SUPREME COURT'S NAZ JUDGMENT: AN UNEQUAL INTERPRETATION OF DOCTRINE OF EQUALITY

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Abstract

The Supreme Court's judgment on the Naz Foundation case showed us a very weak form of judicial review opted by our apex court. We also witnessed how a group of our nationals and citizens constituted were denied the equal protection of law which by the way is the fundamental right and part of the *'Golden Triangle' mentioned* in Article 14 of the Indian Constitution. On the reasoning of very less number of people constituting the community of homosexuals. In this work the author will be engaging in the comparison of both Delhi High Court and Supreme Court's Judgment of the same case and will be critiquing the apex courts judgment on the touchstone of *'Doctrine of Equality'.*

Keywords: Doctrine of Equality, Weak Form of Judicial Review, Strong Form of Judicial Review, Equality, Liberty, Constitutional Legitimacy, Moral Legitimacy.

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INTRODUCTION

"There is a higher court than court of justice and that is the court of conscience. It supersedes all other courts"

- M.K. Gandhi[1]

In authors view this court of Gandhi fits aptly after the Hon'ble Indian Supreme Court's judgment in the case of *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors.*, better known as the Naz foundation case; the judgment which raged the spark of doubt on the conscience and rationality of the apex court which reversed the judgment given by the Delhi high court in the same case. But why did this judgment of the court attracted so much of attention of many; that when given by High Court people cried in joy and later in sorrow when delivered by the apex court.

If seen from a leman perspective it was a judgment over the legalization of homosexuality, but there is a reason that Delhi High Court judgment was acclaimed in the legal sphere and the same case judgment given by the S.C. was equally criticized; the reason being the acknowledgement of the equality rights to the group of people who have to live hiding their sexuality or in some peoples view their identity. The discourse of Justice A.P. Shah was acclaimed because of his understanding and acknowledging the need of change of social mindset of India which shall be starting from court to provide legal reinforcement but the apex court flipped the coin using the morality aspect to keep on the age old social thinking of considering the homosexuals as a plague.

In this work, the author will be attempting to create a discussion on the subject of the doctrine of equality in context of homosexuality in India. Which at present we can see is almost nonexistence, hence questioning the conscience of the apex court in delivering the judgment which has not only be deemed shameful but also has shown that there is lot to be done to call us a nation of developed mind.

THE OBNOXIOUS STAND

On July 02, 2009, the Indian as well as international news channel exploded with the scene outside the Delhi High court where hordes of people were bursting into tears of joy and the whole of the nation has been wrapped into the debate of judging the judgment of the court . The judgment, which announced Sec. 377 of I.P.C. to be in violation of the equality doctrine, which is a fundamental right of the citizen of India under Art. 14 of, the Constitution of India.

In the legal sphere, especially the academicians applauded A.P. Shah for the judgment he delivered rendering Sec. 377 void in and around Delhi, as of finding Sec. 377 I.P.C. being in violation of Art. 14, 16, and 21; all right is being in chapter: III of the Constitution of India, meaning hereby that these were the fundamental rights.

[1] Available at: http://thinkexist.com/quotation/there_is_a_higher_court_than_courts_of_justice/216419.html

Coming back to the topic of concern; this judgment was applauded for its interpretation of the doctrine of equality. The interpretation which helped to prove that the canonical and stereotyped view of a particular view shall not receive any backing up from the law in this modern world and that these public moralities is not in itself is not a valid justification for restriction of any above mentioned fundamental rights. Quoting the paragraph of the judgment will help one better to understand what the judge and the author here want to explain:

"88. The scope, content and meaning of Article 14 of the Constitution have been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e., causal connection between the basis of classification and object of the statute under consideration...In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable."[2]

Here one can observe the broad and constitutional spectrum that the court of law has taken to resolve this issue. The spectrum of constitutional morality over public morality to grant the protection of law to the minority people rather than using a law to coerce them. The court here can be seen calling the cause of action from the side of respondent illogical, unfair and unjust; because of not being able to clear the needed conditions for calling the cause of action of the respondent a restriction over the fundamental right of equality.

Justice A.P. Shah here took the interpretation which in the view of most was the best; interpreting the word *'Sex'* as not only in its literal meaning of sexual intercourse but rather deemed it as a different group of people based on their sexuality. Thos interpretation of the justice has rather been very helpful in justifying the courts stand on the issue. In various part of the judgment, the court can be seen making the same argument and specially in paragraph 93 of the judgment used the *'Declaration of Principle of Equality'* to state that Sec. 377 IPC does indeed is against the doctrine of equality and amount to the harassment. The court defined equal treatment as follows:

"EQUAL TREATMENT Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality, it is necessary to treat people

[2] Naz Foundation v. Govt. of NCT of Delhi; 160 DLT 277 (2009); Paragraph: 88.

differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals. …"[3]

Quoting various judgments both foreign and domestic cases the High Court of Delhi passed the judgment of scraping down the part of sec. 377 IPC till the extent of it affecting the private life of consenting adult.

But this broad view judgment of the court was not long lived as on December 11, 2013; the High Court's judgment was reversed by the Supreme Court. But not to be mentioned in a rather escapist manner where in the conclusion of the judgment all the burden of change in law was transferred to the legislature of the nation. Hence, calling the judgment only a verdict over the correctness over the judgment delivered by the high court.

The apex court in its judgment has mentioned numerous times about the law being against the act in itself and that the mere probability of it getting abused shall not be making it objectionable. In authors view, the popular morality influenced mind of the apex court failed to see several of the flaws in the judgment delivered by them which will be dealt in the succeeding section of the paper.

Therefore coming back to the subject of the work; the author would like to bring in the limelight the narrow use of one's consciousness in matter of law relating equality; where the court have denied a particular group of people the protection under Article 14, a fundamental right and in effect of it we have seen how various other fundamental rights of these people of sexual minorities have been violated. The court in its judgment said that:

"43. While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."[4]

The apex court here can be seen denying the homosexual people the fundamental rights they are deemed to be given being the citizen of the state. But just because the reported orders of the court shows a very small portion of the population constituting the group of homosexuals; the apex court came to a conclusion that it will not be a sound basis for them to call an archaic rule backed by religious values and morals unconstitutional. In spite of paying the cost of denying these sexual minorities the rights they should be getting being a citizen of the Union of India.

It seems that in the mind the court have decided what judgment they have to give rather than what they should be giving, the stand of the apex court in this judgment has shown an immaturity by calling Sec. 377 I.P.C. constitutional in a democratic state. Completely

[3] Ibid.
[4] *Suresh Kumar Koushal & Anr.* v. *Naz Foundation & Ors*; (2014) 1 SCC 1; Paragraph: 43.

denying the fact that there are misuse of this law to harass and coerce the people of these sexual minority communities and also who are not belonging from this community at all. It's shameful to witness that the court has denied all the contention raised by the respondent in the case even on the ground of the safety of the homosexuals from not only societal harassment they have to face but also from the plight of the disease they can communicate and spread because of maintain their secrecy.

THE CRITIQUE

Just as the judgment was delivered, the news sources got flooded with the critique of the judgment. The critique which was not limited to a national level, but even attracted several scholars and other people's attention at the international level. In the following section the author would be attempting to critique the judgment delivered by the Apex Court on various constitutional doctrine and comparing the judgment of the Supreme Court with that of the one which the very same judgment over ruled; the Delhi High Court's.

WEAK FORM OF JUDICIAL REVIEW

Some called it politically influenced, some a religious judgment, but one thing which we found in common too many was; calling the judgment of discussion *'Naz Judgment or Naz Case'* an example of *'Weak Form of Judicial Review'*. Hence, the first contention we will be dealing with.

Mark V. Tushnet defines weak form of judicial review as:

"…a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run."[5]

As we can infer from the judgment, the Indian Supreme Court did opted for a legislative revision of Sec.: 377 I.P.C. rather than scrapping it our or some of its part using the constitutionally granted power of judicial review. This decision of court; opting for a legislative change to be bought in the law rather that practicing their own granted powers is the example for the weak judicial review.

Whereas; we have also observed that the Delhi High Court took a *Strong Form of Judicial Review* approach. Mark Tushnet said that it is the approach where the court of law has the final and unrevisable interpretation and meaning of the constitution, where the executive and legislature don't have substantial role in forming of the court's opinion.[6] The reason of saying that the Delhi high court opted for the stronger form of review is the core aspect of it ready to use doctrine of severability on Sec. 377 I.P.C. to give the homosexuals the right and equal treatment and protection of law which the constitutions grants to its citizen but the law in question was depriving as well as abusing these minority people in this so called modern world with modern thinking.

[5] Weak Form Judicial Review and "Core" Civil Liberties, By: Mark V. Tushnet; 41 Harv. C.R. C.L. L. Rev. 1-22 (2006).
[6] *Ibid.*

But here the main question is; except to the word *'weak'* being used here is there any more consequential result of it? Mark Tushnet answers it in yes. He in his work has clearly stated that this form of review by any judiciary is inappropriate for core constitutional rights, especially the right against discrimination. Tushnet has compared the weak review with strong review and has come to conclusion that how this gave the legislature an in proportionate power where they can come up with their own constitutional power and stick with it. This interpretation might not be the same as the recent judicial interpretation and may even be completely opposite of what interpretation judiciary has come up with.

We can see this happening (legislative interpretation not synchronizing with popular thinking) in the present situation post Naz judgment and not only in the context of homosexuality but various other subjects too. Taking the recent instance of Beef Bann Laws; here we have seen how a legislative intent of the Maharashtra Animal Preservation (Amendment) Act, 2015 has raised a tussle between different groups in the nation. How one particular intent has shown a potential of sidelining and depriving numerous people of different groups from their various fundamental rights. Here we can clearly witness the gap of thinking both legislature and judiciary have and why we need this power tussle of interpretation of law to be balanced among all (legislature, Judiciary and Executive).

EQUALITY OR LIBERTY?

Now after dealing with the form of review our apex court has taken, lets come to the core topic of our paper; doctrine of equality and homosexuality. In the context of a constitutional law; two topics have always been seen running side by side and there has been seen a tussle between the government and civilians for the same; Equality and liberty. Where liberty has been seen as safeguarding the unfettered expression of individuality in all its form, equality on the other hand has been understood as: A set of limitations on human actions.[7] A proper definition of the same could be taken from the one propounded by R.H. Tawney, who said that:

"Equality implies the deliberate acceptance of social restraints on individual expansion. If liberty means, therefore, that every individual shall be free to indulge without limit his appetite (for wealth and power), it is clearly incompatible not only with economic and social, but with civil and political, equality"[8]

Here, one can observe that both these terms; Equality and Liberty are being used as a counter balance to each other. Where liberty is acting as the individual freedom of doing as an individual wills to do; Equality, on the other side has to be taken as the limitation or social restraint over individual expansion, i.e.: Liberty.

But what is the need of mentioning there here, in the context of Naz Judgment?

[7] The Merging Concept of Liberty and Equality, By: Richard B. Wilson; Washington and Law Lee Review; Volume: 12, Issue: 2.
[8] Tawney, Equality, (1931) Page: 238.

In author's point of view, the importance is to differentiate as well as see the scope of individual expression and social restraint over each other and the symbiotic existence of the same. When one go through chapter: III of the constitution of India; Fundamental Rights, one could see that each and every rights carry their own limitations. Some common to others, other distinctive. The need for these limitations is to control the individual expansion of rights and self-expression in a social stage. These limitations were primarily said to be set to maintain a social decorum and peace and tranquility over the society.

But the question arises here is what if the situation became vice versa; meaning: what if these limitations started to overpower the individual liberty guaranteed as a right by the constitution?

This is generally seen in the constitution with less of constitutionalism. But what is constitutionalism? In the simplest it has been defined as an idea that the government should be legally limited in its power, and that the government's authority and legitimacy depends on them observing these limitations.[9] The recent example for this can be seen in the Jasmine Revolution 2011; where the pre revolution Tunisian Government was over thrown by the revolutionaries and one reason for the revolt was the excessive interfere and control of the government on the constitutional guaranteed rights of its citizens by enforcing the limitations over the same rights.[10]

Hence, now we know that there is always a need to limit any rights guaranteed but even those limits shall be subject to certain restriction with the main aim of social welfare, including the maintenance of its peace and decorum. So what stand should one take after Naz Judgment? Should one go through the Delhi High Courts broad interpretation or should one follow the morally backed interpretation of the apex court?

CHECKING THE LEGITIMACY OF THE LEGITIMIZING AUTHORITY

In authors point of view; one should answer this question with a legal and constitutional view point, rather than taking a moral one. Why? Because we are talking about a secular constitution, which shall be free from any religious connotation or any particular groups morality. In the case of Naz judgment one point which was constantly raised was the questioned law being having canonical connotation in it; which was condemning and non-natural sexual intercourse among the consenting humans. This non-natural sexual intercourse includes any sexual act among consenting human beings which are not resulting in the procurement of a child in normal course of nature.

R. Fallon talked about three kinds of constitutional legitimacy[11], which were:

1) Legal Legitimacy,
2) Social Legitimacy &

[9] http://plato.stanford.edu/entries/constitutionalism/
[10] http://www.orsam.org.tr/en/enUploads/Article/Files/20141016_maria.syed.pdf
[11] http://www.righttononviolence.org/mecf/wp-content/uploads/2012/03/Legitimacy-and-the-Constitution.pdf

3) Moral Legitimacy.

In the Naz case, the apex court invoked the most disputed and controversial; Moral Legitimacy whereas the High court opted for the Legal/ Social Legitimacy. But then what is the problem with a court opting for a different perspective than the one opted before?

The problem doesn't lies in what perspective one is opting, but the problem lies in when and where they are use it. In the present instance, The Delhi High Court bought legal and social legitimacy in use by attempting to scrape drown part of Sec. 377 of I.P.C. and hence, getting it a social legitimacy where consenting adults can indulge in the non natural sex in their privacy without the fear of any sanction by law.

But the apex court opted to use moral legitimacy for delivering the verdict of the case. One should know that moral legitimacy generally overlaps to the religious and traditional authority of the society. Generally the practitioners of legal field tent to cease themselves from using this course of legitimacy but this was not the situation in the Naz case.

Therefore now we can see that; because of analyzing a sensitive situation on the moral ground of a non-minor group to judge the morality of a minority group can end up in a drastic consequence of the latter being denied their fundamental rights and not being treated equally in the same society as them.

CONCLUSION

In the conclusion, the author would say that with the changing era and time, we are changing, but some aspect of our life has remained constant and primitive especially our mindset over minority groups is it race, caste, sex, or sexuality. The same drawback was witnessed by us when the apex court declared Sec. 377 I.P.C. constitutional and even expressly denied the homosexual citizen of our nation their fundamental right to equality; on the mere ground of very less number of cases being known to be filed concerning them.

By this work, the author has attempted to compare and critique the judgment delivered by Delhi High Court and the Supreme Court of India and critiqued the latter on the ground of the form of judicial review and their approach of dealing with the present matter.

It is not just us who have face a legal situation regarding homosexuality in the recent times. Various other jurisdiction including U.S.A. have faced similar situation, and upholding the legal principle over the moral one various jurisdiction including U.S.A. have legalized and recognized the homosexuals as part of their constituent population, and have not only given them legal recognition and protection, but has also attempted to change the social mindset of the people. The best example for the same would be the recent case of Obergefell *v. Hodges*[12] in the American Supreme Court; here the apex court of America in a 5:4 decision held that the fundamental right to marry does not exclude same sex marriage, and it is guaranteed to

[12] 135 S. Ct. 2584

the same sex couples (Homosexuals) by both *Due Process of Law* and *Equal Protection Clause* or *Doctrine of Equality*.

Last but not the least, the author would stress on the point that in his view which is following the view of Mark Tushnet; the courts shall refrain themselves from using the weak form of judicial review when they are facing the issue of core and contemporary rights which are guaranteed by the constitution because there was a reason the judiciary has been given the power to question the step of both Executive and Legislature for the Societal welfare, and they shall attempt to go for a societal and legal legitimacy rather than that of a moral one cause morality being a very subjective word will differ from one person to another depending on what group they are affiliated from, and in a secular state like India where the constitution expressly mention the legal distinction for minorities to be legally binding; a minority group based on their sexual preferences shall also be recognized without getting any religious or societal thought getting in the way of justice.

As was mentioned in the very beginning of this work; consciousness supersedes all the court. Hence, for the delivery of justice and for bringing a positive societal change one need to use their consciousness and choose the sides they want to take. In the present context of discussion; the fake morality which denies a particular group of people the right they deserve or the side where we upheld the rule of law and give them the equal protection of law and equal value in comparison to all the other citizen of the state.