# STRUGGLE FOR GAY RIGHTS AND NAZ FOUNDATION CASE ANALYSIS

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## INTRODUCTION

*Who would give a law to lovers? Love is unto itself a higher law.*

*~Boethius, the Consolation of Philosophy, A.D. 524*

In the 19th century the world all over witnessed the genesis of homosexual identities, subcultures, and politics in the various forms which are been prevalent and followed to the present day. In the latter part of the 19th century, the word homosexual with its attendant notions of sexual identity was coined and this was a period of opportunities, challenges, and risks for the homosexuals. The latter were subjected to a barrage of arbitrary hostile legislations which threatened them with imprisonment, prosecution, and even death until 1861. These people were seen with contempt and were exploited whenever possible. They were proclaimed as mentally ill and were thereby outcasted by the society. Society viewed their sexuality as something unusual and unheard of and made homosexuality a taboo.

Findings by various researchers has shown the existence of gays, lesbians, bisexuals and transgenders (LGBT) since the Victorian era, being hidden even then, the mention of such relationships can be seen in many Victorian literatures, thus providing proof to the ignorant society that these things were not new or unusual. The LGBT group has for a long period of time been ridiculed and exploited by the "normal" class of people by claiming them to be a diseased class unfit to survive but with eventual globalization and media reaching to all people globally these people have been made aware of their rights and have been made to think more rationally and stand up against the bullying class. Recent landmark judgments in favor of the LGBT's have given them the confidence to work for the long deserved respect they deserved and this can be seen with the increase in number of movements being carried out by them in order to reach out to the masses and demand for their rights and this has led to an evolution for the gay community, as it no longer is the oppressed class.

## DOMA AND THE WINDSOR CASE

A lawfully married same-sex couple Edith Windsor and Thea Spyer were residing in New York. In 2009 Spyer died and left all of her estate to Windsor. Windsor eventually sought to claim the federal estate tax exemption for surviving spouses but was barred from doing so because their marriage was not recognized as by Section 3 of DOMA, the term "spouse" applied only to a marriage between a man and woman and thereby the Internal Revenue Service found the exemption inapplicable to same-sex marriages and therefore denied Windsor's claim, and compelled her to pay $363,053 in estate taxes.

- *Judgement passed and opinion of the judges*

United States Supreme Court comprising of Justice Anthony Kennedy, Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan in *United States v. Windsor,* held the restriction of the federal interpretation of "marriage" and "spouse" only to heterosexual couples by Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional under the Due Process Clause of the Fifth Amendment.

The bench felt that DOMA's principal effect was to identify a subset of state-sanctioned marriages and make them unequal and thereby undermines both the public and private significance of state-sanctioned same-sex marriages. Proclaiming same-sex marriages as second tier marriages demeans the couple, whose moral and sexual choices are protected by the Constitution itself. Under DOMA, the same-sex married couples are exploited and burdened as they are prevented from obtaining government healthcare benefits, Bankruptcy Code's special protections which would otherwise be available. It even prohibits them from being buried together in veterans' cemeteries. On carefully examining these aspects the court felt that it will be best to declare it as unconstitutional because DOMA without any rational purpose brings inequality in our society and thereby injure those whom the State is itself bound to protect.

**NAZ FOUNDATION AND ITS IMPACT( high court judgment)**

- Article 377 And It's Judicial Interpretation

Section 377 of the Indian Penal Code provides for the anti-sodomy provision and is included in a chapter entitled 'Of Offences to the Human Body' under Indian Penal Code:

***Unnatural Offences - Whoever voluntarily has carnal intercourse 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.***

The Indian Penal Code was drafted by Lord Macaulay and introduced in British India in 1861. At that time the legal principles and laws of this type were largely based on religious views which can be clearly seen from this section which makes penetration sufficient to constitute the carnal intercourse necessary for the offence described in this section. Unnatural intercourse as mentioned in this section was a crime as per the Judeo-Christian beliefs which were a major influence at the time this code was made, thereby criminalizing sodomy.

Section 377 has been since its inception a subject of changing judicial interpretation in India and various tests have been prescribed time and again to penalize crimes under this Section. In cases *Khanu v. Emperor*, the court held that to determine whether carnal intercourse is unnatural, one must see whether the sexual act so performed is without the possibility of reproduction or not. Later on in *Calvin Francis v. State of Orissa*, the question arose as to whether oral sex fell within the ambit of Section 377, to which the court said using the guidelines of *Pierre Elliott Trudeau in 1967" that 'The state has no business in the bedrooms of the nation'."* .The sexual perversity and abnormal sexual satisfactions were not to be evaluated by the court. Subsequently, in *Fazal Rab Choudhary v. State of Bihar*, the Court that the level of 'sexual perversity' would determine whether the crime is punishable under Section 377.

Initially, in 1884 Section 377 was restricted to anal sex and it was expanded to include oral sex by 1935, and later was broadened further to include thigh sex. Absence of a consent based distinction in this section equated homosexual sex with rape and therefore equated homosexuality with sexual perversity.

- The Case

The Naz Foundation an NGO in the course of its work had extensively interacted with sections of society that are vulnerable to contracting AIDS, such as homosexuals, transgenders, and other sexual minorities. The petitioner argued that Section 377 of the Indian Penal Code caused extensive discrimination towards the gay and transgender community and led to the denial of fundamental rights to them. The petitioner contended that by criminalizing consensual oral and anal sex was based on Judeo-Christian moral standards which had no place in the modern society as it directly resulted in the victimization of a certain class of people for no legitimate reason and made them subject to inequality, thereby violating Article 14. It was contended that Section 377 of the IPC violated the fundamental rights of privacy and dignity under the ambit of Article 21 of the Indian Constitution and conveyed the message that homosexuals were inferior to other sections of society. The petitioner raised the question that the expression 'sex' in Article 15 of the Indian Constitution could not be read to include only gender but should also include sexual orientation as by doing so it promoted discrimination on the basis of sexual orientation.

- Judgment

The Court held that one of the major underlying themes of the Indian Constitution was inclusiveness, which is a trait that had been deeply embedded and reflected throughout the Indian society. When inclusiveness is reflected by the society, then all those persons who comprise that society are to be assured to a life of dignity and equality without any discrimination. A statute could not be governed by stereotypes, misconceptions and outdated moral standards in relation to the identity of homosexuals and other sexual minorities and therefore, the court held that the criminalization of unusual intercourse between same sex couples with consensus and in private violates an individual's fundamental rights guaranteed under Articles 14, 15 and 21 of the Indian Constitution. The provision would continue to apply to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. This clarification, the Court held, would hold until the Parliament decides to amend the law.

## SC JUDGMENT: COMPARISON WITH HIGH COURTAND ANNALYSIS

After the judgment of Hon'ble Supreme court came on much debated Naz foundation case challenging the validity of Section 377 of IPC there seems to be a sudden outburst of outrage and anger among the Indian Crowd who initially not only derecognized such relationship but categorized it as sin. While India went under societal and mental change through this judgment, what one failed to understand is what the subject of appeal and how the judgment laid down. The portrayal by media and social media made it appear like SC criminalized the existence of gay itself. For better understanding of the judgment we need to look into the judgment

The appeal that went to the apex court was for challenging the constitutional validity of Section 377 of Indian Penal Code, 1860 (IPC) and the judgment read as under:

"We declare that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality."

Now if we compare the judgment of what was pronounced by Delhi High Court, the Judgment did not strike down Section 377 entirely it only pronounced upon the validity of same-sex marriage, and was far from encouraging the same. The Judgment laid down only maid the penal provision of Section 377 inapplicable to consensual homosexual activity in private between adults of 21 years. It was decriminalized the Section by the accepted judicial technique of *reading down*. The high court had recognized harassment towards the gay community by the police and the imminent threat of prosecution caused to them which usually use to result in yielding to extortion and bribes by the police.

But when the apex Court pronounced its judgment shows a very intolerant and insensitive mindset towards the real problems of those with a different sexual orientation for which they cannot to be blamed or branded for the reason

Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

**Summary of the judgment of the High Court**

Taking note of earlier judgments in relation to Section 377 of Indian Penal Code, the High Court reasoned that "*It is evident that the tests for attracting the penal provisions have changed from the non-procreative to imitative to sexual perversity.*"

The issue in the appeal was that \whether Section 377 should include sexual acts performed by consenting adults in private particular the legality of male homosexuality. The judgment that was pronounced was Relying on judgments from India and other jurisdictions, the Constituent Assembly Debates, scholarly works, and more specifically to 172nd Report of the Law Commission recommending deletion of Section 377 with respect Human Rights and held such acts to be outside the purview of Section 377.

**Violation in respect of Article 14**

The responded(s) argued that the motive and objective of Section 377 was to protect women and children, prevent the spread of HIV/AIDS, and enforce societal morality against homosexuality but These arguments were rejected on basis that consented private acts between two adults have no connection with the protection of women and children, criminalisation increases health risks instead of preventing spread of HIV/AIDS, moreover the moral norms cannot be enforced upon the individual by the state if there is no harm to society. Even though

Section 377 is supposedly worded without reference to sexual orientation but it makes criminals out of all male homosexuals as a class. Since the nature of the activities banned has an unavoidable correlation with the class, which is not only arbitrary but unjust also.

**Violation in respect to Article 15**

By adapting 'strict scrutiny' and 'proportionality review' of laws, High Court within the scope of article 15 makes discrimination solely on the basis of such grounds is prohibited. It lays down if Section 377 interpreted to include male homosexuality it would violate the Constitution.

The High Court noted that, given the other conclusions it had reached, it was not necessary to deal with the issue of the violation of Article 19(1)(a) to (d). Employing the doctrine of severability, Section 377 was 'read down' to include only non-consensual penile-non-vaginal sex and penile-non-vaginal sex involving minors.

**Analysis of the Supreme Court judgment in relation to equality**

The judgment of the Supreme Court discusses previous cases in relation to Section 377 and states (Paragraph 38):

"However, from these cases no uniform test can be culled out to classify acts as "carnal intercourse against the order of nature". *In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed.* All the aforementioned cases refer to non-consensual and markedly coercive situations *and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analysing the manner in which the section has been interpreted. We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section.* Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent." (Emphasis supplied)

Uniform test wasn't evolved as words of provision are very subjective in nature as the first and last lines of the para are in conflict of each other. If Section 377 has a 'plain meaning', a uniform test should be read with the section itself. In either case it is approved and accepted that even judicial interpretation did not provide a uniform test for the applicability of this section, absence of which results in arbitrariness of the uniform test. If at all it has 'core' meaning the

section has to be identified restricted cases of "*non-consensual and markedly coercive situations*", which is precisely what High Court did.

Whereas the Paragraphs 39 to 41 and 51 of the judgment states that the factual foundation required for challenging the constitutionality of the law was not established and discrimination or abuse of law cannot be presumed. According to the judgment, the facts pleaded by Naz Foundation "*are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society.*"

The reasoning in paragraphs 39 to 41 and 51of the judgment is erroneous as the challenge under Article 14 did not require a factual foundation and it's very rare that Supreme Court look into factual foundation under article 136. The challenge was based on the presence of an illogical classification in the law without a nexus with its object.

Paragraph 42 states "*Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter (sic) category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification… Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution"*

In respect to article 14, it is a case where challenge was based to challenge constitutionality of male homosexuality being classified as a class and '*against the order of nature*'. Argument that existence of such classification itself means that it is not arbitrary boils down to the logic that then there would never be no case of irrational classification as long as such classification exists.

In Paragraph 44, by citing two previous decisions, the judgment seeks to argue that the notions of language and the scope for interpretation of a penal provision by itself would not render the provision arbitrary. It is implied that the '*against the order of nature*' cannot be arbitrary merely on the ground that it can be interpreted to mean different things. However, this does not answer any of the challenges to Section 377 under Articles 14 and 15. There is no legal basis to conclude that an interpretation contrary to these fundamental rights can be sustained.