NAZ FOUNDATION VS GOVERNMENT OF NCT OF DELHI AND ORS.[1] SECTION 377 AND WHY THE DELHI HIGH COURT'S JUDGEMENT IS THE WAY FORWARD

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Introduction:

The *Naz Foundation* case is arguably the most important case in recent Indian history and it deals with a subject that is somewhat taboo even in our so called 'modern society' which makes it all the more interesting to analyse. The case was originally dismissed by the Supreme Court in 2004 citing that the petitioner could not challenge the constitutionality of the legislation. Then again the Supreme Court in 2006 through a civil appeal [2]set aside the earlier decision and said that the case should be heard and could not be dismissed on the above mentioned ground and so the case was sent back to the high court to be argued.

The entire case[3] was based around Section 377 of the IPC, which was drafted by Lord Macaulay in the year 1861 and the section reads as such:

'***Unnatural offences. — Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.***

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.'[4]

Petitioner:[5]

The petitioner in this case, Naz Foundation is an NGO which deals mainly in the area of HIV/AIDS and the prevention thereof. They deal with the 'Men who have sex with men' (MSM) domain and what they put forward to the court is that- the gay community is extremely susceptible to the AIDS virus and the fact that they could not receive any sort of help because of the discriminatory attitude shown by state agencies towards the LGBT

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[1] 160 Delhi Law Times, 277
[2] Civil Appeal No.952/2006
[3] WP(C) No.7455/2001
[4] Chapter XVI, Section 377 , Indian Penal Code, 1860
[5] *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277, pg 7.

community under the veil of Section 377 was further hampering their campaign against the spread of AIDS.

They then contended that Section 377 was unconstitutional in the sense that it criminalizes sexual acts which were 'unnatural' even if there was consent from both the parties, hence violating Article 21 of the Constitution. Right to privacy is considered to be a right protected by Article 21 and in order for an individual to truly live his life with dignity- he must be guaranteed privacy for his private actions within his private sphere. This thus includes the right of an individual to choose his or her sexual partner. By criminalizing the LGBT community, Section 377 was essentially violating Article 21-which is a fundamental right guaranteed to each and every citizen of this country. This section causes the LGBT community to face immense social stigma and police harassment which in turn drives the community underground and hence further hampers AIDS prevention and spread.

The next contention was that Article 15 of our constitution, which deals with 'Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth', is meant to be understood in a broad sense. The term 'sex' must not be limited to just gender but also sexual orientation of an individual. Thus criminalizing the sexual orientation of a person was a direct violation of Article 15.

And the last contention of the petitioner was that Section 377 violated Article 19 a,b,c and d of our constitution which essentially prevented a gay person to talk freely about his sexuality and prevented him from moving freely or forming institutions as a gay person.

Hence, the reasons of the petitioner for asking the court to strike down Section 377 can be summarised as follows:

- **It was hampering efforts being made to prevent the contraction and transfer of HIV/AIDS.**
- **Section 377 violated Article 21 of the Indian Constitution.[6]**
- **Section 377 violated Article 15 of the Indian Constitution.[7]**
- **Section 377 violated Article 19 (a,b,c,d) of the Indian Constitution. [8]**

[6] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 8.
[7] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 9
[8] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 10

Respondent:

There were multiple respondents in this case including- Ministry of Home Affairs, Ministry of Health & Family Welfare, National Aids Control Organisation (NACO), Delhi State Aids Control Society, Commissioner of Police.

The Ministry of Home Affairs and (MHA) and the Ministry of Health and Family Welfare had completely different stands when it came to their response to the petitioner.

- The MHA initially said that Section 377 was invoked mainly to punish acts of child sex abuse and fill in the lacunae of rape law and was not used to prosecute homosexuals. Striking down this section would open a 'floodgate' of delinquent behaviour and an unprecedented amount of homosexual activity. They contended that even though many countries decriminalized homosexuality, Indian society was not yet ready to accept this and were strongly against Indian morals. Hence, the thrust of the resistance to the claim in the petition was founded on the argument of public morality. The MHA claims that Section 377 serves the purpose of public morality, public health and healthy environment.[9]
- The Ministry of Health & Family Welfare submitted their response through the National Aids Control Organisation (NACO) and by and large confirmed most of the points made by the petitioner. First NACO listed all the steps they put in place in order to spread awareness of HIV/AIDS and other sexually transmitted diseases and infections. Then they confessed that risky behaviour among the MSM community would go unnoticed as it would go underground out of fear of law enforcement. Police harassment would lead to 'hurried' sex in unhygienic spots without proper protection and there would be no scope of practicing safer sex methods. [10]
- One of the respondents (Respondent no.8) - Voices against section 377 is another NGO which works closely with the LGBT community. They listed out various cases where police brutality and harassment was causing immense hardship and difficulties to the LGBT community. Reference was made to a '*Bangalore incident*' where a eunuch was gang raped and made to perform oral and anal sex by a gang of hooligans and then the eunuch was taken to a police station where she was stripped and harassed by the police

[9] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 13
[10] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 17

officers. They contended that Section 377 so badly stigmatized that section of society that they could not even express their core identity and had to live in the shadows. [11]

Decision of the Court:

The court, after analysing all the material put on record and the extensive arguments of the petitioner and respondents - came to a decision which favoured the petitioners. The court highlighted the theme of 'inclusiveness' and said that this extends to everyone in the country. People who are considered deviants are not excluded on this ground. The court said that a section of society (LGBT) could not be criminalized because the rest of society could not handle their activities because of their own moral beliefs. The court made constant references to Nehru's speech 'Objective Resolution'[12] on December 13, 1946 and said that a society where a spirit of inclusiveness prevailed would be one where every citizen could exercise his right to live a life with freedom and dignity. The court held that Section 377 violated Articles 14, 15 and 21 of the Indian constitution clarifying that the provisions of the act would continue to further govern sexual acts done without consent and acts involving minors (anyone less than the age of 18), meaning that Section 377 was not struck down as a whole. The judgement ended by saying that it would apply till the Parliament chose to amend the law. [13]

Present situation:

On December 11, 2013, a two judge bench passed a judgement which effectively re-criminalized homosexuality. The court gave the reasoning that the 'Delhi High court order decriminalising homosexuality is constitutionally unsustainable as only Parliament can change a law, not courts'.[14] This decision caused wide spread hue and cry among not just the LGBT community but well-wishers and activists as well claiming that years of hard work was arbitrarily washed down the drain and that the Supreme Court was using its judicial activism very selectively.

Why the Delhi High Court's Judgement is the way forward.

Section 377 was a part of a law passed in the 19th century to deal with offences that were prevalent and widely against the social customs of a very backward British run India. The

[11] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 21
[12] Constituent Assembly Debates: Lok Sabha Secretariat, New Delhi: 1999, Vol. I, pages 57-65
[13] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277, pg 104,105
[14] Civil Appeal No.10972 of 2013

idea that two men could have sex with each other disgusted our British rulers and they had no problem enacting this law because the Indian citizens felt the same way. The irony of this is that this law had been repealed in Britain as early as 1967. The act of homosexuality and sodomy between two consenting adults (above the age of 21) was no longer illegal. Which begs the question, why is it not being amended in India? And why is Section 377 targeting only the homosexual community?

The mandate of this section refers to carnal intercourse against the order of nature. Broadly implying that, any sexual act which does not lead to conception or non-procreative in nature is illegal. Further deducing this, the act of oral or anal sex between a consenting male and female should be illegal. In Calvin Francis v. Orissa[15], relying on an earlier judgement[16], it was held that the act of oral sex fell within the ambit of Section 377 IPC. Hence, the question of section 377 violating Article 14 of the constitution rises again because the homosexual community is being oppressed by the law laid down in 377 but at the same time, action isn't being taken against heterosexual couples who might indulge in oral and anal sex. In *Fazal Rab Choudhary v. State of Bihar*[17] it was held that 377 criminalized sexual acts based on the severity of perversity. Essentially what was 'perverse' in nature was decided by 'society'. While society might be able to tolerate a heterosexual couple indulging in oral and anal sex, the same act replicated by a homosexual couple is an abomination in their eyes. So the question is, whether a particular change in law which guarantees advancement is society, should be blocked or prevented because of the attitude of the public?

- **History has proved that controversial decisions have been successful in the long run. Here are a few examples of this.**

- One of the things the British were applauded for in hindsight during their rule over India was the abolition of the barbaric practice of Sati through the *Bengal Sati Regulation*, 1829[18] which was passed by Lord William Cavendish. This law made it illegal to perform the act of Sati and its prevention was carried out by making *Zamindars* and other categories of land owners responsible to report planned acts of Sati to the police, who in turn would send men to investigate the claims. If an act of Sati was carried out, it would be investigated as a case of unnatural death and the perpetrators would be put to death by

[15] 1992 I OLR 316
[16] *Lohana Vasantlal Devchand And Ors vs The State of Gujrat* AIR 1968 Guj 25
[17] AIR 1983 SC 323
[18] Clause I & II Bengal Sati Regulation, 1829

the court.[19] While this law was received with mixed reactions, a sizeable portion of the Hindu society felt that it was imposing on their religious freedom and hence were against its abolition. However, the courts at the time placed the sanctity of human life on a higher pedestal than the superstitious beliefs of uneducated Hindus (the educated Hindus were fighting for its abolishment- Rajah Rammohan Roy).

- The second example taken from history is the abolition of slavery and the liberation of slaves in America. Slavery and slave trade was rampant and owning a slave was a sign of social position and wealth. When Abraham Lincoln was president he worked hard in order to abolish it. While most of society, along with the slaves themselves was for the abolishment, there was a decent chunk of society that wanted slave trade to continue. This was because many land owners, merchants, traders and plantation owners had a direct interest in this. They used the slaves in their day to day business activities and this was profitable to them because they did not have to pay the slaves and the accommodation they provided for them was often negligible. Things like food and clothes that were given to the slaves were also bare minimum. The whites considered it as a necessary evil and its abolishment would be controversial**. Robert E. Lee wrote in 1856:**

'There are few, I believe, in this enlightened age, who will not acknowledge that slavery as an institution is a moral and political evil. It is idle to expatiate on its disadvantages. I think it is a greater evil to the white than to the colored race. While my feelings are strongly enlisted in behalf of the latter, my sympathies are more deeply engaged for the former. The blacks are immeasurably better off here than in Africa, morally, physically, and socially. The painful discipline they are undergoing is necessary for their further instruction as a race, and will prepare them, I hope, for better things. How long their servitude may be necessary is known and ordered by a merciful Provider.'

In spite of all the opposition towards the abolition of slavery, Abraham Lincoln passed the Emancipation Proclamation[20] on January 1, 1863 during the second year of the civil war. This proclamation's purpose was to free every slave in America with a few exceptions (mentioned in the proclamation- Delaware, Kentucky etc.) This decision was met with a lot of dismay and caused political turmoil. Political parties even suggested that the problem could be solved by decriminalizing slavery. However, nothing like that was done and slavery and other forms

[19] Clause V Bengal Sati Regulation, 1829
[20] http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html

of bonded labour have been illegal ever since. In fact, it is considered as *jus cogens* along with crimes like genocide and torture.

- The last example we will take from history in this regard closely relates to Adolf Hitler's regime and the *Nuremburg trials* and more specially the 'Judges trial' where 16 high ranking officials were tried before 3 American judges. The defence used by Franz Schlegelberger, one of the highest ranking officials who stood trials after the atrocities associated with Nazi Germany, was that he was just following orders and he felt it was in the best interest of his country. The other defendants also followed a similar line of defence. The court was unmoved and handed him a life sentence.[21] (The parallel I am trying to draw here is that the actions of the Third Reich were vastly justified in Germany however, the rest of the world more or less condemned it. The 'extermination' of 6 million Jews could not be justified by the court and hence heavy punishments were handed down.)

What all these examples have in common is that there was an underlying 'idea' which a particular society felt was right but could not be justified by any stretch of the imagination. A change had to be brought about, which was received with criticism, but in today's context it could not have gone any other way. That being said acts of sati and 'bonded labour' still exist today but not in any legal capacity.

- In India, when there is a dearth of material regarding a specific subject, the Courts tend to look abroad for guidance through already decided cases and try to paraphrase it considering the situation that exits in India.[22] In *Naz Foundation* the petitioner as well as the court made reference to multiple foreign decisions, however, since then the most iconic case regarding gay rights had concluded in the US Supreme Court.

- ***Obergefell v Hodges***[23]

  It is one of the most talked about case in the past decade throughout the world; the US Supreme Court held that the right to marry was a constitutional right that was guaranteed to everyone including same sex couples. The 14th amendment, through the due process clause, now allowed gay couples in America to marry and get valid marriage licenses for the said marriage. This was a privilege that they were not entitled to prior to Obergefell.

[21] *The United States of America vs. Josef Altstötter,* Summary of the indictment in Department of State Bulletin, *October 21, 1945, p. 595.*
[22] *Vishaka v State of Rajasthan,* AIR 1997 SC 3011
[23] *Obergefell v. Hodges*, No. 14-556

The American Supreme Court has shown a constant advancement in their thinking and has taken into account the changing social scenario and the fact that the idea of 'love' is subjective. This subjectivity should not be a ground for depriving a person of his right under the 14th amendment[24]. In *Loving v Virginia* the Supreme Court held that inter-race marriages are not criminal and is only an extension of the rights guaranteed under the 14th amendment. The court made constant reference to the rights guaranteed to its citizens. 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.'[25] The court held that these 'rights' were not turned into a formulae, and hence- the right to marry was included in it. [26]

In its judgement, the Supreme Court laid down four reasons why the right to marry was granted to same sex couples and these reasons must be taken into cognizance when this issued is argued again in front of Indian courts and Parliament.

Firstly-'The right to personal choice regarding marriage is inherent in the concept of individual autonomy.'

Secondly-'The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals'

Thirdly -'The fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; as same-sex couples have children and families, they are deserving of this safeguard.

Fourthly- 'marriage is a keystone of our social order, and there is no difference between same- and opposite-sex couples with respect to this principle'

Conclusion

Gay rights in India are a controversial topic at best. With our society being divided almost through the centre, we have a long way to go. Despite this, Parliament must pass a law which no longer ostracizes the LGBT community. It is my belief that our society will accept and embrace the LGBT community, if they receive a little push in that direction. An entire

[24] *Griswold v. Connecticut*, 381 U.S. 479 (1965)
[25] *Obergefell v. Hodges*, No. 14-556, slip op. at 1–2
[26] *Zablocki v. Redhail*, 434 U.S. 374 (1978)

community should not be deprived of their rights just because the rest society cannot handle it. **Justice Kennedy's quote in *Obergefell* finds relevance here:**

'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.'[27]

[27] *Obergefell v. Hodges*, No. 14-556, slip op. at 28