ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

ON LAW & MULTIDISCIPLINARY ISSUES

VOLUME I, ISSUE IV

JULY, 2020

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ANALYSIS OF "MAKING COMPARATIVE CONSTITUTIONAL LAW WORK: "NAZ FOUNDATION" AND THE CONSTITUTION OF INDIA" BY PRIYA URS

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ABSTRACT

The researcher carries about a detailed article analysis of Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India" by Priya Urs, in this paper. The research paper will comprise of a brief summary of the impugned article, a commentary of the writer's opinions and the researcher's views regarding the article. The paper tries to bring about the importance of comparative constitution and justifies its jurisprudential constitutionality in the light of divergence from existing laws and public morality and also focuses on the gender justice aspect through analyzing the reasoning of the judgment and the arguments regarding constitutionality of Section 377[1].

Keywords: Constitution, Naz Foundation, LGBTQ Rights, Comparative analysis

INTRODUCTION

The selected article talks about the constitutionality and application of comparative constitutional law, in the light of the Naz Foundation Case[2]. The case was not only a landmark pioneer consideration of LGBTQ rights but also involved a beautiful harmonious construction of the Indian Constitution and the laws of other countries. The writer seems to be moved to write this paper as she witnessed the proceedings herself.

It is a detailed yet crisp description of the events that were a part of the proceedings and also carry the writer's own opinions regarding the same. It gives a holistic perspective of the judgment as well as a comprehensive insight into the proceedings and how the judgment came about.

[1] ' Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 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. '
[2] 2010 CriLJ 94.

ANALYSIS: SUMMARY AND EVALUATION

The writer starts with a brief introduction of the history of the case and states that the constitutional validity was challenged on the grounds of violation of several of the Fundamental Rights such as the rights to equality, privacy, and dignity, and how the conflict arose with clash with notions of public morality.

However, in the introduction, the writer seems to appear skeptical of the approach of comparative constitution taken by the Delhi High Court, especially when she says that the most striking feature of the decision was its use of changed constitutional interpretations, rather than the simpler task of re-interpreting the provisions of Section 377 in a contemporary context, far removed from the Victorian era in which it was envisaged. Further, the writer attempts to establish that High Court risked losing the legitimacy of this decision by using "uncertain jurisprudence" on rights like dignity and privacy. She even suggets that a "traditional legal approach" could be used by excluding consensual sex between homosexuals from the purview of Section 377 or a "constitutional approach" could be adopted to strike down 'order of nature' as violating the Right to Equality. The writer commented that instead of these, the Court probed the doors of Constitutional Provisions and discussed other constitutions. She went on to support this view by stating that before the Supreme Court, the State fervently opposed the use of foreign jurisdiction and cases.

This posed some questions in my mind as a reader, firstly, why does the writer suggest a re-interpretation. A mere re-interpretation would just be challenged again and judicial discretion can later result in a different interpretation hence rendering judgment's objective, null. As opposed to what the writer says, I believe that this approach would have been as risky and a proper reasoning of the different aspects as provided, sets a better precedent. It was also not the case that Indian provisions were not integrated in the reasoning, as in accepted by the writer later.

The writer further went on to state that the judgment had included cases like Lawrence v. Texas[3] which supported use of Article 14 as it rejected State's 'popular morality' argument with the European Court of Human Rights' decision in Dudgeon v. United Kingdom[4], and use the Human

[3] 539 U.S. 558. (2003)
[4] Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at: http://www.unhcr.org/re

Rights Committee's decision quashing Tasmania's sodomy law for violating the ICCPR to include the right to privacy. The Court also noted the global trends of various countries in decriminalizing homosexuality.

The writer goes on to discuss The Legitimacy of Constitutional Borrowing in Judicial decision making to appreciate the scope of the judgment in the light of "Convincing" arguments against to the contrary.

The writer cites morality an empirical study of the world's constitutions by David Law and Mila Versteeg which illustrates a trend towards the inclusion of a greater number of rights in constitutions today, where a number of rights are common, to establish the convergence of the constitutions of the world. She goes on to comment that it is not unexpected in the light of the "various species of Human Rights" developed. She consequently analyzes this in the light of the case where it is said that this case is often regarded as a 'test' case for Human Rights in India.[5] Thus, she remarks that the Court has used this Universalist approach to portray its decision as part of a larger global initiative for the protection of human rights, rather than viewing the Constitution narrowly. The universalism embraced by the High Court according to the writer, opposed to notions of cultural relativism, a species of the broader notion of self-determination, which rejects all comparative materials owing to the fact that they do not emanate from India's culture.

While the previous argument is considered convincing due to the fear of losing a nations culture and beliefs and hence, identity, the second view illustrated by the writer as emanating from this seems to be devoid of the line of argument being taken until now. The writer states that reliance on foreign sources that have come into existence after the Indian Constitution came into force could have had no influence on its drafting and should not be used to interpret its provision, where I understand the point is coming from the argument of other Constitutions having an influence over ours, it is important to expressly conflict this with the logic that morality changes with time and the legitimacy of an international right cannot be adjudicated in the light of this. The argument of morality flawed and these flaws have to be brought about through examples such as that of Sati, which was once justified on the grounds of public morality.

[5] R. Wintemute , Same-Sex Love and Indian Penal Code § 377: An Important Human Rights Issue for India, NUJS Law Review 4 (201 1), pp. 31.

Here, it is pertinent to note that the writer keeps justifying why she has only talked about Naz case and in doing so she appears repetitive and insecure. It also makes the reader question her surety of her own decision of a narrow approach and her stance.

She then proceeds with justifying the comparative methodology in the selected case where she appreciated the "inclusive comparative style" of the judgment and went on to state that it invited minimal disapproval from those who rejected this methodology, which seemed to be a statement contrary to her stance in the rest of the article before. She also applauded the "artful convergence of varied and geographically dispersed jurisdictions", through which the judgment saves itself from fallacy of evidence. In my opinion, however, this was more of reasoning and the evidence of violence and discrimination against the LGBTQ could have been added to actually avoid any such fallacy.

The writer also lauds the equal importance given to all foreign jurisprudence and no differentiation based on the importance usually given to Western Civilized countries. She further makes a very lucrative statement in support of this methodology by saying that the trend seems to suggest that normative decisions on ideas like morality or justice are increasingly arrived at through international dialogue, rather than leaving societies to answer them independent of one another, which is exactly the way Human Rights Conventions have been brought into place.

It is further elaborated that the Court has been careful to include civilizations closer to home to counter the argument of gay rights being a Western Construct. Another important set of observations by the writer has been that firstly, deviation from global trends would have made the Court more exposed to criticism, secondly, comparative methodology in judicial pronouncements is more cheap and practical because a legislative change independent of this would be very slow and finally, the writer combines the English laws, which were the reason for our own penal code, which have also now abolished such criminalization.

The Court uses untouchability as the analogy to justify the doing away with of discrimination based on sexual orientation, as this fits comfortably into India's constitutional culture, as it condemns a form of discrimination that was not discussed but also no excluded. Thus, the judgment brings in the purview of Articles 14, 15, 19 and 21, so as to establish that the public morality cannot overshadow constitutional morality.

The Court's decision, approach and reasoning was logical because our own Constitution is borrowed from these Constitutions and further, as globalization has become such a potent force, an acknowledgement of the other country's status on such issues and analyzing its impact on our citizens and their expectations, becomes an important assessment which must take place. India competes on a global level and amends its stance to compete with the other countries in all other matters, there is no reason that the subject of Human Rights should be given a back seat.

The judgment was ahead of its time as the judges seemed to acknowledge all those rights that came into existence much after this particular judgment and thus, raised awareness of rights not expressly mentioned but which must be included in our Fundamental Rights to realize their meaning. These rights were not created in this judgment because they were already inherent, as was also elaborated upon by Justice Chandrachud[6]. Hence, I humbly disagree with the writer when she raises the issue of permanence of Constitution because that has not been changed.

CONCLUSION

To conclude, I must admit that the writer put me off by her cynical and incredulous Introduction, as I admit I developed my opinion on the basis of the initial paragraphs which seemed to be disbelieving of the approach of the High Court which I personally felt was ahead of its time and a much welcome change from the mechanical interpretations limited to the nation's perspective on public morality. However, the rest of the article was in support of the approach which initially confused me but I went on to appreciate some of the views of the writer. After a comprehensive second reading I can conclude that the Article was an inclusive analysis of the judgment and brought about a very new aspect of the judgment regarding Foreign Constitutions being a viable source of law for our country and the prejudice against this.

Though I realize that I have read the article with a more clarified perspective because of the new judgments regarding Right to Privacy, Dignity and of course, the striking down of Section 377, very recently. However, a more clarified and objectified introduction would have been a welcome change in this otherwise thoughtful and analytical article. An incorporation of the points of Human

[6] Justice K.S.Puttaswamy(Retd) vs Union Of India, (2017) 10 SCC 1.

Rights through a statement about UNDHR[7] would have brought about the concept of the need of gender justice more and it would be well within her focus on foreign jurisprudence, because this point easily favors the decision of the HC as legislations such as those of Sexual Harassment at Workplace[8] and to an extent, our Adoption and Environment laws have been adopted, keeping International Conventions in mind.

[7] "The case for extending the same rights to LGBT persons as those enjoyed by everyone else is neither radical nor complicated. It rests on two fundamental principles that underpin international human rights law: equality and non-discrimination. The opening words of the Universal Declaration of Human Rights are unequivocal: "All human beings are born free and equal in dignity and rights."": BORN FREE AND EQUAL, United Nations, 2012, HR/PUB/12/06, https://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf.; Another interpretation of this is discussed terms of interface between morality and Human Rights, where this particular Article is also cited in: Ryan Thoreson, The Limits of Moral Limitations: Reconceptualizing "Morals" in Human Rights Law, Volume 59, Number 1, Winter 2018, https://harvardilj.org/wp-content/uploads/sites/15/HLI103_crop-1.pdf.

[8] Vishakha & Ors. vs State of Rajasthan, AIR 1997 SC 3011.