JUDICIAL PRONOUNCEMENT AND SOCIAL MOVEMENTS: RECONCILING RIGHTS, GENDER DISCRIMINATION AND RELIGION

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ABSTRACT

In modern democratic systems that follow the Montesquieuan notion of separation of powers, Courts have traditionally been considered aseutral interpreters of the law and arbiters of disputes. However, with the passage of time, Courts have played an increasingly important role in shaping social movements, particularly when important and complex questions involving rights, gender identity and religion have been involved. The interaction between the society, the judiciary and the legislature has not always been uniform, with each of the three drawing from and influencing the other – the relationship to this extent can be termed reflexive. The ability of Courts to both influence and respond to social movements has been analysed by using three landmark cases: the Shah Bano case, the Aruna Shanbaug case and the Naz Foundation case. These three cases illustrate the various ways in which judicial pronouncements affect social movements. Both action and inaction on the part of the

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judiciary might give rise to social movements, which in turn might provide an impetus for progressive (or, in certain cases, regressive) law-making. However, this interaction is not always a two-way interaction, and is often influenced and shaped by external factors, most prominently the media which plays the role of the intermediary in this triadic relationship.

I. INTRODUCTION

Most contemporary democracies follow a model of government based on the Montesquieuan notion of separation of powers.[1] This model envisages a three-fold horizontal separation of powers between co-extensive organs of the State. The functional division of powers as envisaged by Montesquieu did not comprise of a hierarchy of powers but instead aimed at creating a system of restrains, *i.e.*, a system of checks and balances, wherein each organ would keep a check on the exercise of powers by the other two.[2] In this tripartite division of powers, the Legislature was granted the power of enactment of laws, the Executive that of implementation while the Judiciary was conferred the power of interpretation.[3] Since its adoption by the Cromwellian Constitution[4] of 1653, the doctrine of separation of

[1]Robert G. Hazo, *Montesquieu and the Separation of Powers*, 54 AMERICAN BAR ASSOCIATION JOURNAL 665 (1968).
[2]*Id.*
[3]*Id.*
[4]In the *Instrument of Government* (1653) – which constituted England's first written constitution – we can locate the first instance of the embodiment of the classical doctrine of separation of powers. The legislative authority of the State was vested in the Lord Proctor along with the Parliament, the executive authority was vested in the Lord Proctor and the judicial authority was vested in the Lord Proctor along with his council. Thus, at least in theory, there can be seen a manifestation of the doctrine of separation of powers in its most elementary form. See, M.J.C. Vile,

powers has become an integral attribute of modern democracies. It was under this articulation of the doctrine of separation of powers that the Courts derived their role as interpreters of law, as neutral and impartial arbiters of disputes and as the final settlers of disputes between contesting parties.

This idea of Courts as apolitical organs and neutral interpreters of law began to undergo a change with the realization that Courts, while justifiably required to be apolitical, cannot and should not stay out of tune with political reality.[5] Present-day Courts are required to grapple with a multitude of issues that might have a direct or indirect bearing on social policy. If the past few decades have been any indication, Courts have shown themselves willing to take up the mantle to decide issues that could, and at many times did, have tremendous social impact. This is particularly true when matters relating to sensitive issues intertwining rights, gender and religion have presented themselves for resolution. Judicial engagement at such times has presented opportunity for wide-ranging public debate. Further, the power of the Constitutional Courts to regulate the functions of the other branches of the government by way of the exercise of its power of judicial review is often manifested in the form of either providing an impetus for legislative consideration of important issues that would otherwise fall by the wayside, or as a way to resolve difficult conflicts that legislators loathe to decide.[6] When considering this larger picture, Courts often tend to become engineers of social change, by

Foundations of the Doctrine, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 17 (1967).

[5]See, Sotirios A. Barber, *Constitutional Failure: Ultimately Attitudinal*, THE LIMITS OF CONSTITUTIONAL DEMOCRACY 1 (2010). Professor Barber acknowledges the unavoidable link between law and politics and elucidates the role of each in shaping the other. Courts, as interpreters of law in a necessarily political environment, must not be ignorant of present-day political demands and policy. However, this does not take away from the fact that they continue to remain neutral arbiters of disputes and impartial interpreters of law.

[6]Daniel A. Farber & Suzanna Sherry, *The Democracy Worry*, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 4 (2009) [Hereinafter, Farber & Sherry].

inadvertently providing direction to both legislative policy and social movements.

This paper attempts to analyze the social impact of judicial movements. Judges, via the form and content of their judgements are capable of initiating social movements that have far-reaching consequences for society. It could be the choice of words or the approach adopted by the Court that causes uproar or the nature of the decision itself that accords it a monumental status. The impact of judgements on society is not restricted to merely the affected groups or 'people at large', but also to the Parliament which has at times been arm-twisted into taking action because of judicial pressure. Landmark judgements from Courts have often sparked public debate with vehement support and opposition flowing in from interested parties. These judgements have often been the stepping stone for social movements, providing direction to public opinion[7] and initiating social change.

To support this argument, this paper analyzes three important cases to illustrate the social impact of judicial pronouncements. First, the paper discusses the *Shah Bano*[8]judgement in light of the reactions it elicited from both the affected groups as well as Parliament. *Shah Bano*is one glaring instance of a situation where a progressive judicial decision acted as a catalyst for regressive legislative action. The case possibly marks a low-point in judicial authority where a pro-rights approach adopted by the Court was overturned by political decision-making. Next, the paper discusses the *Aruna Shanbaug*[9]judgement where the Court permitted passive euthanasia for persons who are in a persistent vegetative state. Analysis focuses on the response it evoked

[7]The question of public opinion is one that has been subject to much study and discussion. The impact of judgements on public opinions presents an independent area of research and is beyond the scope of this paper.
[8]Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.
[9]Aruna Ramchandra Shanbaug v. Union of India, AIR 2011 SC 1290.

from religious groups and the medical fraternity. Lastly, the decision of the Supreme Court in *Naz Foundation*[10] has been discussed. For a comprehensive analysis of the same, the decision of the Delhi High Court and the reactions it evoked are dealt with before considering the final settlement of the matter by the Supreme Court. The ruling of the Court against gay rights by shifting the burden to the Parliament to take necessary steps shows an attitudinal shift from *Shah Bano.*

These cases have been chosen for three reasons: first, all three of them have an underlying theme of placing individual rights against public interests; second, they are all landmark Supreme Court judgements that have elicited varied and emotional reactions from across the sections of Indian society; and third, , the manner in which they have been decided has led to vastly different types of social and legislative responses. The selected cases provide the scope to study the diverse types of responses that judicial decisions can elicit.

II. THE *SHAH BANO* CASE

The paper begins with an analysis of the *Shah Bano* judgement, which is believed to have created a furore unequalled since the 'great upheaval of 1857'[11]. What started as an innocuous incident of an old, destitute Muslim woman appealing for maintenance from her divorced husband, snowballed into a controversy that had more ramifications than could have been anticipated.[12] The story of Shah Bano has been re-written time and time again, with each new author adding another dimension to the story. The social impact of the judgement has often been commented upon, and can hardly be denied. The following discussion draws upon this vast body of literature to

[10]Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563.
[11]Shekhar Gupta et al., *The Muslims, a Community in Turmoil*, India Today, Jan. 31st 1986, at 90.
[12]Rajashri Dasgupta, *Historic Judgment and After* 22, EPW 748 (1987) [hereinafter Rajashri Dasgupta].

describe the sort of reactions the judgement elicited, the reason for such reactions and the unfortunate series of events that followed the decision.

In 1985, the Supreme Court heard an appeal against a decision of the Madhya Pradesh High Court granting maintenance to Shah Bano from Mohd. Ahmed Khan, her husband of 40 years, under Section125 of the Code of Criminal Procedure. In a landmark judgement, the Supreme Court upheld the decision of the High Court, sparking a raging controversy that would engulf the whole nation in the years to follow.[13] Reactions to the judgement were varied and wide-ranging. From feminists to conservatives, people from all sections of society responded to the judgement in a passionate and emotive way.

At the forefront of the supporters of the judgment were the feminist groups. They saw the judgement as indicting the high-watermark of women's rights in India. The Court had chosen to respect the individual rights of the woman over the group rights of Muslims. What was hitherto considered as unknown territory became a new avenue for Muslim women to enforce their rights.[14] Women and human rights workers from across the spectrum of society joined hands to applaud the judgement and celebrate the victory that female-kind had secured.

However, this joy was short lived as the judgement faced severe criticism from many parts of the Muslim community. Sections of the Muslim community launched the biggest-ever agitation in the post-independence era, accusing the Supreme Court of interfering in Muslim Personal Laws.[15] Muslim fundamentalists went up in arms

[13]Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, 27 ASIAN SURVEY 935 (1987) [Hereinadter, Nawaz B. Mody].
[14]Siobhan Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD JOURNAL OF LEGAL STUDIES 671 (2004) [Hereinafter, Siobhan Mullally].
[15]Rajashri Dasgupta, *supra* note 12.

against the judgement, raising cries of "*Hindu men are saving Muslim women from Muslim men*" and "*Islam is in danger*".[16] The Muslim critique of the judgement focussed on four distinctive but interrelated points: the interpretation of §125 of the CrPC by the Supreme Court; the Court's interpretation of Muslim Personal Law; the Court's allegedly disparaging remarks about the degradation of women in Islam and the Muslim husband's unfettered right of divorce; and, the *obiter dictum* of the judgement recommending the speedy promulgation of a uniform civil code.[17] Thus, what actually is and should have been treated as a women's cause became submerged in communal and political manoeuvrings at the cost of justice to women. [18] The focus was shifted from women's rights to communalization of politics and marginalization of religious communities.[19]

Such wide ranging criticism must necessarily have been provoked by some cause. Ironically, the Constitutional Bench deciding the case felt that it presented "no issue of constitutional importance". The Court could have hardly fathomed that the judgement would cause the sort of uproar that it did. The Supreme Court had on previous occasions held that a Muslim woman is entitled to maintenance under §125.[20] The problem, then, was not with the content, but with the form of the judgement. Instead of adopting a 'social justice' approach or 'equality before law' approach or proclaiming §125 as part of civil law to be equally applicable to all religions, the Court sought to interpret the Quran and various provisions of Muslim Personal Laws to conclude that granting maintenance under §125 does not violate

[16] Zakia Pathak &Rajeswari Sunder Rajan, *"Shahbano"*, 14 SIGNS 558 (1989) [Hereinafter, Pathak &Rajan].
[17] Nawaz B. Mody, *supra* note 13.
[18] Rajashri Dasgupta, *supra* note 12.
[19] Siobhan Mullally, *supra* note 14.
[20] Bai Tahira v. Ali Hussain Fidaalli Chothia, [1979] 2 SCC 316; Fazlunbi v. K Khader Vali, [1980] 4 SCC 125.

Muslim law.[21] In interpreting the Quran, not only did the Supreme Court overstretch its boundaries and enter into the field of theologians and religious jurists, but also imposed on Muslim men an obligation unrecognized by Islamic jurisprudence. [22] The interpretation of Muslim law proposed by Justice Chandrachud was seen by the Muslim *ulema*as an attempt by the Court to undermine the Personal Laws of the Muslims.[23] The spectre of an exclusively Hindu Court choosing between competing interpretations of Islam and pronouncing on the appropriate interpretation of the Quran provided sufficient ground for conservative Muslims to raise a furious outcry against the judgement.[24] This was compounded by observations by Justice Chandrachud to the tune of "*it is alleged that the fatal point in Islam is the degradation of women*" [25] and "*the Muslim husband enjoys the privilege of being able to discard his wife… for no reason at all*".[26] It is this callous treatment of Muslim law and practices that enraged the community. The recommendations for a Uniform Civil Code were also met with scepticism from the Muslim community. Many amongst the community felt that a Uniform Civil Code, if promulgated would either reflect the views of the majority or reflect some form of Westernized values.[27] The fear among the Muslims was that a Uniform Code would necessarily be predominantly Hindu and thereby lead to suppression of their Personal Laws.[28]

[21]Sara Ahmad, *Judicial Complicity with Communal Violence in India*, 17 NW. J. INT'L L. & BUS. 320 (1996) [Hereinafter, Sara Ahmad].
[22]*Id.*
[23]Zoya Hasan, *Minority Identity, Muslim Women Bill Campaign and the Political Process*, 24 EPW 44 (1989) [Hereinafter, Siobhan Mullally].
[24]Siobhan Mullally, *supra* note 14.
[25]Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945, at ¶1.
[26]Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945, at ¶3.
[27]Pathak &Rajan, *supra* note 16.
[28]Sara Ahmad, *supra* note21.

What is truly disheartening about this controversy is the adverse effect that it had on Shah Bano. Caught in the furore caused by the judgement, which had been passed in her favour, Shah Bano was trapped in a position which required her to choose between her individual identity and religious identity. She eventually rejected the judgement and dissociated herself from "*every judgement that is contrary to the Islamic Shariat*".[29] Thus, despite being granted her rights, she was coerced by unscrupulous social forces into abandoning them and publicly proclaiming her allegiance towards the Muslim community.

If the response of conservative Muslims is seen as antithetical to the judgement, the political response it generated is particularly reprehensible. The Congress party, which initially supported the judgement, was caught unaware by the scale of the protests that it generated.[30] Its defeat in some by-elections in December 1985[31] coupled with the rapid growth of the BJP indicated a sharp decline in its popularity among Muslim voters[32]. The Congress responded to the rising communal tensions by passing the Muslim Women's (Protection on Divorce) Act 1986. In doing so, the Congress yielded to the claims of cultural conservatives within the Muslim community[33] while also trying to recover its lost Muslim votebank by reversing the impact of the *Shah Bano*judgement[34]. The decision to introduce the Act was part of the strategy to reverse the 'rising tide against the Congress party's efforts to woo the Muslims'[35]. Rajiv Gandhi's decision to bulldoze the Bill through Parliament remains one of the starkest reminders of his tenure.[36] In this way, the Indian state performed a balancing act of accommodating and according

[29]Pathak &Rajan, *supra* note 16.
[30]*Id.*
[31]*Id.*
[32]Siobhan Mullally, *supra* note 14.
[33]*Id.*
[34]Zoya Hasan, *supra* note 23.
[35]*Id.*
[36]Nawaz B. Mody, *supra* note 13.

protection to all religions and religious sentiments under the umbrella of multi-theocratic pluralism and an ideology of secularism that encourages and protects all religions.[37] The Act relegated Muslim women to the category of secondary citizens, left without the right to claim maintenance against the husband under secular law and forced to resort to her paternal family in case of divorce.[38]

The *Shah Bano* case is one extreme example of how judicial decisions can act as a catalyst for regressive legislation. The sequence of events that followed the decision – the controversy and its attempted rectification by the Congress – reflects a conscious choice made by the Government in favour of group identity. This is but another example of a situation where individual rights are compromised in the name of preservation of group identity.[39] The affected party – Shah Bano – was somehow lost in the melee that followed the decision.[40] The campaign initiated by Muslim conservatives and accommodated by the Congress Government turned the issue into a purely political and communal matter while the real stakeholder lay completely ignored. This judgement and the sequence of events that followed it reflect the absolute low point of judicial independence and authority. The ease with which a settled legal matter was overturned by the Government to meet its own political ends serves to show the fallibility of judicial pronouncements. A natural inference is that while the judiciary as an institution is independent, the authority of its judgements is still subject to the satisfaction of the Government which retains the power to overturn any judgement that threatens its political interests. Thus, judgements while provoking public reaction, can also lead to legislative action that destroys the very basis of the judgement.

[37]Zoya Hasan, *supra* note 23.
[38]*Id.*
[39]Siobhan Mullally, *supra* note 14.
[40]*Id.*

III. THE ARUNA SHANBAUG CASE

The story of a 24-year old nurse who was sodomized and strangled with a dog-chain by a ward-worker in her hospital made headlines in March 2011 when the Supreme Court pronounced judgement on a plea made before it to discontinue force-feeding her and allow her to die a dignified death. While denying her plea, the Court permitted passive euthanasia in cases of persons rendered to a persistent vegetative state.[41] The irony of the situation is most eloquently highlighted by Justice Katju's opening quote from Ghalib: *Martehainaarzoomeinmarneki, Mautaatihai par nahiaati*.[42] Aruna Shanbaug, after 37 years of being rendered bed-ridden, and confined to a small dark hospital room, found herself evading death yet again while many in the country applauded the Court's decision[43].

Most discussion generated by the decision is on the subject of euthanasia in general and passive euthanasia in particular, and originates from the medical fraternity. Most supporters of the Supreme Court's decision come from the field of medicine and laud not just the permission to perform passive euthanasia but also the responsibility placed upon doctors (with approval from the High Court) to determine which cases are fit for passive euthanasia.[44]The judgement has been hailed as 'progressive' with 'far-reaching implications for end-of-life care and medical practice'.[45] The

[41] *Passive Euthanasia Possible But No Mercy Killing: SC*, OUTLOOK (Mar. 7, 2011),http://www.outlookindia.com/news/article/Passive-Euthanisia-Possible-But-No-Mercy-Killing-SC/714143.

[42] *Judge Quotes Ghalib in Aruna Mercy Killing Judgement*, OUTLOOK (Mar. 7, 2011), http://www.outlookindia.com/news/article/Judge-Quotes-Ghalib-in-Aruna-Mercy-Killing-Judgement/714202. The quote translates to One dies longing for death but death, despite being around, is elusive.

[43] *Medical Fraternity Hails SC Verdict on Euthanasia*, OUTLOOK (Mar. 7, 2011), http://www.outlookindia.com/news/article/Medical-Fraternity-Hails-SC-Verdict-On-Euthanasia/714168.

[44] *Id.*

[45] Roop Gursahani, *Life and death after Aruna Shanbaug*, 8 INDIAN JOURNAL OF MEDICAL ETHICS 68 (2011) [Hereinafter, Roop Gursahani].

reluctance shown by the Union of India to positively engage in the debate and consider the possibility of legalizing euthanasia[46] has led to one author commenting that "*it is now becoming obvious that our legislative leadership believes in ducking all socially important issues awaiting recognition and perhaps closure unless they are of immediate political significance*"[47]. The observations made by the Court regarding the low ethical levels and rampant corruption prevailing in the country have also been acknowledged by the medical fraternity.[48]

Opposition to the judgement has come from two main groups: religious groups advocating the sanctity of life and disbelievers in the ethicality of our medical system. The opposition from religious groups comes on predictable grounds. The sanctity of life argument finds its genesis in what has been called 'eclectic religious authorities'[49] which propound the sacrosanct nature and inherent inviolability of human life.[50] It is argued that there is inherent value to human life and it is morally reprehensible to take away such value either forcefully or by choice.[51] It is believed that destroying life because of its supposed worthlessness is a violation since human life in and of itself cannot be worthless.[52] Opponents of euthanasia are also suspecting of the standard of 'suffering' which justifies the taking of one human's life by another even if it is at his own instance.[53] Legal arguments against euthanasia come from the reading

[46]Aruna Ramchandra Shanbaug v. Union of India, AIR 2011 SC 1290, ¶22.
[47]Roop Gursahani, *supra* note 45.
[48]*Id.*
[49]Sushila Rao, *India and Euthanasia: The Poignant Case of Aruna Shanbaug*, 19 MED. LAW REV. 646 (2011) [Hereinafter, Sushila Rao].
[50]*Euthanaisa*, RELIGION FACTS (Mar. 18, 2015), https://religionfacts.com/euthanasia.
[51]Anuj Shaha, *Legalizing Euthanasia – Issues and Challenges*, SAVITRIBAI PHULE PUNE UNIVERSITY (Mar. 21, 2015), https://www.academia.edu/9440185/Legalizing_Euthanasia_Issues_and_Challenge.
[52]*Id.*
[53]*Id.*

of the right to life under Article 21 as an inherent natural right whereas suicide or euthanasia is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life.[54] This is a natural continuation of the debate regarding whether the 'right to life' includes the 'right to die' thereby bringing it within the ambit of fundamental rights. This question has previously been answered in the negative by the Supreme Court.[55] Another argument raised by opponents of the judgement is the possibility of malafide intentions and medical practices which are rampant in the country. Many fear that the judgement would allow for factors like unavailability of health facilities and the patient's lack of resources to take precedence while permitting passive euthanasia.[56] While these concerns regarding the condition of our health infrastructure are valid, they cannot be the overarching factors to determine whether euthanasia should be allowed. In any case, the Court has tried to incorporate sufficient safeguard against this by mandating the approval of the High Court on a case-by-case basis before allowing passive euthanasia.

The decision of the Supreme Court in the *Aruna Shanbaug* case brought back into the limelight an issue which has been at the centre of a long and protracted debate.[57] At the time when the judgement was delivered, it was hoped that public reaction and the Court's pleas for legislation, would bear fruit in the form of a nuanced and deliberated law.[58] In its judgement, the Court recommended to the Parliament to consider the feasibility of deleting §309 (attempt to suicide) from the Indian Penal Code, saying that it had become 'anachronistic though it is constitutionally valid'[59]. The Court further

[54]Suresh Bada Math & Santosh K. Chaturvedi, *Euthanasia: Right to life vs right to die*, 136 INDIAN J. MED. RES. 899 (2012) [Hereinafter, Math &Chaturvedi].
[55]Gian Kaur v. State of Punjab, [1996] 2 SCC 648.
[56]Math &Chaturvedi, *supra* note 54.
[57]Sushila Rao, *supra* note 49.
[58]*Id.*
[59]Aruna Ramchandra Shanbaig v. Union of India, AIR 2011 SC 1290, at ¶100.

elaborated that "*a person attempts suicide in a depression; and hence he needs help, rather than punishment*". [60] After taking into consideration the view of the Supreme Court as well as the recommendations of the Law Commission in its 210th Report[61], the Government has finally decided to repeal §309. [62] The positive approach taken by the Government instils hope that 'a ritualistic burial will finally be given to this anachronistic law'[63]. It is hoped that the proposed amendment will soon be laid before Parliament and enacted into law. This will be one example of an instance where judicial pronouncement has laid the foundation for progressive legislation. The decision brought the issue into the limelight, opening it to public scrutiny and recommending legislative intervention. This recommendation seems to have had an impact with the Government finally deciding to take up the mantle and proposing action.

This is one clear instance of how the judiciary not just influences social movements but also provides impetus for legislative action. In this particular case, the proposed legislative reform cannot be credited

[60] *Id.*

[61] The Law Commission, in its 210th report submitted in 2008, had noted that attempt to suicide may be regarded more as a manifestation of a diseased condition of mind, deserving treatment and care rather than punishment, and accordingly recommended to the government to initiate the process for repeal of the "anachronistic" Section 309. It called Section 309 a "stumbling block in prevention of suicides and improving the access of medical care to those who have attempted suicide."

[62] In a reply in the Rajya Sabha, Minister of State for home Haribhai Parathibhai Chaudhary said that the Government had decided to drop §309 from the IPC after 18 states and 4 Union Territories backed the recommendation of the law commission. As of December 10, 2014, a Cabinet note on the proposed amendment had been circulated by the Home Ministry among other Ministries. See, Bharti Jain, *Government decriminalizes attempt to commit suicide, removes section 309*, TIMES OF INDIA (Dec. 10, 2014), http://timesofindia.indiatimes.com/india/Government-decriminalizes-attempt-to-commit-suicide-removes-section-309/articleshow/45452253.cms.

[63] *A step toward humanisation*, THE HINDU (Dec. 15, 2014), http://www.thehindu.com/opinion/editorial/editorial-a-step-toward-humanisation/article6691224.ece.

to the judiciary alone. The process began with the Law Commission's Report in 2008. The Supreme Court brought the debate back into the public domain in 2011. The decision to repeal §309 came to light in 2014. This decision has come as a result of a long-drawn process. However, the role of the judiciary in re-igniting public debate on a contentious issue and recommending specific legislative action cannot be overlooked. This is one instance where Courts facilitate legislative action by deciding sensitive issues that a politically-minded Parliament would loathe to resolve. By pronouncing authoritatively on the issue, the Court provided direction to social policy, giving the government a necessary push. Thus, in contrast to *Shah Bano*, this is a case where judicial decision-making resulted in positive legislation and legal reform. This decision clearly highlights the key role that Courts play in guiding and directing social policy.

IV. THE NAZ FOUNDATION CASE

In 2009, the Delhi High Court delivered a judgement that is considered a landmark moment in Indian judicial history.[64] Reading down §377 of the Indian Penal Code, the Court decriminalized consensual sexual acts between adults in private. This judgement was hailed by the LGBT community as paving the way towards equal sexual citizenship and empowering a community that has been historically marginalized.[65] It pushed towards a new discourse, away from the medicalized idea of homosexuality and towards a vocabulary of inclusiveness and tolerance. The high points of the judgement come in the form of the expansive interpretation of Article 15 of the

[64]Danish Sheikh, *The Road to Decriminalization: Litigating India's Anti-Sodomy Law*, 16 Yale Hum. Rts. & Dev. L.J. 106 (2013) [Hereinafter, Danish Sheikh].
[65]*Id.*

Constitution[66], the importance placed on the right to dignity[67] and the crucial distinction drawn between the concept of public morality and constitutional morality[68]. One of the most remarkable aspects of the case was the diametrically opposite stands taken by different ministries of the Union Government. The Home Ministry filed an affidavit saying that legalizing homosexuality would hurt public morality whereas the Health Ministry through the National AIDS Control Organization (NACO) stated that criminalization of homosexuality has hampered AIDS prevention efforts by driving homosexuals underground and away from legal and medical protection.[69] Thus, the fractured approach of the State was noticeable at this point itself. While the LGBT community, supporters of gay rights, international human rights organizations and AIDS control organizations celebrated across the country[70], it attracted opposition

[66]The Court interpreted the term 'sex' in Article 15 to include discrimination based on sexual orientation, thereby making any form of discrimination based on sexual orientation.

[67]The Court placed heavy reliance on the principles of inclusiveness, dignity and privacy, which it claimed form the basic tenets of the Indian constitution.

[68] The Court drew an interesting difference between public morality and constitutional morality. Public morality, it held, was short-lived and based on shifting and subjective notions of right and wrong. Constitutional morality, on the other hand, is drawn from constitutional values and is a cultivated standard. The test of 'compelling state interest' can be met only by demonstrating the standard of constitutional morality and not mere public morality. Thus, the enforcement of public morality cannot be used as a justification for infringing personal liberty since constitutional morality must outweigh the argument of public morality, even if it be of the majoritarian view. The essence of the distinction between public and constitutional morality is that public morality is merely a reflection of the moral and normative values of the majority of the population (as expressed by the legislature), while Constitutional morality not only reflects the majority's values, but also shapes and changes them as part of the social engineering aspect of our Constitution. See, Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*, 2 NUJS L. REV. 445 (2009).

[69]Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1 (2015) [Hereinafter, Bret Boyce].

[70]Aarti Dhar, *Judgment on Section 377 Welcomed*, THE HINDU (Jul. 3, 2009), http://www.hindu.com/2009/07/03/stories/ 2009070361381800.htm; *Gay Sex*

from a variety of religious groups[71]. While the State decided against filing an appeal, several other actors took up the mantle, the first among who was an astrologer named Suresh Kumar Koushal.[72]

After being reserved for judgement for nearly an year and a half, the Division Bench of the Supreme Court finally pronounced its verdict in *Koushal v. The Naz Foundation*, holding §377 of the IPC to be constitutionally valid and reversing the judgement of the High Court. While the judgement was welcomed by some religious leaders[73], most reactions towards the judgement were those of shock, disbelief and disappointment[74]. The decision of the Supreme Court has been criticized as being 'remarkably thin in legal analysis' while placing excessive focus on what acts constitute 'unnatural sex'.[75] The Court swept aside the entire discrimination argument articulated by the High Court to hold that §377 only describes certain acts and not categories of persons and is therefore not discriminatory.[76] The Court further observed that the LGBT community formed only a 'miniscule fraction' of the population of the country, and over the course of 150 years, not even 200 individuals have been prosecuted under §377.[77] While enunciating the principle of judicial restraint, the Court pointed out that the possibility of misuse could be a relevant factor for the Legislature to consider while judging the desirability of amending

Judgment Greeted with Delight, Jubilation, THE HINDU (Jul. 4, 2009), http://www.hindu.com/2009/07/04/stories/2009070451260300.htm.

[71]Danish Sheikh, *supra* note 64.

[72]*Id.*

[73]See, Amrita Madhukalya, *Rare Unity: Religious Leaders Come Out in Support of Section 377*, DNA INDIA (Dec. 12, 2013), http://www.dnaindia.com/india/report-rare-unity-religious-leaders-come-out-in-support-of-section-377-1933612.

[74] See, Shreya Atrey, *Of Koushal v. Naz Foundation's Several Travesties: Discrimination and Democracy*, OXFORD HUM. RTS. HUB (Dec. 12, 2013), http://ohrh.law.ox.ac.uk /?p=3702; *The Unbearable Wrongness of Koushal v. Naz Foundation*, INDIAN CONST. L. & PHIL. BLOG (Dec. 11, 2013), http://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation.

[75]Bret Boyce, *supra* note 69.

[76]Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563, at ¶42.

[77]*Id.* at ¶43.

§377. [78] While presenting a clear case of judicial abdication, commentators feel that this decision is one of the most poorly-reasoned decisions ever handed down by the Supreme Court of India.[79] The judgement has been written in a callous and insensitive manner, betraying that the judges did not consider the matter to be of particular importance.[80] The use of phrases like "*miniscule fraction*" and "*so-called rights*"[81] of the LGBT people, reflect a drastic change in attitude from the approach of inclusiveness adopted by the Delhi High Court. The anxious wait for the LGBT community[82] has ended in deep disappointment with the Court refusing to take the initiative to recognize gay rights and instead transferring the burden onto the Parliament, which will have to account for multiple political considerations. Further, the refusal of the Court to look to foreign judgements and jurisprudence for guidance is also a step back from recent practice adopted by the Court.[83]

One of the most remarkable aspects of this decision is the stance adopted by the State during the hearing before the Supreme Court. At the first instance, the Union of India refused to file an appeal since it did not find any error of law in the decision of the High Court.[84] In fact, the Attorney-General even traced the history of the practice of homosexuality in the Indian context, explaining that it was an accepted practice in ancient India and its criminalization was a colonial imposition to preserve British morality.[85] Given the backing of the State to the High Court's judgement, it is hard to determine

[78]*Id.* at ¶51.
[79]Bret Boyce, *supra* note 69.
[80]*Id.*
[81]Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563,at ¶52.
[82]Danish Sheikh, *supra* note 64.
[83] Rehan Abeyratne & Nilesh Sinha, Insular *and Inconsistent: India's Naz Foundation Judgment in Comparative Perspective*, 39 YALE J. INT'L L. ONLINE 74 (2014).
[84]Danish Sheikh, *supra* note 64.
[85]*Id.*

why the Supreme Court decided to even entertain the appeal.[86] With both the primary affected parties – *i.e.*, the State and Naz Foundation – in agreement, it is hard to understand why the Court felt the need to overturn the High Court's decision without giving much in the name of reasons. An easier and fairer route for the Court would have been for it to declare §377 unconstitutional to the extent that it criminalizes private sexual intercourse between consenting adults and directing the Parliament to make amendments to that effect. What the Court has done though is completely left the matter in the hands of the Parliament. The Parliament has been given complete discretion to decide if and when the law should be changed, and how. Any action taken by the Parliament must necessarily have political backing. Given the highly sensitive and controversial nature of the issue of gay rights, it is unlikely that the Parliament will take the initiative in the near future to make suitable amends to §377. The very idea of independence of the judiciary takes a back-seat when the Court decides to exercise 'judicial restraint' in a matter involving issues of great social import.

The first two cases which have been discussed illustrated the social impact that Courts can generate by adopting a pro-rights discourse and acting as a catalyst for public debate and giving direction to social policy. *Naz Foundation*, on the other hand, has generated debate by the Court's refusal to adopt the pro-rights approach that it has come to be associated with. The judgement in *Naz Foundation* is seen as regressive and a major setback to gay rights after the positive signals sent by the High Court's decision. However, this has only increased the demand for legislative action to secure equal rights. Whatever be the final judgement, the decision has brought the question of gay rights squarely into the limelight and opened it to public debate. Thus, a negative judgment from the Court can also act as a catalyst for

[86] None of the appellants were party to the suit before the High Court, and if thoroughly examined, might not have had standing to raise the appeal. However, the Court took an extremely relaxed view on standing, thus allowing the appeal without much ado.

public debate. The debate generated in this case stretches beyond the issue at hand into the wider realm of the role of the judiciary[87] and the duty of the State[88]. The abdication of responsibility by the Court has opened to scrutiny the very means by which it reached its decision. Not only have we seen widespread support for the LGBT movement[89], the decision has also shaken the faith of the people in the judiciary as a protector of citizen's rights[90]. Whether the Parliament will take the initiative to complete the process initiated by the Delhi High Court is a political question, the answer to which can at best be termed uncertain. After a prolonged period of judicial activism, the Court seems to have reverted to the initial Montesquieuan idea of separation of powers where the three organs of government have distinct well-defined powers. However, in an era where Courts have come to influence and guide social policy, adopting such a straitjacket formula is both impractical and undesirable. There is a need for the Courts to be socially responsible and understand their role as proponents of social policy. Their very impartiality and neutrality is the source of the trust and legitimate expectations reposed by the people in the institution. In such a scenario, the decisions taken by the Court have enormous significance in determining social policy and driving legislative reform.

A more recent example that represents the relationship between judicial decisions and social movements comes from the debates surrounding the amendments to the Juvenile Justice Act that permit a person below the age of 18 years to be punished as an adult in certain cases.[91] The immediate aftermath of the *Nirbhaya* rape case[92],

[87] Alika R.S., *Section 377: The way forward*, THE HINDU (Mar. 1, 2014), http://www.thehindu.com/features/magazine/section-377-the-way-forward/article5740242.ece.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Kiran Bedi, *Amended Juvenile Justice Act is a message for society*, HINDUSTAN TIMES (Dec. 24, 2015), http://www.hindustantimes.com/punjab/amended-juvenile-

witnessed public fury over the possibility of the youngest offender receiving a light punishment because the law explicitly provides the manner in which juveniles must be punished. The Supreme Court, while expressing its sympathies with the public outrage surrounding the release of the juvenile, highlighted its inability to take further action in the absence of any law in this respect.[93] This is perhaps an example of how law and morality, despite their many interconnections, are distinct and separate concepts. The Supreme Court's refusal to deviate from the law shows both the strengths and weaknesses of the Indian legal system. At the level of theoretical discussion, it reflects an adherence to the notion of separation of powers and the limits within which the judiciary is permitted to act. At a more practical level, it indicates the power of the judiciary to take clear stances and thereby fuel progressive law-making. Despite rendering a negative decision, the judiciary succeeded in moulding and legitimizing public opinion – a fact which has been implicitly recognized by the legislature while amending the law governing juveniles. This represents yet another manner in which the public, the judiciary and the legislature interact with each other.

V. CONCLUSION

As stated in the beginning of this paper, we have come a long way from the Montesquieuan idea of the judiciary which envisaged Courts merely as neutral settlers of dispute. With changes in political

justice-act-is-a-message-for-society/story-MJEUTpHKthryaLFkndJUpL.html. The Act provides for punishment of persons aged between 16 to 18 years for certain heinous adult crimes and also enunciates the principle of family responsibility, amongst others.

[92]Tanima Biswas, *Delhi gang-rape case: What happened that night*, NDTV (Dec. 23, 2012), http://www.ndtv.com/delhi-news/delhi-gang-rape-case-what-happened-that-night-508293.

[93]Amit Anand Choudhary & DhananjayMahapatra, *SC says hands tied by law, can't stall juvenile release*, TIMES OF INDIA (Dec. 22, 2015), http://timesofindia.indiatimes.com/india/SC-says-hands-tied-by-law-cant-stall-juvenile-release/articleshow/50275193.cms.

circumstances, the role of the Court has also evolved to meet social needs. This conception of the Courts as having a say in matters relating to social movements and social policy is largely self-imposed. With the emergence of judicial activism and the dawn of the PIL-era, Courts have become increasingly willing to tackle issues of great social import.[94] The role of Courts as not just interpreters of the law but also substantive law makers come from political practice rather than constitutional norms.[95] This paper has discussed three cases illustrating the types of impact that judicial pronouncements can have on society. Courts, by identifying and ruling on an issue, act as a medium to generate public debate. Sometimes, as the *Shah Bano*case shows, this debate can take unexpected turns and result in regressive law-making. However, for the most part, as the *Aruna Shanbaug* case indicates, positive action taken by the Court is welcomed by society and acts as impetus for progressive legislation. The *Naz Foundation* judgement reflects a situation where the failure of the Court to adopt a pro-rights approach acted as a catalyst for a rights-based discourse amongst the populace. Whatever be the content of the judgement, by its very nature and authority, the word of the Supreme Court is capable of highlighting important social issues, providing a background and support for the identified issues and suggesting possible policy changes. It serves as the bedrock for public demand for change and the incorporation of such change by legislative intervention.

Apart from being landmark judgements and generating immense public response, there is another important factor which is common to all three cases. This factor is the complete absence of the protagonist from the story that unwinds after the judgement is pronounced.[96] In

[94]As an example, we can take the judgement in PUCL v. Union of India, [2013] 2 SCC 633 where the Supreme Court laid down directions for the allocation of funds to implement the Right to Food.
[95]Farber & Sherry, *supra* note 6.
[96]Pathak &Rajan, *supra* note 16.

all three cases, the individual lays forgotten, swept aside by the waves of the controversy that rages on. The individual is compromised for the good of the community; group interests prevail over those of the person.[97] Consider the cases individually. The Shah Bano controversy was raked up by the Muslim conservatives who felt their religious identity was under threat. The Government, in fear of losing its votebank passed the Muslim Women's Act. Where did Shah Bano find herself in this quagmire? Sidelined by the masses and sacrificed for a greater cause, she was coerced into rejecting the judgement which was passed in her favour. The Aruna Shanbaug case drew much applause from the medical fraternity who welcomed the decision to permit passive euthanasia. However, the woman herself was denied her plea because of the refusal of the hospital staff. The discussion that followed the case definitely started with her story, but gradually the attention shifted to 'larger matters', those which would have long-lasting consequences.[98] As with Shah Bano, Aruna Shanbaug the woman lies forgotten as the world moves on. The Naz Foundation judgement was expected to be the harbinger of hope for the LGBT community, opening up a new bright future that promised equal citizenship and rights. By adopting an anti-rights approach, the Court effectively drew attention away from the cause to its own role, particularly because of the deference shown by the Court towards the Parliament in initiating progressive reform.[99] The discussion that followed the Naz judgment represents yet another instance of where the original cause of the petitioner becomes secondary to the overarching issue, which thereafter becomes the subject of public debate and discussion. Thus, in all three cases, there is seen a shift away from the individual, where the main cause is forgotten in the

[97]Siobhan Mullally, *supra* note 14.
[98]Pinky Virani, *The unbearable agony of being Aruna Shanbaug: A great injustice*, FIRSTPOST (Jun. 4, 2012), http://www.firstpost.com/living/the-unbearable-agony-of-being-aruna-shanbaug-a-great-injustice-331622.html.
[99]Indulekha Aravind & Ritika Bhatia, *Weapon 377*, THE BUSINESS STANDARD (Dec. 13, 2014), http://www.business-standard.com/article/beyond-business/weapon-377-114121201179_1.html.

debate that follows the judgement. Opinions of interested parties dominate the public forum, drawing attention away from the judgement towards the larger causes that it espouses.

Despite these flaws, these debates make an important contribution to the very sustenance of democracy. One of the most important aspects of democracy is the free and open exchange of ideas in a public sphere.[100] The proper functioning of a modern democracy requires informed debate and participation by the citizens.[101] Participatory decision-making is seen as a hallmark of a true democracy.[102] Social movements are one of the ways in which popular participation in the decision-making process is ensured.[103] These present an opportunity for the voice of the public to be heard and considered while formulating legislative policy. The role of the Courts in shaping public movements has been discussed in this paper. By bringing issues into the public domain, Courts initiate debate and act as catalysts for informed debate. This serves the larger ends of democracy by providing the citizens a chance to be part of the decision-making process and generate a feeling of inclusiveness, which is essential for the functioning of any modern democracy.

On a concluding note, it is important to keep in mind the role of the media as the self-appointed conduit between the public and the judiciary. American humourist Will Rogers' iconic starting line "*All I know is what I read in the papers*" succinctly summarizes the position that most people find themselves in.[104] The observation holds ground

[100]Nancy Rennau Tumposky, *The Debate Debate*, 78 THE CLEARING HOUSE 52 (2004).
[101]James Mumm, *Democracy Needs Direct Participation*, 7 THE GOOD SOCIETY 32 (1997).
[102]*Id.*
[103]*Id.*
[104]MAXWELL MCCOMB, SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC 1 (2004) [Hereinafter, MAXWELL MCCOMB].

even today, one hundred years after it was first made in 1915.[105] While the means of communication have undergone a sea change, the general public still depends on mass media for knowledge and information regarding public affairs.[106] Most of the issues that engage our attention are not amenable to personal experience.[107] Thus, for all concerns on the public agenda, citizens deal with a 'second-hand reality', a reality that is constructed by journalists' reports about events and situations.[108] This is particularly true of Court judgements which despite being in the public domain are not accessible to most members of the populace. Judgements are read and circulated among the niche members of the legal fraternity and perhaps the odd adventurous journalist who dares to wade through a plethora of legalese to find a breaking story. The mass media is often the sole medium through which the public gains access to judicial pronouncements. Thus, the manner in which judgements are reported by the Press also goes a long way in influencing and shaping public reaction.[109] It is therefore important to acknowledge the role of the media in gauging the way in which people respond to judgements and the manner in which it shapes social movements. However, a detailed study on this matter must be the subject of another paper.

[105]Rogers would start his live stage performances in poked fun at politicians and other new events with this opener. See, "*Well, all I know is what I read in the papers.",* THIS DAY IN QUOTES (Sep. 30, 2018),http://www.thisdayinquotes.com/2010/09/well-all-i-know-is-what-i-read-in.html.

[106]MAXWELL MC COMB, *supra* note104.

[107]*Id.*

[108]*Id.*

[109]An example is the case of Shah Bano. The coverage of the judgement and the subsequent controversy varied markedly among Urdu (who supported the Muslims), Marathi (who supported the Hindus) and English papers (who remained neutral). See, Pathak & Rajan, *supra* note 16.