

Case Summary

Suresh Kumar Koushal and another v NAZ Foundation and others **Supreme Court of India: Civil Appeal No. 10972 of 2013**

1. Reference Details

Jurisdiction: The Supreme Court of India (Civil Appellate Division)

Date of Decision: 11 December 2013

Case Status: Final

Link to full court judgement:

<http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>

2. Facts of the Case

The case concerns the constitutionality of Section 377 of the Indian Penal Code which was enacted during the British administration in India in 1860. Section 377 created an offence of voluntarily having carnal intercourse “against the order of nature” with any man, woman or animal, punishable by up to ten years imprisonment or a fine. Although the provision appears to be neutral on its face, it was argued to have a discriminatory effect on LGBT persons, particularly homosexual men.

In 2001 the NAZ Foundation – a non-governmental organisation working in the field of HIV/AIDS intervention and prevention – filed a writ petition before the Delhi High Court seeking a declaration that Section 377, to the extent that it penalised sexual acts in private between consenting adults, violated the India Constitution, specifically, Articles 14 (equality before the law), 15 (non-discrimination), 19(1)(a)-(d) (freedom of speech, assembly, association and movement) and 21 (right to life and personal liberty). The Naz Foundation argued that the law had a discriminatory effect because it was predominantly used against homosexual conduct, thereby criminalising activity practiced more often by homosexual men and women. This was said to jeopardise HIV/AIDS prevention methods by driving homosexual men and other sexual minorities underground. It was further argued that, as private consensual relations were protected under Article 21 of the Constitution, Section 377 was invalid as there was no compelling state interest to justify the curtailment of a fundamental freedom. The Naz Foundation also argued that Section 377 violated Article 14 on two grounds: first, because it was unreasonable and arbitrary to criminalise non-procreative sexual relations, and secondly, because the legislative objective of penalising “unnatural” acts had no rational nexus with the classification between procreative and non-procreative sexual acts.

In 2004, the High Court dismissed the writ petition on the grounds that only purely academic issues had been submitted which could not be examined by the court. It did the same in relation

to a subsequent review petition. The NAZ Foundation challenged both orders and the writ petition was remitted for a fresh decision in 2006.

In its 2009 decision, the High Court found in favour of the NAZ Foundation and accepted its arguments that consensual same-sex sexual relations between adults should be decriminalised, holding that such criminalisation was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination. In reaching its decision, whilst the court placed a great deal of emphasis on domestic judgments, the court also relied on comparative law in reaching its decision, referring to judgements from various jurisdictions including the European Court of Human Rights, the United Kingdom, the Republic of Ireland, South Africa and the USA. The court also relied upon a number of progressive international legal frameworks including the Yogyakarta Principles and the 2008 Declaration of Principles of Equality produced by the Equal Rights Trust as well as a number of reports and documents demonstrating the discriminatory effect of Section 377. In its reasoning, the High Court stated that Section 377 “grossly violates [homosexual individuals’] right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual acts between adults in private”. The court also held that:

“Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution”.

The decision was appealed to the Supreme Court and attracted a large number of interveners. Interveners supporting the Appellants included organisations and individuals who have stated that they had an interest in protecting the moral, cultural and religious values of Indian society. Interveners for the Respondents are composed of individuals and organisations arguing that Section 377 caused harm to the LGBT community and homosexual men in particular.

3. Law

Domestic Law

- Constitution of India 1949: Article 14 (Equality before the law); Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth); Article 19 (Protection of freedom of speech, assembly, association and movement and others); and Article 21 (Protection of life and personal liberty);
- Indian Penal Code 1860: Section 375 (Rape); Section 376 (Punishment for rape); Section 377 (Unnatural offences).

International Law

- Article 12 of the Universal Declaration of Human Rights 1948
- Article 17 of the International Covenant on Civil and Political Rights 1966
- European Convention on Human Rights 1950

4. Legal Arguments

Appellants' Arguments

The Appellants' denied that Section 377 was unconstitutional and made a variety of submissions as to why it was not:

- The High Court committed a severe error by declaring Section 377 to violate Articles 14, 15 and 21 of the Constitution as it ignored the lack of any foundational facts in the Respondent's writ which would be necessary for pronouncing upon the constitutionality of any statutory provision. The documentary evidence supplied in its place was not a basis for finding that homosexuals were singled out for discriminatory treatment by the law.
- The statistics incorporated in the Respondent's petition were insufficient for finding that Section 377 adversely affected the control of HIV AIDS and that decriminalisation would reduce the number of such cases. The Appellants also argued that the data presented was manufactured and fraudulent.
- Section 377 is entirely gender neutral and covers voluntary acts of carnal intercourse irrespective of the gender of persons committing the act. As no specific class is targeted by the law, no classification has been made, therefore rendering the finding of the High Court that it offended Article 14 to be without basis.
- Section 377 does not violate the right to privacy and dignity under Article 21 and the right to privacy does not include the right to commit any offence as defined under Section 377 or any other section.
- If the declaration were approved, India's social structure and the institution of marriage would be detrimentally affected and it would cause young people to become tempted towards homosexual activities.
- Courts by their very nature should not undertake the task of legislating which should be left to Parliament. The High Court was unsure whether it was severing the law or reading it down and, as long as the law is on the statute book, there is a constitutional presumption in its favour. Whether a law is moral or immoral is a matter that should be left to Parliament to decide.

Respondents' Arguments

The Respondents submitted:

- Section 377 targets the LGBT community by criminalising a closely held personal characteristic such as sexual orientation. By covering within its ambit consensual acts between persons within the privacy of their homes, it is repugnant to the right to

equality. Sexual rights and sexuality are human rights guaranteed under Article 21. Section 377 therefore deprives LGBT of their full moral citizenship.

- The criminalisation of certain actions which are an expression of the core sexual personality of homosexual men makes them out to be criminals with deleterious consequences impairing their human dignity. As Section 377 outlaws sexual activity between men which is by its very nature penile and non vaginal, it impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, equality and right to health by criminalising all forms of sexual intercourse that homosexual men can indulge in.
- Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalising sexual acts engaged in by homosexual men, they are denied this human experience while the same is allowed to heterosexuals.
- The Court should take account of changing values and the temporal reasonableness of Section 377. The Constitution is a living document and it should remain flexible to meet newly emerging problems and challenges. The attitude of Indian society is fast changing and the acts which were treated as an offence should no longer be made punitive.
- The right to equality under Article 14 and the right to dignity and privacy under Article 21 are interlinked and must be fulfilled for other constitutional rights to be truly effectuated.
- The difference between obscene acts in private and public is recognised in Section 294. It should be read in light of constitutional provisions which include the right to be let alone.
- Section 377 is impermissibly vague, delegates policy making powers to the police, and results in the harassment and abuse of the rights of LGBT persons. Appellants provided evidence of widespread abuse and harassment (citing judicial evidence and NGO reports).
- Section 377 does not lay down any principle or policy for exercising discretion as to which of all the cases falling under the broadly phrased law may be investigated. It is silent on whether the offence can be committed within the home.
- Criminalisation increases stigma and discrimination and acts as a barrier to HIV prevention programmes. It thwarts health services by preventing the collection of HIV data, impeding dissemination of information, preventing the supply of condoms; limiting access to health services, driving the community underground, preventing disclosure of symptoms, creating an absence of safe spaces leading to risky sex.

5. Decision

The panel of two Supreme Court judges deciding the case allowed the appeal and overturned the High Court's previous decision, finding its declaration to be "legally unsustainable". The Supreme Court ultimately found that Section 377 IPC does not violate the Constitution and dismissed the writ petition filed by the Respondents.

Regarding its power to rule on the constitutionality of a law, the Supreme Court acknowledged that it and the High Court are empowered to declare as void any law, whether enacted prior to

the enactment of the Constitution or after. However, it noted that there is a presumption of constitutionality in favour of all laws, including pre-constitutional laws, as the Parliament is deemed to act for the benefit of the people. The Court noted that the doctrine of severability seeks to enable unconstitutional portions of laws to be severed from the constitutional elements of the law in question with the remainder retained and that, alternatively, that Court has the option of “reading down” a law to prevent it from being rendered unconstitutional, whilst refraining from changing the essence of the law. With regard to Section 377 the court observed that whilst it and the High Court were able to review the constitutionality of the law, and were able to strike it down to the extent of its inconsistency with the Constitution, the analysis must be guided by the presumption of constitutionality and the courts must exercise self-restraint. The court concluded that unless a clear constitutional violation was proved, the court was not empowered to invalidate the law.

The Supreme Court drew attention to the large number of amendments to the Indian Penal Code since its adoption in 1860, totalling around 30 amendments. The court recalled that Section 377, along with the rest of the statute, was originally passed in 1860. In explaining the development of Section 377, the court referenced numerous section 377 related cases dating back as far as the nineteenth century. The court noted that the previous cases referenced all related to non-consensual situations and that no uniform test could be ascertained from them to classify acts would fall under Section 377. Rather, the court stated that acts can only be determined with reference to the act itself and the circumstances in which it is executed. Despite this, the court stated that in light of the legislative history of Section 377, it would still apply to same-sex couples irrespective of age and consent. The Court nevertheless maintained that:

“Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation”.

Regarding whether the High Court was justified in entertaining the challenge to Section 377 despite the Naz Foundation not having laid a factual foundation to support its challenge, the Supreme Court stated that the party had “miserably failed” to provide the particulars of the discriminatory attitude exhibited by state agencies towards sexual minorities and of their consequent denial of basic human rights. The Court held that the details provided to the High Court were thus “wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment”.

In determining the application of Article 14 of the Constitution to the constitutionality of Section 377, the Supreme Court quoted from *Re: Special Courts Bill, 1987* (1979) 1 SCC 380, which set out the scope of Article 14, including the principle that legislation need not treat all people exactly the same, but that “all persons *similarly circumstanced* shall be treated alike both in privileges conferred and liabilities imposed” (emphasis added). Further, the State had “the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject” provided that such classification was not “arbitrary” but:

“[R]ational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation”.

With little analysis, the court held that:

“[T]hose who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute *different classes* [emphasis added] and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification”.

In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that “a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders” and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that “this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.” The court also regarded the discriminatory treatment complained of by the Naz Foundation as a result of Section 377 as being neither mandated nor condoned by the provision itself and the fact that the police authorities and others misuse Section 377 was *not a reflection* of the *vires* of the provision but instead may simply be a relevant factor for Parliament to consider whilst judging whether to amend Section 377.

Regarding the application of Article 21 of the Constitution, the Supreme Court stated that the law must be competently legislated whilst also being just, fair and reasonable, which give rise to notions of legitimate state interest and the principle of proportionality. The court specifically noted that the right to live with dignity had been recognised as a part of Article 21. In assessing the High Court’s ruling that Section 377 violated the right to privacy, autonomy and dignity, the Supreme Court spent little time analysing the application of Article 21 to Section 377, instead criticising the High Court for relying too extensively upon judgments from other jurisdictions in its anxiety to protect the “so-called rights of LGBT persons”. It concluded that “Section 377 does not suffer from the vice of unconstitutionality” with no further elaboration.

The judges noted that whilst the court found that Section 377 was not unconstitutional, the legislature was still free to consider the desirability and propriety of deleting or amending the provision.

Appeal allowed.