Sunshine through the Rain: New Hope for Decriminalization of Gay Sex in India?

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Govind Manoharan Mi 24 Jan 2018 Mi 24 Jan 2018

On 11th December 2013, the Supreme Court of India, speaking through a panel of two Judges, delivered arguably one of the most controversial decisions in recent times —*Suresh Kumar Koushal v. Naz Foundation*. An appeal against a decision by a Delhi Court that decriminalized consensual gay sex came to be allowed. Section 377 of the Indian Penal Code, was upheld as being constitutionally valid, and criminal consequences for consensual gay sex were brought back into operation.

The decision of the Delhi High Court was celebrated as a great step forward for a nation which, in complicit silence, continued a draconian provision that was made part of the Code back in the 19th Century by Sir T.B. Macaulay. Until 2009, the provision remained as a constant cloud over the dignity, autonomy and privacy of the LGBTQI people in India. India was pulled back to the 19th Century by her highest Constitutional court in a decision that displayed a dismal abdication of court's role as the protector of the fundamental rights of her citizens.

The *Naz Foundation* decision was heavily criticized domestically, as well as internationally, for its narrow interpretation of the Constitution. The late Justice Leila Seth's criticism in her poignant piece on the decision in *Talking of Justice: People's rights in Modern India* (2014) is worthy of remembrance:

> "But what has pained me and is more harmful is the spirit of the judgment. The interpretation of the law is untampered by any sympathy for the suffering of others."

She was, of course, referring to the reluctance of the panel to hold in favour of fundamental rights of the LGBTQI community demoting them to a "miniscule fraction of the country's population." The decision was a great blow to the larger LGBTQI movement in India as getting rid of criminal sanctions that target the community is really the first step.

Atonement and Reparations

Sadly, this is not the first time in the history of the Indian Supreme Court that its orders have trampled on fundamental rights. During Indira Gandhi's Emergency, the Court in the infamous *ADM Jabalpur's* case (1976), had held that the right to life and liberty stood suspended during an Emergency. Although wiser Judges in freer times have referred to the decision as one that ought to be confined to the "dustbins of history", it was (surprisingly) the Parliament that was first to undo its effect by enacting the 44th Constitutional Amendment of 1976.

To be fair to the Court, in the decades that followed, through panels of varying strengths, the Court has atoned for this aberration and made reparations by holding that it stood impliedly over-ruled (In *I.R. Coelho v. State of Tamil Nadu* in 2007) and then, declaring that

the decision violated the fundamental rights of citizens (In *Ram Deo Chauhan v. Bani Kanta Das* in 2010). Finally, in August 2017, a panel of 9 Judges while declaring the right to privacy of persons in India in the decision of *Justice K.S. Puttuswamy v. Union of India* (2017)—the Privacy Judgement—expressly over-ruled *ADM Jabalpur* decision after 41 years.

Unlike in *ADM Jabalpur's* case, the Parliament was not to step in to set right the wrong in the *Naz Foundation* decision. Even the Court at first blush was not prepared to reconsider the decision, when on 24th January, 2014 the review petition filed against the decision also came to be dismissed. In India's judicial framework, there are limited remedies available against a final decision of the Supreme Court. A review petition on limited grounds on an "error apparent on the face of the record", is the first possible remedy. On an even more unsure footing lies a final remedy—a curative petition. The curative petition being an extra-ordinary remedy, the chance of interference by the Court is even more limited. So much so that only four curative petitions have been allowed by the Supreme Court till date since the remedy was first carved out in 2002. The curative petition filed against the *Naz Foundation* decision has been pending consideration since 2014.

Atonement is a slow, painful process. Reparation after atonement is only logical, but rarely do institutions muster the courage to go so far.

Sunshine through the Rain

Only five months after the *Naz Foundation* decision was delivered, another panel of two Judges made humble, yet significant, amends. In *NALSA v. Union of India* (2014) the Court declared that the self-defined sexual orientation and gender identity of each person is "integral to their personality, and is one of the basic aspects of self-determination, dignity and freedom." This was observed in the context of the legal and constitutional claims of the transgender community.

In 2016, the curative petition surfaced again and considering the larger public interest involved in the petition, the panel directed that the petitions be placed for consideration of a panel of 5 Judges. In the structure of India's judicial framework, the Chief Justice of India—being the "master of roster"—was to constitute an appropriate "bench" for hearing of this petition. This meant that although the rigours of a curative petition would still be an impediment to over-turn the *Naz Foundation* judgment, the Court expressly recognized that there were issues of larger public interest and "considerable importance" in the case.

The clouds still loomed large, but the Court, it would seem, was already on the path of reparation.

The Privacy Judgement

On a wet August morning in 2017, a 9 Judge panel of the Supreme Court delivered its unanimous decision declaring privacy a fundamental right protected by the Constitution of India. Although this decision was prompted by the challenge to the validity of the "*Aadhaar*" project—an all-pervasive Unique ID system floated by the Government—the Judges made certain powerful observations about the *Naz Foundation* decision.

Under a heading entitled “Discordant Notes”, the Court noted the decisions in *ADM Jabalpur* and *Naz Foundation* as being aberrations in the desired parallel evolution of society and constitutional doctrine. While the former was expressly over-ruled (as noted above), the Court, in due deference to judicial discipline, refrained from commenting on the constitutional validity of Section 377 as it is pending for consideration before another panel. However, the Court expressly held that sexual orientation is an essential attribute of privacy and that the protection of sexual orientation lay at the core of the fundamental rights guaranteed by the Constitution. Although about ten paragraphs were dedicated to ‘doubting’ the decision in the *Naz Foundation* case, the following observation is significant:

> “The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection.”

This was atonement—a sunshower. And at the end of a sunshower is often a rainbow.

The 2016 Petition, 8th January 2018: Order and Rainbows

While the curative petition was pending, a fresh petition was presented before the Supreme Court challenging Section 377. What distinguished this petition was the fact that the persons who came knocking at the doors of the Court seeking justice were members of the LGBTQI community, whose fundamental rights were directly affected by the offending provision. (The earlier struggle was led by reputed NGO’s, parents of LGBTQI persons and mental health professionals.) What is important here is that this petition was not presented on the strength of the mammoth Privacy judgment, but much before it. It demonstrated the courage and confidence in the Petitioners to assert their constitutional rights stemming from the gradual recognition of the Court that “certain social norms may not meet the test of Fundamental Rights.”

On 8th January this year, a panel of 3 Judges, after noting the various opinions rendered in the *NALSA* case as well as in the Privacy Judgment in the context of sexual orientation, expressly opined that the *Naz Foundation* decision required reconsideration. The panel had various reasons to offer. However, the arena defined seems to be between constitutional morality and social morality, when the Court speaks as follows:

> “The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution.”

Following this order, the petition awaits a hearing early this year.

A panel of 5 Judges will finally have an opportunity to make reparations for the dismal opinion in the *Naz Foundation* case. Strategically, this may also prove to be a much easier task for the community in knocking down Section 377 than the pending curative-route due to its inherent limitations. It would seem the work is cut out for this panel in light of the earlier opinions of the Court culminating in the Privacy Judgment. The biggest challenge,

however, is that the Court must find it within itself to supply a modern, progressive interpretation to the Constitution in the face of legislative inaction and regressive majoritarian opinion.

It must be remembered that the Delhi High Court decision was not challenged by the Government of India before the Supreme Court, which was perceived as an act of acceptance of the judgment by the then Congress Government. Interestingly, it was at the behest of an astrologer and some religious groups (Hindu, Christian and Muslim) that this decision was set aside.

We are living in troubling times in India. Confusing if not troubling, or troubling because it is confusing. Even as some of the leaders of the ruling party—the BJP—expressed support to the LGBTQI community, the ultra-conservative fringe groups that the BJP is accused of pandering to, may influence the stand of the Government in Court. The panel set to hear the case will be headed by the Chief Justice of India—Dipak Misra, J.—against whom allegations of taking positions favourable to the Government have surfaced. Steering clear of these larger political considerations, any opinion by the Court on the rights of the LGBTQI community must reflect the idea of the Constitution as being an all-embracing, evolving document as opposed to a life-less record of rights and duties.

Justice Vivian Bose of the Indian Supreme Court—"a lover of liberty" and one of our greatest dissenters—opined that the Indian Constitution being a product of the freedom struggle, is a living organism that should be allowed to grow sturdily in the "democratic way of life, which is the free way." This vision for the Constitution, rendered when the document was merely an adolescent in 1951, may prove useful guidance to the Court. An inclusive interpretation of the Constitution is unavoidable and with the wealth of guidance already before it, all that this panel really needs to do is look towards the rainbow.

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