observations of Lord Devlin as quoted by Cross and Jones in their Introduction to Criminal Law, 9th Edn., pp. 18-19.
- Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254; see also, "Will Delhi HC Gay Order Apply Across India?", The Times of India, New Delhi, 3-7-2009.
- The present view is not that of the researcher but propounded by Mr Shivprasad Swaminathan, B.C.L. (Oxon), currently pursuing his Doctorate from the University of Oxford in Jurisprudence.
- Upon interpretation, Section 226(2) says any High Court can issue directions to the Government of any other State even though the seat of the Government is not within the jurisdiction of that High Court.
- Suresh Kumar Kaushal v. Naz Foundation, SLP (C) No. 15436 of 2009.
- The petitioner brings to the attention of the Court that from the time between 2-7-2009 of the date of pronouncement of the judgment to 20-7-2009 of the date of hearing of SLP in the Hon'ble Supreme Court, seven same-sex marriage cases have been reported.
- The petitioner argues that the judgment will lead to "gay prostitution" and "gay brothels" where private consensual acts be allowed, therefore nullifying the effect of the Immoral Traffic (Prevention) Act, 1956.