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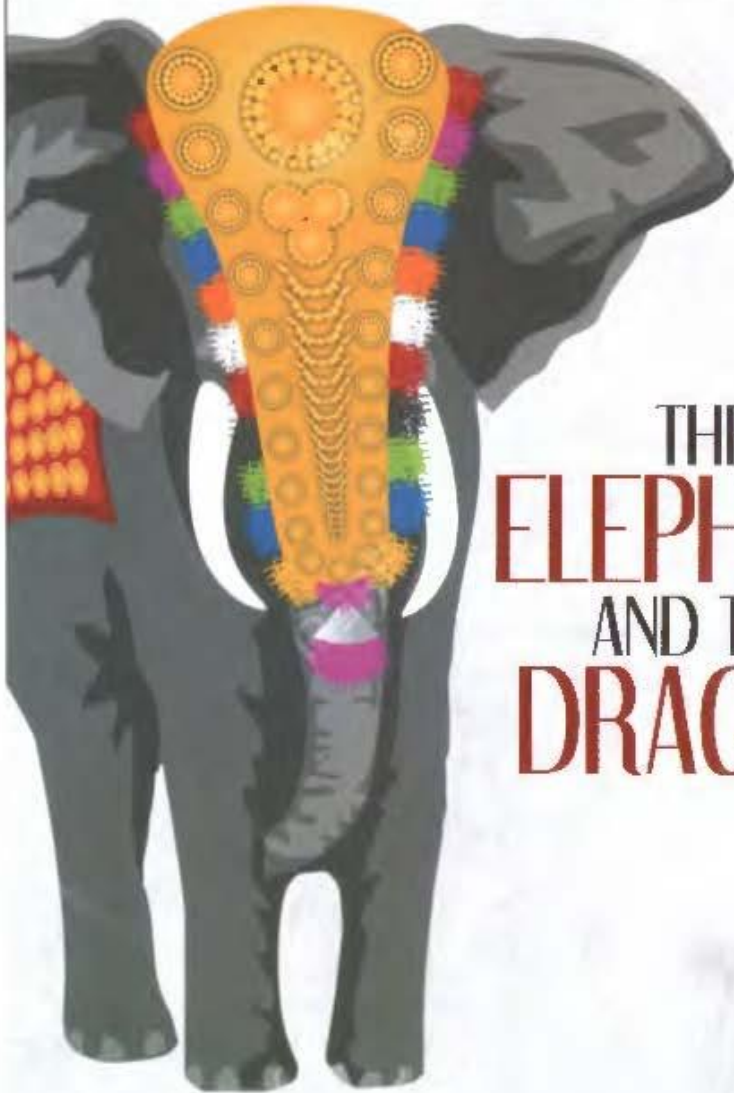
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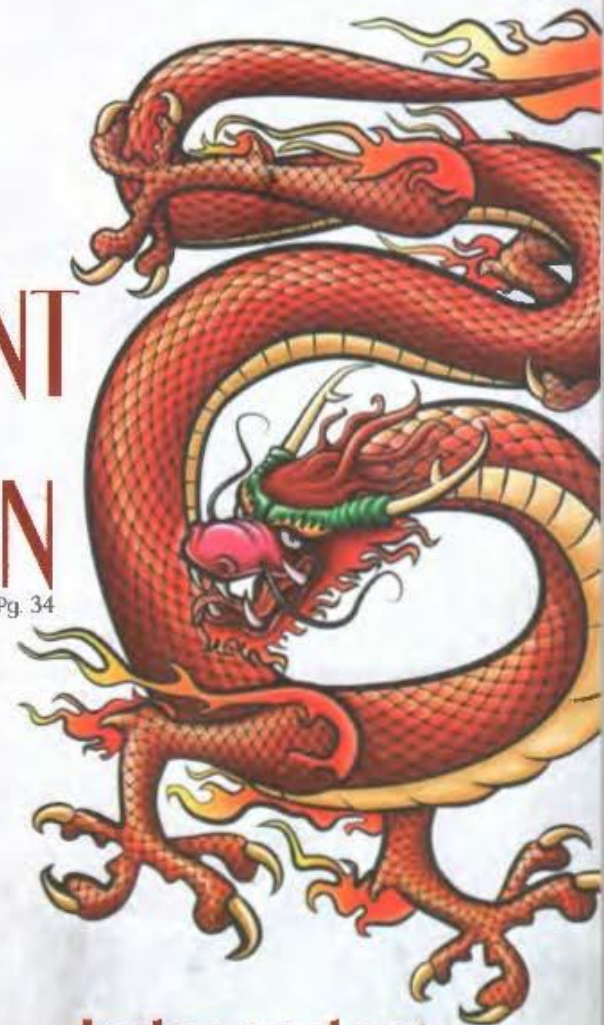


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THE LGBT DILEMMA

Two separate judgements delivered by the SC have caused a degree of confusion as the subjects thereof give the impression of being inextricably intertwined with each other

Two separate judgements delivered by the Hon'ble Supreme Court, in two succeeding years, have caused a degree of confusion in legal minds because, despite a disclaimer to the contrary, by the Supreme Court in its latter judgement, the subjects dealt with and pronounced upon, in the two cases, give the impression of being inextricably intertwined with each other. The first judgement, dated December 11, 2013 was delivered by Singhvi and Mukhopadhaya JJ in *Suresh Kumar Kaushal and another vs NAZ Foundation and others*, Civil Appeal No. 10972 q/2013. The second judgement was delivered by Radhakrishnan and Sikri JJ, on April 15, 2014 in *National Legal Services Authority vs Union of India and others*, WP (Civil) No. 400 of 2012.

2. In *Suresh Kumar Kaushal and another vs NAZ Foundation and others*, (hereinafter the *NAZ Foundation Case*), their lordships of the Supreme Court upheld the Constitutional validity of Section 377 IPC which provides:

"Unnatural offences-- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [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. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

3. While pronouncing its judgement, in the *NAZ Foundation Case*, the Supreme Court observed that:

- i) No particulars had been provided by the Respondent (NAZ Foundation) of cases arising out of harassment and assault from the public and public authorities to sexual minorities (emphasis added). Therefore, given the insufficiency of detail, it was not possible to record a finding that these sexual minorities were being subjected to discriminatory treatment by either the State or society.
- ii) The provisions of Article 14 (Right to Equality) of the Constitution could not be invoked to strike down Section 377 IPC because the "classification" provided for the purpose of legislation was not arbitrary in this case. Therefore, the legislature was well within its rights to selectively apply the law (Section 377 IPC in this case) to certain classes or groups of persons (namely the sexual minorities).
- iii) It would not be in order to read down the provisions of Section 377 IPC as being *ultra vires* of Articles 14 & 15 of the Constitution as only a "minuscule fraction of the country's population is constituted by lesbians, gays, bisexuals or transgenders (LGBT) and in the last more than 150 years, less than 250 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC".
- iv) Recourse could not be taken to the concept of "due process" which had been embedded into the interpretation of Article 21 of the Constitution pertaining to the right to life and personal liberty, by the Supreme Court in the *Maneka Gandhi* case. This right too was not absolute and even if



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Section 377 was, as alleged by NAZ foundation, misused by police authorities and others, it is not a reflection on the vires of the section. It might be a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC".

- v) Attempts at transplanting the Western experience in our country (judgements by courts of western nations upholding the right to privacy of sexual minorities in respect of their sexual practices in keeping with their sexual orientations) were dubious exercises. An analogy was drawn with capital punishment which this country has retained on the statute books despite its abolition elsewhere in the world.

4. Let us examine the NAZ Foundation case in the light of the subsequent judgement, of the Supreme Court in the case of *National Legal Services Authority vs Union of India and others* (hereinafter "*Trans Gender Case*").

5. The Supreme Court categorically declared in its judgement in the *Trans Gender* case that:

"A Division Bench of this Court in *Suresh Kumar Kaushal and another v. Naz Foundation and others* [(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 I/PC and, hence, we express no opinion on it since we are in these cases, concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation"

Notwithstanding the above unequivocal assertion by the Supreme Court, the two judgements, read together, would point to the existence of several grey areas which, either the legislature or the judiciary may have to step in, in order to inject clarity into the entire gamut of issues affecting the Transgender.

6. In paragraph 11 of his judgement in the *Transgender Case*, K. S. Radhakrishnan. J. observed that "Transgender is

generally described as an umbrella term for persons whose gender identity, gender expression or behaviour (emphasis added) does not conform to their biological sex". If the term "behaviour" is taken to mean being in conformity with their "biological sex", then it would be possible to infer that Transgender persons cannot be expected to demonstrate sexual behaviour which would meet the "order of nature" dictum prescribed in Section 377 IPC, a provision that was upheld as constitutional by their lordships in the *NAZ Foundation case*.

7. In paragraph 20 of the judgement (ibid), the Supreme Court remarked that "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom...". Assuming that the Supreme Court used the two terms "sexual orientation" and "gender identity" as expressions with different meaning rather than being interchangeable or synonymous, the conundrum here would be to decipher what precisely could be the difference. One possible elucidation could be that of the term "sexual orientation". Inter alia, the Oxford Advanced Learner's Dictionary (Web Edition) describes "Orientation" as:

"a person's basic beliefs or feelings about a particular subject"

- religious/political orientation
- a person's sexual orientation (= whether they are attracted to men, women or both)".

The phrase "Sexual Orientation" is more elaborately defined in the Oxford Dictionaries – Language Matters (Web) as:

A person's sexual identity in relation to the gender to which they are attracted; the fact of being heterosexual, homosexual, or bisexual.

The Merriam-Webster Dictionary (Web Edition) explains "Sexual Orientation" to mean:

"the inclination of an individual with respect to heterosexual, homosexual, and bisexual behaviour"

Going by the assumption that the Supreme Court has used the term "Sexual Orientation" in keeping with the ordinary meaning of the phrase, it would mean that the Court incontrovertibly regarded sexual preference as coextensive with "Gender Identity" as being integral to the personality, dignity and freedom of a person and thereby entitled to the protection of the law.

8. In the *Trans Gender Case*, the Supreme Court approvingly quoted copiously from the "Yogyakarta Principles" as addressing a broad range of human rights standards. One such quote affirmed that:

"Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms".

The approbation of the aforesaid Yogyakarta Principle by the Supreme Court would have to be viewed in the context of Section 377 IPC apparently being anathema to this principle and thereby arises the confusion vis-a-vis the requirement of constitutional protection, under the umbrella of Articles 14, 15 and 21 for Transgender persons especially if their sexual orientation does not tread the straight and narrow path delimited by Section 377 IPC.

9. In paragraph 55 of his judgement in the *Trans Gender Case*. K. S. Radhakrishnan. J. observed that: "Non-recognition of the identity of hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces at home and in jail, also by the police". on the face of it, this observation would be at variance with the conclusion made by their lordships in the Sec. 377 Case namely that as no particulars had been provided by the Respondent (NAZ Foundation) of cases arising harassment and assault from public and public authorities to sexual minorities (emphasis added), therefore, given the insufficiency of detail, it was not possible to record a finding that these "sexual minorities" were being subjected to discriminatory treatment by either the State or society. Going by the Oxford Advanced Learner's Dictionary (Web), the word "Transgender" would include the entire LGBT spectrum:

"relating to transsexuals and transvestites"

- transgender issues
- gays, lesbians, bisexuals and transgender people"

10. Yet again, in paragraph 66 of his judgement in the *Trans Gender case*, His Lordship K. S. Radhakrishnan observed

that: "A transgender's personality could be expressed by the transgender's behaviour (emphasis added) and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality". This observation too appears to betray a degree of divergence from the judgement in Sec. 377 Case because the "behaviour" of a transgender in keeping with the personality of the said transgender would presumably, include sexual behaviour and orientation as well.

11. Going by the Transgender Case judgement it would seem that the legislature and the executive do not any longer have the authority to selectively apply the law (Section 377 IPC in this case) to certain classes or groups of persons (namely the sexual minorities). This conclusion would be at odds with the judgement in the *NAZ Foundation Case* if it is held that members of the Transgender community (with their often distinctive sexual mores and behaviour very different from the dictum contained in Section 377 IPC) are entitled to the full scope constitutional safeguards contained in Articles 14, 15 and 21 of the Constitution.



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