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Judicial Recalibration of LGBTQ+ Rights in India: Interpreting Originalism, Textualism & Transformative Constitutionalism

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Abstract

This Paper appraises the two views of interpreting the constitution i.e. the Originalist view & the textualist view. Paper focuses on the Supreme Court's engagement with homosexuality from an originalist perspective, culminating in the decriminalisation of consensual same sex act between consenting adults. Paper briefly outlines the significance of constitutional theory in legitimizing judicial action on issues like Homosexuality in India. It further delves into the liberty limiting principles highlighting their relevance in criminalizing this conduct. Further the paper traces the history of 'sodomy' laws and how these colonial-era laws were imposed without significant resistance reflecting colonial imposition.

Paper analyses the key Indian Legal cases such as Naz Foundation case where Delhi High Court adopted an originalist view and held section 377 of IPC as unconstitutional. Court emphasized on Constitutional Morality, interpreting constitutional broadly to account for dynamic conditions. Conversely in Suresh Kumar Kaushal Case Supreme Court revert to strict textualist interpretation. The paper argues that this decision ignored the constitutional value of diversity. Paper then discusses the Navtej Johar case as a corrective measure embracing both intentionalism and textualist originalism. This case restored egalitarian values & promoted transformative constitutionalism by recognizing sexual autonomy and dignity.

Finally, paper also addresses the recent Supriyo case relating to legal recognition of same-sex marriage. Here Supreme Court again adopted the textualist approach, rejecting transformative constitutionalism & ruled that right to marry is not a fundamental right & deferring the matter to the legislature. This approach is being compared with more progressive international precedents from USA, UK, France, Canada, Nepal & Taiwan which have leveraged the judicial action & combined with legislative reform have advanced LGBTQ+ rights. Paper also highlights the potential concerns regarding the absence of provisions for non-consensual homosexual acts.

Key Words: Originalist, Textualism, Constitutional Morality, Homosexuality LGBTQ+ Rights, Liberty limiting principles.

Introduction:

Writing on the Judiciary and Homosexuality issue it's vital to highlight the importance and meaning of constitutional theory in brief. It aims to legitimize and give validity to any constitutional or political action taken to address any constitutional or controversial issue prevailing in the legal culture of any nation. One such issue is that of Homosexuality in India. In the last decade the courts have given the lot more weightage to the Constitutional morality and constitutional values as a result many landmark judgements were delivered which experienced the radical shift in various areas one of which is the decriminalization of Homosexuality. In decriminalizing the homosexuality in India constitutional theory have played an important role. The Judges have adopted the Originalist view while addressing this issue and interpreting the Constitution and its values and recognizing the constitutional morality over the popular morality. Originalist approach while interpreting the constitution traces the populace and intent of the makers at the time of the making of the constitution and what founding fathers would have intended to it if the present variables of culture, societal development would have present in those times. It provides Liberal construction of the constitution rather than the strict textual interpretation. They generally construct that the constitution has "Objectively Identifiable" or public meaning at the time of its inception which is constant and the task of judicial officers is to interpret the original meaning of it.[1] People in favour of using originalists approach as to the interpretation of the constitution points out to the historical aspects and the democratic will of the people who originally framed & ratified constitution.[2] The 'Original' meaning of the text of the constitution is objectively construed similar to the 'reasonable man standard' in tort law, which provides the objective standard to judge any act from the shoes of the ordinary man actions placed in the same situation. Similarly in this approach the meaning of any text exists independently of the subjective standards of the individuals.

Now after having understood the meaning of originalism in brief under constitutional theory, to deal with decriminalizing homosexuality in India we need to first understand the principles behind criminalisation of the act and restraining the individual liberty of the person. Liberty is the external construct in which the person has freedom to act or omit in any manner which he likes without interfering the rights of others hence to ensure this the legal constraints are imposed. In order to justify this legal constraint, the question arises that what all sorts of actions the state makes criminal without hampering the autonomy of its subjects. Thus, there are 4 liberty limiting principles i.e. Legal Moralism, Harm Principle, Offence Principle and Legal Paternalism Principle. Out of these four principles, Legal Moralism & Harm principles become more relevant. Legal moralism principle prevents the inherent immoral act & it is immaterial that they are harmful or not. For the Positivist legal moralists, the appropriate reason to legally restrict the homosexuality is that the majority of people disapproves the homosexuality. But at the same time these principle balances between the popular morality and the actual morality involved in the particular act. Here comes the role of positive social construction of LGBTQ+. Positive social construction, argues that social norms and moral ideas are malleable. They were susceptible to being actively moulded and altered. Through the modification of our ideas

regarding equality, freedom, and human dignity, legal and social discourse has the potential to produce a morality that is more open and fairly distributed. According to this new moral code, identities and relationships that are associated with the LGBTQ+ community are not only acceptable but also moral and worthy of protection. It is necessary for LGBTQ+ groups to have positive social constructs in order for LGBTQ+ rights to be advanced; issue salience can only assist LGBTQ+ rights if public opinion is supportive.[3] Harm principle tends to limit the liberty of individuals by the state on those immoral acts which are harmful (physical, mental, reputation or monetary) for persons. If any act/omission does not cause any harm to others than that act/omission is not penalized. The Classic example of the application of the Harm Principle is decriminalization of the Homosexuality in England after the Wolfenden Committee Report of 1957 that the consensual sexual acts between the homosexuals is not harming those who find this very act as offensive. But India, in terms of the rational liberal ideology, was 50-60 years backward as in 2017 only in Navtej Johar vs Union of India, the Apex Court declared criminalization of homosexuality as unconstitutional.

Evolution of sodomy laws and Original intent of section 377

The initial documented references to "sodomy" in English law originate from two middle age pact, Fleta and Britton. Fleta mandated that " Christians who renounced, sorcerers, and similar individuals must be caught and burned." If someone is caught in the act and proved guilty by legal and public evidence, they will be buried alive if they are determined to have ties to Jews or to have committed crimes of bestiality or sodomy. Britton, in the meantime, mandated a sentence of burning for those publicly convicted as "sorcerers, heretics renegades, and sodomists." "Sodomy" was considered a sin against God in both the treatises. Sexual misbehaviour by Jews or apostates, who represent the racial or religious Order, was classed with other acts against custom and social purity.[4] An orthodox Christian theology that viewed sexual pleasure as polluting and only permitted if it promoted Christian reproduction was partly to blame for this.[5] It better conveyed Middle Ages concerns about infection and degradation across class boundaries. Historian R.I. Moore claims that in the 11th and 12th centuries, a "persecuting society" developed in Europe that targeted Jews, those with disabilities, apostates, witches, prostitutes, and "sodomites," who posed a threat to purity and pollution and had to be driven out and tamed.[6] European law was marked by intermittent persecution of this and other communities for decades. Thus, "sodomy" was pollution. Religion and race were highlighted in its punishment. British authorities' eagerness in introducing "sodomy" regulations into colonial settings even before they're fully established in their own country this may reflect the legal category's beginnings.[7]

The colonies set up by Britishers was ideal for legal rationalisation and systematisation. Colonial laboratories were inactive. According to a 19th-century historian, the Indian Penal Code was effective because, unlike in Britain, the British government was able to articulate "a distinct collective will" and carry it out without the local populace questioning it.[8] This authoritarian code taken advantage of the lack of public dissatisfaction among the Indian population, which at first did not question these criminal laws, thereby providing Macaulay

with an unrestricted opportunity for experimentation.[9] The legal systems of the several Asian and African colonies that were formerly part of the British Empire were modelled after the Indian Penal Code.

Naz Foundation case: Originalist view and upholding Constitutional Morality

It all traces back to year 2001 when Naz Foundation filed the petition before Delhi High Court to decriminalize section 377 IPC as it violates right to equality and life and personal liberty of individual. But Court dismissed the petition on the ground that issues submitted were purely academic in nature which cannot be considered. Against this review petition was filed but was same dismissed. Against these orders appeal before Supreme Court was filed which remitted the case before Delhi High Court for fresh Consideration in 2006. In 2009 in Naz Foundation v. Government of NCT of Delhi[10] which has identified the flaw in the criminalization policy of the state in criminalizing homosexuality and expounding the constitutionalism. Court found section 377 IPC being violative of article 14, 15 and 21 of constitution of India as it violates right to dignity and privacy. **Court observed that if one consensually and without harming any other person expresses one's sexuality then invasion on that precinct is breach of privacy**. It also relied upon the principles of "Strict Scrutiny" and "Compelling State Interest" and declared **that "constitutional text should be construed in a wide and liberal manner and not in strict and narrow sense so as to anticipate and take account of dynamic conditions & objectives so that any constitutional provision is not atrophied rather remains flexible to address new challenges." Court in interpreting provisions invoked the constitutional morality which discards the concept of criminalisation based upon the popular morality and only constitutional morality can pass the test of compelling state interest.**

It observed that if any conduct or act is not causing any wrongful harm defined as per the spirit of the constitutional principles then there is no point in criminalizing such action. Originalists argue that while interpreting the constitution, original intent of the people who proposed, drafted, argued, ratified the constitution is to be looked upon and in order to ascertain what they wanted to convey. For ascertaining this court looked outside the texts of the constitution such as constituent assembly debates, discussion of different committees (such as Drafting Committee of Constitution chaired by Dr. B.R. Ambedkar) etc. The judgement was widely celebrated but was limited to the jurisdictional limits of Delhi High Court. **The intent of the Constitution makers were to treat all persons equally and not to discriminate anyone on the ground of religion, race, caste, sex, descent and to provide certain special treatments to backward classes so that they can compete at par with others. Section 377 of IPC clearly discriminates on ground of 'sex'. Treating these sexual minorities differently and discriminately was never be intention of makers of the constitution**

Going back to archaic principles: Recourse to Textualism

In 2013 the appeal was filed against this decision of Delhi Court before the Supreme Court seeking overruling of the judgement and declare section 377 as Constitutional. In Suresh

Kumar Kaushal & Another v. Naz Foundation and others[11] held that the impugned judgement of Delhi High Court is legally unsustainable and restored the colonial position of 1860 i.e. criminalizing sexual acts between consenting adults. Here court adopted textualism as the method of interpreting legal text. In this mode of interpretation focus is on the plain and popular meaning of the text of legal document and emphasizing how the constitutional text would be understood by the people at the time when it was written and context in which it appeared. They focus on the objective meaning of texts as well but without inquiring into questions pertaining to the intent of the drafters of the constitution when deriving the meaning of the texts.[12] **Court in the present case said that section 377 merely identifies certain acts and does not criminalise a particular section or identity or orientation. Prohibition only regulates the sexual conduct regardless of gender identity and orientation. Hence it is not violative of article 14, 15, 19 and 21 of the constitution.** This observation shows that the court interpreted section 377 strictly and only limited to the plain texts. **It did not attempted to inquire about the effect of the section that criminalizing the sexual conduct will violate the individual liberty, dignity and privacy of homosexuals which are structured in that way naturally thus by criminalizing carnal intercourse against the order of nature is discriminating them from majority who are not structured in that way**. Court here discarded constitutional morality and gave importance to the popular morality which was not at all the correct approach. **Court also said that Homosexuals constitutes the miniscule fraction of population and over last 150 years less than 200 people were prosecuted for the same which cannot be the basis of holding section 377 as violative of article 14, 15 and 21 of constitution. Here court ignored the constitutional value of Diversity as the part of democratic principles.** The intent of the Constitution makers was to treat all persons equally and not to discriminate anyone on the ground of religion, race, caste, sex, descent and to provide certain special treatments to backward classes so that they can compete at par with others. Section 377 of IPC clearly discriminates on ground of 'sex'. Treating these sexual minorities differently and discriminately was never be intention of makers of the constitution.

Navtej Singh Johar Case: Restoring the correct position and preventing miscarriage of Justice

In Navtej Singh Johar vs Union of India[13], petitioner filed a writ petition before Supreme Court to struck down section 377 and overrule the judgement delivered in Suresh Kumar Kaushal vs Naz Foundation 2013. Apex court held that improper rationale was adopted in Suresh Kumar Kaushal case and held that even if a miniscule population is in minority with respect to the sexual orientation, it is to be protected by fundamental rights. **It held that section 377 (as far as consensual sexual act between 2 adults in private is concerned) it discriminates the LGBTQ+ community for sexual orientation without any intelligible differentia. Also, there is no reasonable classification in demarcating what constitutes natural sexual acts and what constitutes unnatural sexual acts. Thus section 377 on constitutional touchtone of article 14, 15 fails. With respect to the touchstone of Article 21, Apex Court observed that criminalizing sexual act between 2 consenting adults in private is violation of their Right to Privacy. Section 377 has an adverse impact on the identity of the homosexuals**

which force them to be bisexual thus violating their right to live with dignity. Justice Indu Malhotra Observed that homosexuality is a variation and not abhorrence. The judgement led to the transformation of the society rather bolster the old values subscribed by majority and this principle of transformative constitutionalism ameliorates the chilling effect of section 377. Court in this case used both intention and textual based originalism while interpreting the constitution. It correctly restored the egalitarian values enshrined under the constitution by recognizing the sexual autonomy of homosexuals and ensuring its aspiration of equal treatment to all. It changed to an extent the societal beliefs concerning homosexuals through transformative constitutionalism and upholding the constitutional morality. Decriminalizing sexual conduct in private by two consenting adults is a bold step where members of LGBTQ+ community can enjoy the fundamental rights at par with others. But this judgement does not guarantee the change of societal belief completely, it requires some positive efforts from respondents in the case i.e. government to supplement the judgment with the legislation and steps to recognize their sexual autonomy and to ensure that they live their life with dignity.

Supriyo case: The apex court ruled that right to marry does not falls under the fundamental right

The petitioner filed a writ petition seeking legal recognition of same-sex marriage. The petitioners argued that right to marry is a fundamental right under article 19 and article 21 w.r.t to this they have cited Shafin Jahan[14] and Shakti Vahini[15] Case. The apex court held that the cases which are cited by the petitioner are related with the inter-faith and inter-caste marriages that too between a male and a female. This court ruled that a person's choice of partner, whether for the purpose of marriage or not, is entirely their own, and the government cannot restrict this right. [16]. Similarly in the case of Shakti Vahini it was held that two adults have the right to be married when they decide to do so on their own initiative. However, the CJI decided that these cases would not be relevant in this particular case. They addressed instances when government, individuals or group of individuals "prevented a couple which was otherwise entitled to marry, from marrying,"[17] he reasoned. Justice Bhat agreed with him he further stated that the right to marry does not come under the purview of fundamental right which the court can compel the state and governance institutions to provide," as marriage is an individual's decision that confers social status. Justice Bhat noted that the popularity of a social institution does not necessarily imply that it constitutes a fundamental right. Following this line of reasoning, the Chief Justice of India concluded that text of the Constitution did not contain any provisions that indicated the existence of a fundamental right to marry, hence, the bench decided unanimously that right to marry is not a part of fundamental right. The parameters of marriage and the associated rights are established through legislative measures. In other terms, as the State facilitates marriage, it possesses the authority to eliminate the processes for its acknowledgement. The Supreme court of India used a textualist approach rather than a strict originalist interpretation in Supriyo v. Union of India[18]. On the question of whether section 4 of Special marriage act is unconstitutional or not the basis of that it excludes the marriage between non-heterosexual unions. The petitioners cited the decision of South African Constitutional court Fourie v. Minister of Home affairs[19] where the South African Marriage

Act violated the constitution by excluding the same sex couples from marriage the Constitutional court unanimously struck down the marriage laws which restricted the unions of non-heterosexual couples and ordered the parliament to make changes in the present marriage laws. It is essential to observe that South Africa's Marriage Act includes a singular provision (Section 30(1)) that explicitly restricts marriage to heterosexual couples. In contrast, India's SMA comprises multiple sections (4, 27(1A), 31, 36, and 37) that explicitly limit marriage to unions between a man and a woman. Secondly, South Africa's legal framework had already acknowledged same-sex unions through existing legislation prior to the Fourie case. India's legal system lacks any provisions that recognise same-sex partnerships, even indirectly.

Therefore, the legal and constitutional context in Fourie was fundamentally distinct from that of India. The South African Constitutional Court encountered a more limited challenge due to the nation's progressive legal framework, while India's SMA exhibits a more inflexible and exclusionary structure, lacking any prior acknowledgement of same-sex unions. The apex court rejected the applicability of the Fourie's case citing that there is no explicit constitutional protection for sexual orientation unlike the Section 9 of the South African Constitution, secondly the majority in the present case held that Indian courts cannot rewrite the marriage laws as this is the task of legislature. The court ignores the constitutional morality over the public morality by stating that the Indian society is not yet ready for this radical change, the court also contradicts with its own precedents where it has struck down discriminatory laws. Although the majority opinion acknowledged that LGBTQ+ individuals encounter discrimination, it adopted a more balanced stance. They claimed that only the legislature, not the courts, could recognise marriage. This viewpoint basically depends on a legal framework (such as the Special Marriage Act) that was created as a result of society's belief that marriage is an institution that is only for heterosexuals. A socially constructed, heteronormative legal reality is implicitly accepted by the majority's refusal to "read in" marital equality into the law as it stands. Chief justice in his dissenting view supported Fourie's reasoning by saying that transformative constitutionalism applies to India too and it is important for judiciary to intervene whenever parliament fails to act. Dissenting opinion directly addressing the social construction of LGBTQ+ persons as "lesser citizens" is the purpose of this argument, which seeks to topple that social order through the interpretation of the Constitution. By putting out the idea that the court should create a new sort of "civil union," the dissenting opinion proved that they were willing to challenge and alter a socially constructed legal reality rather than simply interpreting it.

Conclusion

Constitutional interpretation is carried out with the purpose of reconstructing pre-existing legal and social frameworks that are founded on views that are destructive to society. A discriminating statute, such as one that renders same-sex partnerships unlawful, is said to be predicated on outdated and biased notions about nature or morality, rather than on objective reality, from the perspective of a court that employs this method. A detrimental societal

stereotype is proactively destroyed by the court by the overturning of such legislation, which is a legal structure that sustains the stereotype. To put it simply, it contends that the social idea that serves as the foundation of the law is not viable from a legal standpoint. In order to create a new reality that upholds the identities and rights of the marginalised minority, the court exercises its interpretive jurisdiction. This is the action that will make all the difference. In addition to removing a barrier, the court grants the group a new legal status or right that acknowledges their humanity and dignity. A court can explicitly declare a fundamental constitutional right to self-identified gender in circumstances pertaining to transgender rights, in addition to invalidating laws requiring surgical procedures for formal gender recognition. This act provides transgender identities legal and social legitimacy by positively defining gender identity as an issue related to human liberty and constitutional right. Similar to this, activist courts in the marriage equality case did more than just overturn limits on marriage; they reinterpreted marriage as a right that all people possess, regardless of their sexual orientation. The concept of marriage as a social institution was altered as a result. In order for members of the LGBT community to have access to other services that are commonly provided to the general public, such as banking services, it is essential that their rights be acknowledged for the reasons that have been stated. The financial services industry is a complex social system that frequently discriminates against and excludes people who identify as LGBTQ+. In the event that LGBTQ+ individuals and their communities are unable to acquire financial services due to discriminatory institutions, this poses a threat to the overall economic well-being of these individuals and their communities.[20]

France was the first country to decriminalise homosexual acts in the year 1791, with the intention of putting a focus on liberty and equality. This led to a re-evaluation of legislation and cultural standards, which was a natural consequence of the decision. One of the objectives was to lessen the impact that the church has on the legal system and the government. The ideas of consent and harm have been prioritised in the new code, rather than the moral or religious restrictions that were previously in place.

The United States of America has likewise removed sodomy prohibitions, utilising the living constitutionalism argument rather than textualism. In Lawrence v. Texas[21], the US Supreme Court ruled that sodomy statutes prohibiting consenting gay partnerships are unconstitutional, stating the right to privacy and equal protection guaranteed by the Fourth Amendment. Following the court's ruling, numerous states removed laws relating to homosexuality. The Defence of Marriage Act of 1996, which defines marriage as a union between a man and a female, was partially struck down by the Supreme Court of the United States in the case of United States v. Windsor[22]. This act defines marriage as a relationship made between a male and a female. A progressive meaning of the word "liberty" was used in the landmark decision of Obergefell v. Hodges[23], which was decided in the year 2015 and recognised the legitimacy of marriages between people of the same gender.

Across the world, a number of nations that were formerly British colonies have done away with their sodomy restrictions and made marriages between people of the same gender legal. In the year 1957, the Wolfenden Report suggested for the decriminalisation of homosexual

actions that were carried out in private with the consent of the individual. After it, parliamentary discussions took place, and non-governmental organisations made substantial contributions to the drive for reform. As a result, the act of homosexuality between two consenting males who were at least 21 years old was largely decriminalised in England and Wales in the year 1967. On July 17, 2013, the Marriage (same-sex couples) Act 2013, a historically significant piece of legislation that legalised marriage between people of the same gender, gained the royal assent. The passage of this legislation represents a significant advance for the rights of LGBTQ+ individuals in England and Wales.

In addition to this, the Canadian court has referred to the living tree doctrine, which asserts that the constitution is able to adjust to the shifting conditions that exist in society. Both Nepal and Taiwan demonstrate boldness in the judicial system. Invoking constitutional rights to equality and dignity, Nepal's highest court issued an order that legal recognition be granted to marriages between people of the same gender and those of a third gender. Equal protection is a principle that is implemented in Taiwan, which was the first Asian nation to legalise marriages between people of the same gender. In the face of hostility from the society, the courts of South Africa and Nepal took courageous action to achieve equality. On the other hand, the courts of the United Kingdom and Taiwan combined judicial rulings with further legislative action. On the other hand, in the most recent ruling on Supriyo, the Supreme Court of India refrained from applying change, giving a new interpretation to the existing principles of the constitution, and left the matter up to the parliament. This ruling on marriage between people of the same gender in India places a focus on caution rather than boldness; yet, precedents from across the world demonstrate that rights may be protected when politicians and judges work together. In 2023, new criminal laws came into effect in India; the Bharatiya Nyaya Sanhita replaced the Indian Penal Code, and there is no mention of section 377, which criminalised gay activity prior to the 2018 judgement of Nav Tej Singh Johar. The removal of Section 377 appears to be a beneficial act by parliament, but it could seriously harm the LGBTQ+ community because there is no provision for non-consensual coercive homosexual acts.

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