

# The Indian Supreme Court's Investiture in the World Rainbow

Pranav Nanda, and Vasundhra Minocha

**Abstract**—“Marriage should be between a spouse and a spouse, not a gender and a gender”, it is to be seen if these words of Hendrik Hertzberg would ever exit the rhetoric and actually form the spirit of laws of our era. We in this world are currently in a place where our every act, choice and sanction would define us as a nation and ratify what we as a nation stand for. The acts, choices and sanctions that are currently in the international eye of the storm are not the nuclear law, not foreign policy but a nation's stance is on homosexuality. Today, the tolerance and spirit of a nation is inferred largely from their stance in relation to homosexuality. In this paper we have sought to bring some perspective post the decision given by the Hon'ble Supreme Court recently in India where it overruled the decision of the High Court of Delhi in the Naz Foundation case thereby in essence 'criminalizing homosexual and other specific sexual activities'. In furtherance of said perspective we have also looked at relevant jurisdictions including Russia, Netherlands, US and Germany, especially Russia considering the onset of the 2014 Winter Olympics and Vladimir Putin's Week of War against Homosexuality. In conclusion we look to infer logic in the homosexual journey of the world and come to head with the principle of Majoritarian Gradualism which explains the journey and behavior of the journey.

**Keywords**—Homosexual, Suresh Kumar Koushal and another v. NAZ Foundation & Ors, Section 377, I.P.C, Majoritarian Gradualism, Sochi Winter Olympics, 2014.

## I. PREFACE

WE write this paper as the world witnesses change in global dynamics with respect to the legal status of homosexual relations. The recently concluded Sochi Winter Olympics witnessed media's spotlight on Russia's recent anti-gay propaganda law. This paper is a brief critique of the Indian Supreme Court judgment in the Suresh Kumar Koushal and another v. NAZ Foundation & Ors. in the light of established principles of statutory interpretation, Indian and foreign judgments, global trends and societal changes. Through this paper we have projected the legal future of this subject.

## II. INTRICACIES & FACTS

The case of Suresh Kumar Koushal and another v. NAZ Foundation & Ors. reached the Supreme Court of India through 15 Special Leave Petitions filed mainly on behalf of faith based and religious groups against a Delhi High Court judgment in this respect. The Supreme Court herein has ruled that Section 377 does not suffer from the vice of

unconstitutionality and declaration to this effect made by

Division Bench of Delhi High Court is legally unsustainable. However, while parting with the case, the Court has noted that the judgment pronounced is only restricted to the constitutional correctness of the view of the High Court. The judgment will not act as a bar against legislative competence to enact a law amending or repealing Section 377 from the statute book. At the time of writing this paper, review petition had been rejected by the Supreme Court on January 28, 2014 on the ground that the judgment did not suffer from any legal fallacy. However, on April 22, 2014 the Supreme Court of India allowed oral hearing on a curative petition filed in this regard.

## III. JUDGEMENT

The major issue in the case of the Appellants is the lack of tangible material produced by the Respondents to justify their claim that this Section was being used to harass people observing non penile-vaginal sexual practices. It was repeatedly reiterated that only 200 people have ever been convicted under this section in 150 years history of its existence in the statute book. This sparse rate of conviction under this section has been used to establish its inherent non-abusive nature. The Court in doing so has ignored the fact that rate of prosecution is dependent on recorded judgments, which is only a small segment of the unreported cases at the trial level. Moreover, this figure does not take into account the adverse physiological effect of having this Section on the statute book, and the threat of use of the law, that LGBT persons face on an everyday basis. Moreover what has to be borne in mind is that whenever any behavior is identified as entailing criminal sanction, it gives the police and other law enforcement officers' huge power to harass and victimize people from amongst that category. Section 377 acts as the sword that hangs over the lives of all sexual minorities in this country.

This judgment is being criticized as a marked divergence from Indian judiciary's image as the champion of rights of the marginalized communities. The Court has not taken into account the Principle of Regard to Consequences while setting out the scope of judicial review of this subject.

The judgment also falters on other grounds; the locus standi of the Petitioners to invoke Art. 136 of the Constitution has not been satisfactorily established. The doctrine of locus standi is a fundamental element in any legal proceeding; it determines the

Pranav Nanda and Vasundhra Minocha, are with Symbiosis law School, Pune, Symbiosis International University, India.

competence of the plaintiff to 'stand before the Court'. It is of foremost importance to inquire into the locus standi of Mr. Koushal and others. However, in the present case the court has not discussed this issue at all in the judgment.

This judgment of the Indian Supreme Court is a narrow and blindfolded interpretation of the law, ignoring the momentous changes in the society and notions of the morality that India is witnessing. The Supreme Court should have remembered that its duty is to proclaim liberty for all, not be shackled by its own indecisiveness.

#### A. *Russia*

The event that contemporarises the issue without any shed of doubt is the current historic stance of Russia, in light of signing of the deemed 'Anti-Propoganda' Law by Vladimir Putin, substantiated by the fact that Russia hosted the Sochi Winter Games 2014 . If attention be paid to Russia's history since 2006, their methodical anti-homosexual policy becomes apparent. Most recently, on June, 11, 2013, Parliament passed the law namely, 'Propaganda of Non-traditional sexual relations', the law among other things, imposes a fine of \$31, 000 for providing information about LGBT community to the minors, holding gay pride events, speaking in defence of gays and the likes. Within a space of a week, Putin signed the above-said law and also the law banning adoption of Russian Children by same-sex married couples.

According to ESPN, which in its news story, cited the annual assessment of Human Rights arranged by the US State Department's Bureau of Democracy, Human Rights and Labor, the resultant laws were part of a nationwide pattern of increasing 'social stigma and discrimination' against LGBT communities.

Russia is currently working to sign bilateral agreements on child adoption with other countries. One of the first to sign such an agreement was France, and over the past few years it ranked fourth by the number of adopted Russian children after the United States, Italy and Spain. After France legalised same-sex marriage in May 2013 Russian officials said that the adoption agreement must be urgently changed. Thus journeys Russia's Homosexual Propoganda, still a powerful exception to the world ideology and rat-race.

#### B. *The Pink Triangle – Germany*

One of the biggest reasons we feel for global movement for rights of homosexuals, to constantly promoting tolerant and liberal view of homosexuality, is the unfortunate treatment of the homosexuals during the Nazi Regime. Universal hatred and condemnation of the Nazi Policies post WWII and the rise of Human Rights have today led to a society where homosexuals can fight for their rights fearlessly.

One of the oldest known laws against intercourse between the same sex was in 1871, when a national prohibition was enacted through the entry of Paragraph 175 in the Reich Penal Code in the German Empire. After the Nazis became the only legal party in the Third Reich, homosexual men and women

became the target of police and interrogation. By June 28th 1935, and in effect from September 1st 1935, the new § 175 had been revised to include indecency and two further amendments had been added to Article 175 ie 175a & b. These further amendments to the Paragraph 175, increased the scope whereby, the law directly criminalised homosexual activities. It is worthy to note that this law became the tool to successive arrests and imprisonments.

The Pink Triangle, was a motif or a symbol on specific prisoners in the concentration camps. These specific prisoners who had a pink triangle on their uniforms, were recognised as gay. The Pink Triangle in this case, came to identify the sexual orientation of the prisoner .

History reads in a chronology of fascination events, as Germany now is one of the most tolerant states on homosexuality. It is the meltdown from the Nazi Regime to the Post WWII Germany to the 70s to current Germany; gradually the people of Germany including voices of minorities have increased in numbers, with Human Rights as their 'weapon' of choice this time. Irony and History are the best of friends, and it is our opinion that the pro-homosexual movement that we see today is a huge manifestation of the events and actions of Nazi Germany and Hitler.

#### C. *Netherlands*

Netherlands holds the distinction to having been the first country to have legalised same-sex marriages, in the year 2001 . According to the official Holland Website, 'The gay scene in Amsterdam is one of the largest in Europe and boasts well over 100 gay bars, clubs, shops and hotels' . Netherlands has immortalised the struggles of the homosexual, especially those enforced by the Nazis by constructing the Homomonument, which symbolises their struggle and rights. The shape of the Homomonument, consists of three pink triangles (referred to above), the same symbol Hitler used for them in concentration camps for their easier execution.

This journey of history is a perfect lesson on symbols and motifs. Netherlands is one of those very few nations, where gay marriages are allowed just as a 'normal marriage' would be conceived and not be watered down to a 'private partnership agreement' as is resorted to. Also worthy to note here, that the Equal Rights Act, 1993 was enacted by the Dutch Parliament banning discrimination on grounds of sexual orientation as well in employment, housing etc.

Returning to the present, as was reported by Pravda.ru, the Dutch Authorities had officially declared on 8th November, 2013 that Netherlands shall be home to all the homosexuals who are suffering in Russia, offering them political refugee status. Also as reported by Pravda.ru the Dutch officials have constantly been in talks with the Russian Officials in this matter, trying to persuade them to understand the inappropriateness of the stance. Russia is not the only nation where we see such courses of events, Holland along with Denmark and Norway pulled away government aid to Uganda after, Uganda made the Anti-Homosexuality Bill into law . As noted, the Dutch are extremely enthusiastic and sympathetic

towards cause of the homosexual, on withdrawing its 7 Million Euros aid to Uganda, explaining that to compliment the same; they shall modify their asylum policies to be more flexible.

#### D. *United States of America*

The position in USA in its long history has seen many changes in public perspective with regards to legality of same-sex relationships. From 1951, when Harry Hay, founded The Mattachine Society', the first national gay rights organisation in USA to the recent decision of the Supreme Court of USA in the case of *United States v Windsor*, holding that Section 3, of Defense of Marriage Act, 1996 which defined 'spouse' as one of the opposite sex, thereby effectively only recognizing marital heterosexual relationships as unconstitutional and violative of the Due Process Clause of the Fifth Amendment; the movement for rights of homosexuals in USA has indeed come a long way.

Following this decision, in June, 2013 the US Office of Personnel Management sent a memorandum to various federal agencies informing them that same-sex spouses would be eligible for health insurance, life insurance and retirement coverage. The children of such couples also will be able to participate in many of the programs. This was a landmark step in the fight for equality by the homosexual community. The public sentiments and voice of the homosexual community seems to be getting stronger in the USA every year, and this is visible from the judicial interpretation of laws in their favor as well as legislation enactments to this effect.

#### IV. CONCLUSION

The subject at hand has received three kinds of reactions; overwhelming support, repulsive opposition or simple indifference. The objective of our paper was to provide enough perspective on this issue so that all three reactions may understand the foundation of the issue along with legality of the arguments presented by our contemporary courts.

This subject is widely contested across the globe. There is divergence of views with regard to recognition of same-sex relations within the European Union. The legal status of the 'bond' of same-sex couples changes across the border lines. In USA, this problem is amplified due to the varied state legislations in this regard.

With regards to India, the enormity of the subject matter persuaded us to pursue only the Supreme Court's recent decision on this subject in the case of *Suresh Kumar Koushal* and another v *NAZ Foundation & Ors* which has received a lot of criticism. After analyzing the various issues that have arisen and those that have been ignored by the Court we conclude that this judgment is based on a narrow interpretation of the law, ignoring the momentous changes in the society and notions of the morality that India is witnessing. Friedrich Nietzsche famously had said 'those who do not understand how to put their thoughts in ice should not enter the heat of debate'; and we believe that the Supreme Court in the present case crumbled in the face of public morality and religious sentimentality and departed from its role as champion of the

downtrodden and weak sections of the society.

The immense public outcry in India triggered by the decision of the Supreme Court in the *Suresh Kumar Koushal* case is a sure indication of rising public resentment against this legal fetter on expression of personality. This resentment must be addressed to prevent it from erupting later in form of a civil strife. In the Indian framework now there remain only two channels after judgment by Supreme Court with respect to this subject- the last remaining judicial remedy or alternatively the legislative route in keeping with the Principle of Majoritarian Gradualism. The recent judgment of the Supreme Court of India in the case of *National Legal Services Authority v. Union of India & Ors.* recognizing 'transgender' as a third gender, has reposed hope of the public in the Supreme Court of India as the sentinel of justice and civil rights.

We conclude in hope that this anomaly will also be 'cured' soon!

#### REFERENCES

- [1] Civil Appeal No. 10972 OF 2013, Arising out of SLP No. 15436 of 2009, Decided on 11 December, 2013
- [2] Civil Appeal No. 10972 OF 2013, Arising out of SLP No. 15436 of 2009, Decided on 11 December, 2013
- [3] The Indian Express, January 29, 2014 available at <http://indianexpress.com/article/india/india-others/supreme-court-refuses-to-review-verdict-on-gay-sex/>, last accessed on February 27, 2014 at 11.39 P.M.
- [4] SC agrees to hear arguments for curative petition on Section 377, Mint Newspaper, April 22, 2014, Dhamini Ratnam, available online at <http://www.livemint.com/Leisure/niu1YzYdbkJPtikDRZv1CJ/SC-agrees-to-hear-curative-petitions-on-Section-377.html>, last accessed on May 24, 2014
- [5] Open letters against Sec 377, NY Times. available at [http://www.nytimes.com/packages/pdf/international/open\\_letter.pdf](http://www.nytimes.com/packages/pdf/international/open_letter.pdf)
- [6] Ivan Sekretarev, Russian Anti-Gay Bill Passes, protesters detained, (CBS News, June 11, 2013), <http://www.cbsnews.com/news/russian-anti-gay-bill-passes-protesters-detained/> last accessed on Feb, 08, 2014, 01:20pm
- [7] Lewis Oswald, 'Pink Triangles', (Hardnet- Homocaust: The Gay Victims of Holocaust, 2004), <http://www.hardenet.com/homocaust/pinktriangles.htm>, last accessed on 7 February, 2014.
- [8] Everyone is Gay in Amsterdam, <http://www.holland.com/us/tourism/interests/gay-lesbian.htm>, last accessed on 19 March, 2014
- [9] Id.
- [10] Lyuba Lulko, 'Holland promises paradise to all Gays of Russia', (Pravda.Ru, November 8, 2013) [http://english.pravda.ru/society/stories/08-11-2013/126088-holland\\_russiagays-0/](http://english.pravda.ru/society/stories/08-11-2013/126088-holland_russiagays-0/), last accessed on 19 March, 2014
- [11] Id.
- [12] Lizabeth Paulat, 'Why Cutting Aid for Uganda is not the Solution', (Care2make a difference.com, 7 March, 2014), <http://www.care2.com/causes/why-cutting-aid-for-uganda-and-other-countries-is-not-the-solution.html>, last accessed on 19 March, 2014
- [13] 'Holland stops Ugandan aid, promises flexibility on asylum for gays', (Expatica.com, 25 February, 2014) [http://www.expatica.com/nl/news/dutch-news/Holland-stops-Ugandan-aid-promises-flexibility-on-asylum-for-gays-\\_286065.html](http://www.expatica.com/nl/news/dutch-news/Holland-stops-Ugandan-aid-promises-flexibility-on-asylum-for-gays-_286065.html), last accessed on 19 March, 2014
- [14] *United States v Windsor*, Judgment available at [http://www.supremecourt.gov/opinions/12pdf/12-307\\_6j37.pdf](http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf), last accessed on 19 March, 2014.
- [15] Carol Cratty, 'Process begins to allow federal benefits for same-sex spouses', (CNN, 30 June, 2013) [http://edition.cnn.com/2013/06/28/politics/same-sex-benefits/index.html?iid=article\\_sidebar](http://edition.cnn.com/2013/06/28/politics/same-sex-benefits/index.html?iid=article_sidebar), last accessed on 19 March, 2014.

- [16] National Legal Services Authority v. Union of India & Ors. , WRIT PETITION (CIVIL) NO.604 OF 2013, judgment delivered on April 15, 2014s.