We Dissent

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The Supreme Court's decision in *Suresh Kumar Kaushal & Another* v. *Naz Foundation & Others* is an unprecedented ruling, deciding to turn the clock back to pre-July 2009, when LGBT persons were criminalized by section 377 of the Indian Penal Code. On close reading, the judgment is based on a narrow and blindfolded interpretation of the law, ignoring the momentous changes in society and notions of morality that India is witnessing. Further, the judgment, in many parts, relies on shaky precedent, does not explain the logic of its conclusions, and is surprisingly dismissive of substantial evidence that was placed before it.

The judgment can be divided into six issues that the Court addresses:

I Restrictive Reading of the Power of Judicial Review

The Court, going against its recent history of judicial activism, defer to the legislature in order to respect the doctrine of separation of powers and the democratic mandate of the legislature. The court, while recognizing that pre constitutional laws like 377 can be declared void if they are inconsistent with the Constitution and to the extent they abrogate fundamental rights, goes on to invoke the principle of 'Presumption of Constitutionality', whereby courts Additional Solicitor General Indira Jaisingh, in interviews to the media, immediately after the judgment has pointed out that the inconsistent approach taken by the Bench in this case. She wondered why, the same judges who did not have a problem encroaching on the legislative domain on a regular basis for a wide variety of issues were suddenly reluctant to do so when it came to implementing fundamental rights.

II Meaning and Scope of Section 377

The Court, referring to precedent on the interpretation of section 377 observes that the law can be interpreted only in a case-by-case basis, "with reference to the act itself and circumstances in which it is executed". It also observes that all the case law it has relied on is incidents of non-consensual sex, thereby throwing into doubt whether the same interpretation can be applied to consensual sexual acts. Yet, the Court goes on to hold that in light of its plain meaning and legislative history, section 377 applies irrespective of age and consent, and that it criminalized acts, not identities, orientation or a particular people. The court says that such prohibition criminalises sexual conduct regardless of sexual orientation and gender identity.

III Appreciation of Evidence

The Court fails to appreciate the evidence of discrimination, harassment and torture faced by LGBT persons that was placed before in the form of FIRs, personal affidavits, fact-finding reports, official statistics, peer reviewed articles, and the reported judgments. Instead the Court holds that the respondents "miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them."

IV Article 14 (Right to Equality) and Article 15 (Non-Discrimination) Arguments

a) Reasonable Classification

For a law to withstand an Article 14 challenge, it has to satisfy the Test of Reasonable Classification, which has two requirements - (1) Is the classification based on intelligible differentia? (ii) Is there a rational relation to the object sought to be achieved by the Act? The court distinguishes between "those who indulge in carnal intercourse in the ordinary course" (presumably non-anal, non - oral, non-thigh sex) and "those

who indulge in carnal intercourse against the order of nature". The Court says that therefore section 377 is not classified irrationally or arbitrarily.

b) Too Small a Community to Protect

The Court hold that the LGBT community is only a "miniscule fraction of the country's population", thereby implying that they are not in need of protection from the law. This is counterintuitive to the notion of discrete and insular minorities who are unable to fend for themselves or use the political process and in need of judicial intervention to protect their rights and freedoms. The Court also said that there were 'only 200 persons' prosecuted under section 377 in the last 150 years, ignoring the fact that these are 200 recorded judgments of the High Courts and Supreme Court, which is only a fraction of the unreported cases at the trial level. Further this does not take into account the impact of having the law on the statute book, and the threat of use of the law, that LGBT persons face on an every day basis.

c) Vagueness and Arbitrariness

The Court says that while it is true that, especially in criminal law, the language of the law must not be vague or arbitrary, neither the constitution nor the law requires impossible standards, there can only be expectation of a reasonable degree of certainty, and the law must contain adequate warning measured by common understanding. The Court says that while analyzing a penal provision, the court must keep in mind the vagaries of language and prior application of the law For instance the law uses terms like 'bringing into hatred and contempt' (s. 124A IPC), 'maintenance of harmony between different religious groups' (s. 153A IPC). 'likely to cause harmony, or hatred or ill-will (s. 153B IPC) or 'annoyance to the public' (s. 268 IPC).

In a counter-intuitive move, the Court relies on the *K.A. Abbas* case to say that there is ample authority that a law affecting fundamental rights may be considered bad for sheer vagueness. The judges in *K. A. Abbas* in turn refer to referring to *State of Madhya Pradesh and anr* v *Baldeo Prasad* where sections of Central Provinces and Berar Goondas Act, 1946 was declared void for sheer uncertainty, because the definition of 'goonda' was uncertain and vague.

The Court simply cites para 47 of *K.A. Abbas* (reproduced below) without bothering to link this passage to the facts in the case.

> *The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases.*

A reasonable application of the above passage would be that section 377 is susceptible to a constitutional challenge because of the 'boundless sea of uncertainty' it creates and the fact that prima facie it does take away a guaranteed freedom.

The Court dismisses the Article 15 challenge along with Article 14 (non-discrimination) arguments without even addressing Article 15 substantively. This is in direct contrast to

the Delhi High Court judgment, which read Article 15 expansively to include discrimination based on sexual orientation.

V Article 21:

a) Right to Privacy:

In this part, the Court shows poor judicial craftsmanship again. It cites *Maneka Gandhi* acknowledging that the U.S. Supreme Court standard of substantive due process has been read into the Indian Constitution and that this is governed by principles of legitimate state interest and proportionality. The Court talks of the privacy-liberty-dignity link, and refers to *Kharak Singh* and *Gobind*, two important cases on the right to privacy. However, like in the previous section, the Court cites these cases and does not complete the logical flow of its statement, by applying its reading of these cases to the facts in *Naz*. Instead, the Court cites Para 46 of *Kharak Singh* and Para 47 of *Gobind* as if it is self-evident why privacy and liberty arguments do not apply here.

For instance if one were to pick the para below from the extracts they cite

> *27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might he engaging in such activities and that such 'harm' is not Constitutionally protective by the state. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures see 26 Stanford Law Rev. 1161 at 1187.*

This extract could as easily be support the claim that section 377 violates the right to privacy. One is supposed to assume that they depend on the part of the extract, which says that that the right to privacy is not absolute. Again, they do not even attempt to connect the precedent to the facts of *Naz*.

b) Right to bodily integrity and sexual choice

The Court again relies on a rights-enhancing judgment to restrict rights. This time it cites *Suchitra Srivastava* , where the Supreme Court had held that women have the right to dignity , privacy and bodily integrity, the right to contraception and the right to refuse to participate in sexual activity. The Court (presumably, since it does not bother to clarify) instead on focusing on these rights, refers to the fact that these rights were held subject to the provisions of the Medical Termination of Pregnancy Act.

The Court goes on to cite *Mr X v Hospital Y,* a case that involved a doctor disclosing HIV positive status of a patient to his fiancé. In this case the right to privacy is not absolute and the state can take measures to protect morals, against crime, health and the rights and freedoms of others.

Again, the Court after relying on *Suchitra Srivastava* and *Mr X* v *Hospital Y* makes no attempt to tie the loose ends after citing. We are supposed to assume from the facts of these case that what the Court is inferring from these cases is that the privacy is not absolute and can be restricted.

c) The Right to Live with Dignity:

The court cites the most important Supreme Court case on the right to dignity, *Francis Coralie Mullin*, but then deflects this question by holding that section 377 does not mandate the ill treatment of the LGBT community. The court goes on to rely on precedent to hold that the mere fact that police authorities misuse a law does not reflect on its constitutional validity.

VI Reliance on Foreign Jurisdictions

In a highly insular move, the Court criticizes the Delhi High Court's reliance on foreign precedent to read down section 377. The Court observed:

> *In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.*

Here the court refers to *Jagmohan* v *State of U.P.* where the Supreme Court during the course of hearings on the challenge to capital punishment rejected references to the U.S. case law, saying that Western experience cannot be transplanted in India. It also refers to *Surendra Pal* v *Saraswati Arora* where the lawyer relied on the English doctrine of presumption of undue influence in a case where parties were engaged to be married- court's logic here was that family law has undergone a drastic change in England, while in India it is still largely an arranged affair- social norms and considerations are different. The implication here (again not stated clearly) is that Indian social conditions and morality differ from the west and so Western judgments cannot be used as a point of comparison. This completely ignores the commonalities of LGBT experience and state morality when it comes to this issue, or the transnational history of this law.

The judgment concludes with the Court declaring is that section 377 does not suffer from the vice of unconstitutionality. However, the Court ends by saying that despite this judgment, Parliament is competent to legislate whether 377 should be deleted from the statute books. With the general elections around the corner, it seems improbable that the government will push this issue in Parliament now.

The Court, in overturning the Delhi High Court decision, after almost five years, has taken the unprecedented step of reversing rights granted to the LGBT community. From the text of the judgment, it appears as if the Court's logic is rooted in a narrow reading of the power of judicial review to protect the fundamental rights of a "miniscule" minority. The Court has failed to appreciate the compelling evidence placed before it, preferring to rely only on the 200 reported judgments of convictions under 377. The court admits that the meaning of the terms 'carnal intercourse against the order of nature' is not evident, yet does hold the law constitutional, and uses this as a basis for reasonable classification. The Court's dismissal of Art 14, 15 and 21 claims are unconvincing and not expressly laid out. Further, the Court has not been able to understand the tectonic changes, the culture-shift that has taken place in Indian society, where LGBT persons are no longer in the closet.

This moment reminds me of the 1986 *Bowers* v *Hardwick* decision in the Unites States when the U.S. Supreme Court upheld the constitutionality of a Georgia anti-sodomy law. (Bowers was overturned in 2003 in *Lawrence* v *Texas*)

Justice Blackmun, in his dissenting judgment in *Bowers* said

"…I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent."

The Indian Supreme Court has betrayed the values that the Delhi High Court judgment stood for – dignity, liberty, equality, non-discrimination, inclusiveness and constitutional morality.

We Dissent.