

“Case Analysis of Suresh Koushal and Others VS. NAZ Foundation and Others”

Deepak Kaneriya
NLIU, Bhopal

India is as we know is multi ethnic and culturally rich as well as diverse country. Hindu religion always adopts new ideas and thus progressive in nature and had a place for every person irrespective of their caste, language, gender. It had a very rich history of sexuality or rather homosexuality¹. Even in mythologies like Ramayana² and Mahabharata³ we can find instances of homosexual acts. Even Hindu deities connected with gender variety such as Aravan⁴ and Caitanya Mahaprabhu.⁵ So homosexuality was a very much part of ancient literature and society.

In author opinion to consider a homosexual act as “immoral is a “colonial” concept because English law is based on Judeo- Christian morality⁶. It recognized sexual intercourse in purely functional form i.e. for procreative purposes.

I. INTERNATIONAL PERSPECTIVE:

Many international organizations who advocate human rights recognized the need to protect the homosexuals and transgender. International law and conventions concern with the rights of sexual minorities gained momentum after the decision in *Toonen v. State of Tasmania*⁷ in which the Human Rights Committee held that the anti-sodomy statute (very similar to Section 377 of the IPC) violated the rights to privacy. Constitutional court of South Africa⁸ has declared the anti sodomy statute unconstitutional as it violated the rights to privacy and dignity of homosexual people. However in most of the countries Homosexuality is still seen as something, “abnormal”. Moreover to adopt a denying approach to human rights from the perspective of protection of minorities seems to be a difficult task.⁹ It is common assumption that minorities rights should be protected judicially I.e. through judicial pronouncement. Everyone in fact is entitled for fair and equal treatment irrespective of their gender, race, language, religion, sex.¹⁰ So every person is

¹ The sculpture in the temples of khajuraho

² Incident when ram went for exile

³ Shikhandi used by pandvas to defat bhism pitamah

⁴ A hero whom Krishna married after becoming a women

⁵ An incarnation of radha and Krishna combined.

⁶ Petitioner’s submission in *NAZ Foundation v. Govt. Of NCT of Delhi*.

⁷ U.N. Doc CCPR/C/50/D/488/1992 (1994)

⁸ Justice Ackermann in the *National Coalition for Gay and Lesbian Equality v. The Minister of Justice*.

⁹ Campbell, Ewing and Tomkins, “skeptical essays on human rights”(oxford university press 2001) p. 277

¹⁰ Article 2 of universal declaration of human rights 1948 read as “everyone is entitled to all the rights and freedom set forth in the declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

entitled to be also providing with right against interference with persons fundamental rights, namely arbitrary interference with ones privacy.¹¹

II. SEXUAL ORIENTATION AND INTERNATIONAL HUMAN RIGHTS LAW

International human rights law on the homosexual right and sexual orientation are clear and settled. ICCPR (International Covenant on Civil and Political Rights, which India acceded to (ratified) in 1979) provided that laws that criminalize same sex behavior violated the human right to freedom from non-discrimination and the human right to privacy.¹²

The Committee noted that reference to "sex" in the non-discrimination clauses of the ICCPR - Articles 2(1)¹³ and 26¹⁴ - should be taken as including "sexual orientation", thereby setting out that the rights set out in the ICCPR cannot be denied to any individual because of their sexual orientation.¹⁵

III. THE YOGYAKARTA PRINCIPLE

Yogyakarta principles are comprehensive and coherent principles for the application of international human rights law in relation of sexual orientation and gender equality. This principle identifies as on state to protect the Human rights violations and denial of fundamental rights, freedom from torture and safety and security of person.¹⁶ Preamble of Yogyakarta principles specifically and explicitly mentioned that no one shall undermining the integrity and dignity of people because of their sexual orientation.

IV. POSITION IN USA AND UK

In 1986 Supreme Court of United States in *Bowers v Hardwick*¹⁷ held persons who commit sodomy are not protected within the law related to privacy.

In *Romer v Evans*¹⁸ Supreme Court upheld an amendment unconstitutional that prohibit state and local government from enacting any law, regulation, or policy that would, in effect protect the

¹¹ Article 12 reads as “no one shall be subjected to arbitrary interference with his privacy, family home or correspondence, or to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

¹² Article 17 of ICCPR reads as: no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.

¹³ Article 2(1) of ICCPR reads as: each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁴ Article 26 provided that: all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination

on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁵ *Toonen v. Australia*, (Views on Communication, No488/1992, adopted 31 March 1994, UN Committee on Human Rights).

¹⁶ Flaherty and fisher john : “sexual orientation, gender identity and international human rights law”-contextualizing the Yogyakarta principles (human rights law review :oxford university press)

¹⁷ 92 L. Ed. 2d 140 (1986)

¹⁸ 134 L. Ed. 2d 855 (1996)

civil rights of gays, lesbians and bisexuals. Many criticize Supreme Court for their verdict but however in *Lawrence v Texas*¹⁹ in 2003 supreme court held that intimate consensual sexual conduct is the part of liberty and 'due process', protected by 14th amendment²⁰.

Same sex marriage

Ten years after the *Lawrence v Texas*, united state Supreme Court In *United States v Windsor*²¹ court held that Section 3²² of defense of marriage act by is unconstitutional as it deprive person from 'liberty in marriage, protected by Fifth Amendment'. Court held that government should recognized the same sex marriage where it has been legalized, and provide liberty and federal rights, and privileges.

Abolishment of "don't ask, don't tell" policy

The term "don't ask and don't tell" was coined after President Bill Clinton in 1993 directing military personnel "don't ask, don't tell and don't harass homosexual military officer. So practically this policy lifted a ban on homosexual services that has been imposed during World War 2. The policy has officially been ended on September 2011.²³

V. POSITION IN UNITED KINGDOM:

Before and during the formation of UK, Homosexuality or same sex sexual activity was considered as sinful under the buggery act 1533, person accused punished with death. Until 1954 homosexual acts were considered as criminal offence under British law.

Wolfenden Committee: To consider UK law relating to "homosexual offence" a committee had been setup. It submitted report (known as *wolfenden* report) concluded that criminalization of 'homosexual acts' is the encroachment on civil liberty.

Sexual Offence Act 1967: The decriminalization of male homosexuality had to wait until the more liberal condition and circumstance of the late 1960s. House of Lords in 1965, *Lord Arran* advanced a motion in favor of implementing the recommendations of the Wolfenden Report. The sexual offence act 1967 was accordingly passed and received royal assent on 27 July 1967. Though act provided decriminalization of homosexual acts under the conditions given below:

- I. The act should to be consensual

¹⁹ 156 L. Ed. 2d 508 (2003)

²⁰ 14th amendment of US constitution reads as: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

²¹ 133 S.ct.2675

²² Section 3 of defense of marriage read as: in determining the meaning of any act of congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the united states, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

- II. Act had to be take place in private.
- III. involve person not below the age of 21.

Current position

Same-sex marriage was legalized in England and Wales in 2013, followed by Scotland in 2014, which are both expected to come into effect later in 2014.

I. HISTORICAL BACKGROUND OF SECTION 377 IPC

In 17th – 18th century India was a British colony. British scholars drafted penal law according to their morality and what they think as right or wrong. “Buggery” law was basically an ecclesiastical law, so certainly there was no innovation in wording. Buggery law goes through transformation and in 1860 it was reformulated as *unnatural intercourse* in penal code of India 1860. Section 377 of Indian penal code deals with carnal intercourse “against the order of nature.” Now one of the important questions is what constitutes “against the order of nature”? What constitute “an order of nature” is very important as well as deciding factor to prosecute a person under section 377 IPC. In general sense it is a theological and sociological view of how society should be ordered and conduct.

Justice Michael Kirby²⁴ expresses that criminalization of private, consensual act are the legacy of similar criminal penal code drafted by Macaulay (Indian penal code 1860) and James Fitz James Stephen (Indian evidence act 1872). Through these laws British crown imposed imperial rule on colonial people, Kirby opine that such laws are wrong.²⁵

II. LEGISLATIVE INTENTION BEHIND SECTION 377 IPC

In reality Indian penal code was not entirely British code rather an Indian code inspired and influenced by British law. Jeremy Bentham (1746-1843) best knew for his support in entire codification movement in 19th century around 1785 he wrote an essay titled as “*Offences against one’s self*” which was unpublished until 1978. Jeremy Bentham in his essay seems to be against criminalization of same sex act. Macaulay through Indian penal code tries to expend the buggery law of England by protecting person from any touch intended to gratifying “unnatural lust.”

III. INDIAN PERSPECTIVE WITH RESPECT TO HOMOSEXUALITY

Judicial decision defending the rights of transgender generally considered as illegitimate judicial activism.²⁶ Though now we are witnessing a gradual change in the underlying structure of sexual inequality. Today gay “culture”, “community” and “identity” are more common in discussion.²⁷ Now if we critically and comparatively analyze *Suresh Kumar Kaushal v NAZ Foundation*²⁸ with *Shatrughan Chauhan v Union of India*²⁹ then one thing is clear that Supreme Court is

²⁴ Former judge of Australian high court

²⁵ Kirby Michael AC CMG at 16th national commonwealth law conference, Hong Kong, 8th April, 2009 on Homosexual law reform: an ongoing blind spot of commonwealth of nations.

²⁶ Keck Thomas K., “Beyond Backlash- Assessing the impact of judicial decisions on LGBT rights” Wiley law and society review Vol.43, No.1 (March 2009)

²⁷ Goodman Ryan, “beyond the enforcement principle: Sodomy laws, social norms, and social panoptic”(California law review: volume 89, number 3, may 2001)

²⁸ Civil appeal No. 10972 of 2013(2013)

²⁹ , (2014) 3 SCC 1

paradoxical in *its reliance on foreign cases and jurisprudence*. In many cases the court was visibly very keen to protect the human rights of persons responsible for heinous crime. Supreme Court even relied on foreign precedent and judgments.³⁰ The same court went just opposite in NAZ foundation case³¹ and criticize Delhi court³² for extensively relying upon “the judgment of other jurisdiction” in its disquiet to protect the “so-called”³³ rights of LGBT persons.³⁴

Supreme Court justify and upheld that “the right of privacy is not treated as an absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or “Morals “or protection of rights and freedom of others with others”.³⁵

Though Morality is very subjective and it does differ from person to person. Nick Robinson³⁶ in his observation pointed out that internal working, conflict, structure of Supreme Court is misleading because any given bench of supreme had own interpretation of law then other bench. He pointed out that certain judges are known for their aggressive intervention when they saw flaw in governance, while other judges barely sanction intervention.

IV. FLAWS IN SUPREME COURT JUDGMENT

Maintainability issue:

Article 136 of Indian constitution reads as: *special leave to appeal by the supreme court- (1) Notwithstanding anything in this chapter, the supreme court may, in its discretion , grant special leave to appeal from any judgment, decree , determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

(2) Nothing in clause (1) shall apply to any judgment, determination, Sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces.

Supreme Court in a case held that “It is true that strictest vigilance over abuse of the process of the court, especially at the level of the Supreme Court, should maintained, and ordinarily a private party, other than the complainant, should not be permitted to file an appeal.”³⁷

But Supreme Court accepted his claim that as a citizen he had a moral obligation and duty to protect Indian society. One thing which can be deduced from Supreme Court statement was that, Supreme Court had pre existing notion of treating Delhi high court judgment as “inappropriate” and not within moral of majority.

Double standards of Supreme Court to protect the moral “majority” and “homophobic”.

³⁰ *Ibid.* p.33-34

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*

³⁴ Shivshankar goutham and parthsarthy suhrit,”condemned to die, but not to wait”
<http://www.thehindu.com/opinion/lead/condemned-to-die-but-not-to-wait/article5653592.ece> Accessed at 1:12 AM on 14/2/2014

³⁵ *Mr X. vs Hospital Z* (1998)8 SCC 296

³⁶ “Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts”:*American Journal of Comparative Law* 173 (2013)

³⁷ V.N.Shukla, *The Constitution On India*(11th Edition,Eastern Book Company,Lucknow)(2011)

Supreme Court went to cite many cases without linking fact of those cases to instant .Supreme Court on one hand relied on various foreign authorities and judgment and commutes the death sentence to life imprisonment.³⁸ On the other hand it criticizes the Delhi high court for relying extensively on various foreign authorities.

Court in visakha case not only made law but also relied on the foreign convention (to which India ratify) namely CEDAW (convention on the elimination of all forms of discrimination against women). But in the instant case Supreme Court neither protects the right of homosexual by way of judicial activism nor through wide interpretation of article 14, 15 and 21 nor it relied on the foreign convention. On the part of legislation it is violation of article 253 of Indian constitution which empowered parliament to make law for the whole or any part of the territory of India.

Fails to apply intelligible differentia test under article 14 of constitution

Article 14 guarantees to every citizen the right to equality before the law or the equal protection of law. There are two expression of article 14 one is ‘*equality before law*’, is a declaration of equality of all persons within the territory of India, it implies that no one should have special privilege another expression is ‘equal protection of laws’ it is a corollary to first expression³⁹.

Section 377 and article 14

Supreme court applied the test to the section 377 and find that it does create a classification: “between carnal inter-course ordinarily and carnal intercourse against the order of nature”, then go on to state that the high court was not right in declaring Section 377 ultra vires of Articles 14 and 15. Actually Section 377 IPC itself is very conflicting because founding fathers of Penal code never define what is “within the order of nature” and “what is against order of nature”. Though the doctrine, no doubt, talks about rational classification; but what makes classification rational is that there is a demonstrable nexus between the class and Objectives of the law. The objective of the law here was to discriminate between those who had carnal intercourse against the course of nature and those who had carnal intercourse not so contrary. It is true that sometime “rational” may not be reasonable⁴⁰ so classification that renders certain number of people right less may count as “rational” but for that reason alone can never be called reasonable or even constitutional. So in my view section 377 IPC is discriminatory in nature and it should be deleting or amend because it discriminate person on the basis of their sexual orientation.

V. SUGGESTIONS AND RECOMMENDATION

Amendment in section 377IPC

From the bare reading section 377 IPC of statute we can see that it only mentioned men, women and animal. And it does not include the homosexual, so people generally perceive that the above section only deals with the homosexuals’ acts.

³⁸Shatrughan Chauhan v. Union of India, (2014) 3 SCC 1

³⁹ V .N.Shukla, The Constitution On India(11th Edition,Eastern Book Company,Lucknow)(2011)

⁴⁰ Rawls John: Political Liberalism Columbia University Press, 1993

So in opinion section 377 IPC should:

- I. Need to be gender neutral.
- II. Men and women shall be replaced with 'person' to make it gender neutral.
- III. Section shall define what is 'carnal intercourse within the order of nature and 'Carnal intercourse against the order of nature'.

Another measure would be enactment of Comprehensive civil rights legislation which shall offer sexuality minorities the same protection and rights guaranteed to others (Heterosexuals) on the basis of sex, caste, creed and color. The constitution should be amended to include sexual orientation explicitly as a ground of non-discrimination.

Inclusion in society and state recognition

Indian politician, policy maker are more comfortable to speak up for rights of hijra⁴¹ than the rights of gay and lesbians⁴² but after supreme court judgment⁴³ perception and attitude of Societies had been changed⁴⁴ towards transgender yet they were facing social inclusion problem. Above is the corollary of non recognition on the part of state. In my opinion it is the duty of state to recognize the gender minority. Since transgender are "vulnerable" and they can't stand for their rights so it's the duty of civil societies to promote the interest of transgender.

In India Karnataka is the only state where in 2010⁴⁵ transgender were included in most backward communities. So in that way states now recognized the "gender minority" which is a progressive step.

VI. CONCLUSION

December 11, 2013 will now be remembered as the 'dark hour' in the history of Supreme Court of India because through their judgment⁴⁶ judges turned the clock of justice back by several decades.⁴⁷ So many times we saw the Supreme Court performed the legislative function but in the instant case Supreme Court held that it is the duty of legislature to make and repeal law but I think Supreme Court ignore visakha judgment. On the other hand court gave this judgment to satisfy popular majoritarian morality in a so called 'secular' country. So for that purpose The Court needs to reaffirm its central counter-majoritarian purpose in a liberal democracy. Court also failed to appreciate article 145 of Indian constitution. In a nutshell we can say that it was a

⁴¹ In India, this term is commonly used to denote eunuchs (who come under transgender/transsexual category).

⁴² Narrain Siddharth, "gender identity, citizenship and state recognition" Socio-Legal Review, Vol. 8, Issue 2 (2012), pp. 106-115

⁴³ *National Legal Services Authority v Union of India and Others* WP (Civil) No 604 of 2013

⁴⁴ A research had been conducted by Dipika Jain(LL.B (Delhi), LL.M (Dalhousie), LL.M (Harvard).AssistantProfessor and Assistant Director, Centre for Health Law, Ethics and Technology, Jindal Global Law School)

Research can be accessed at: http://www.jgu.edu.in/chlet/PDF/Report_ImpactFoundation_publication.pdf.

⁴⁵ C.S.Dwarakanath Backward Classes Commission Report 2010. *The Commission Recommended That The Transgender Community Be Included In The Category Of More Backward Communities (2-B) That Would Entitle Them To Govt. Benefit. The Basis For This Decision Was Their Finding That None Of The Persons From These Communities Who They Had Spoken To Got Government Jobs Either In Government Departments Or In The Non-Government Agencies.*

⁴⁶ *Ibid*

⁴⁷ Venkatesan ,.Rajalakshmi And Dutta: Rights& wrongs, frontline (January 2014 issue).

poorly reasoned decision, self contradictory and it was full of bias with regard to the conception of sexuality.