

## CASE COMMENT: SURESH KUMAR KOUSHAL & ANOTHER V. NAZ FOUNDATION & OTHERS

Ms. Divya Sharma\*

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### Introduction

The Supreme Court of India on December 11, 2013 in *Suresh Kumar Koushal & Another v. NAZ Foundation & Others*<sup>1</sup> reversed the decision of Delhi High Court and again upheld the validity of Section 377 of Indian Penal Code, 1860 (IPC) negating the contentions of the respondents that the above section violates Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution of India, 1950 (hereinafter the Constitution). These appeals are directed against order dated July 2, 2009 by which the Division Bench of the Delhi High Court allowed the writ petition filed by NAZ Foundation–respondent No.1 herein, by way of Public Interest Litigation (PIL) challenging the constitutional validity of Section 377 of IPC. Respondent No.1 is a Non-Governmental Organization (NGO) registered under the Societies Registration Act, 1860 which works in the field of HIV/AIDS intervention and prevention. Its’ work has focused on targeting “Men who have Sex with Men (MSM) or homosexuals or gays” in consonance with the integrationist policy.

Alleging that its efforts have been severely impaired by the discriminatory attitudes exhibited by state authorities towards sexual minorities, MSM, lesbians and transgender individuals and that unless self respect and dignity is restored to these sexual minorities by doing away with discriminatory laws such as Section 377 IPC it will not be possible to prevent HIV/AIDS, NAZ Foundation filed WP(C) No. 7455/2001 before the Delhi High Court impleading the Government of NCT of Delhi, Delhi Commissioner of Police, Delhi State Aids Control Society, National Aids Control Organization (NACO) and Union of India through Ministry of Home Affairs and Ministry of Health and Family Welfare, and prayed for grant of a declaration that Section 377 of IPC to the extent it is applicable to and penalizes sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution. Respondent No.1 further prayed for grant of a permanent injunction restraining Government of NCT of Delhi and Commissioner of Police, Delhi from enforcing the provisions of Section 377 of IPC in respect of

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\* Assistant Professor, Department of Laws, Guru Nanak Dev University, Amritsar.

<sup>1</sup> Civil Appeal No. 10972 of 2013.

sexual acts in private between consenting adults. Respondent No.1 pleaded that the thrust of Section 377 of IPC is to penalize sexual acts which are “against the order of nature”; that the provision is based on traditional Judeo-Christian moral and ethical standards and is being used to legitimize discrimination against sexual minorities; that Section 377 of IPC does not enjoy justification in contemporary Indian society, and that the section’s historic and moral underpinning do not resonate with the historically held values in Indian society concerning sexual relations.

Respondent No.1 relied upon 172nd Report of the Law Commission of India which had recommended deletion of Section 377 and pleaded that notwithstanding the recent prosecutorial use of Section 377 of IPC, the same is detrimental to people’s lives and an impediment to public health due to its direct impact on the lives of homosexuals; that the section serves as a weapon for police abuse in the form of detention, questioning, extortion, harassment, forced sex, payment of hush money; that the section perpetuates negative and discriminatory beliefs towards same sex relations and sexual minorities in general; and that as a result of that it drives gay men, MSM and sexual minorities generally underground which cripples HIV/AIDS prevention methods. According to respondent No.1 Section 377 is used predominantly against homosexual conduct as it criminalizes activity practiced more often by men or women who are homosexually active. The evidence that refutes the assumption that non-procreative sexual acts are unnatural includes socio-scientific and anthropological of homosexuality in society at large; that private consensual sexual relations are protected under Article 21 under the privacy and dignity claim. It was further pleaded that Section 377 of IPC is not a valid law because there exists no compelling state interest to justify the curtailment of an important fundamental freedom; that Section 377 of IPC in so far as it criminalizes consensual, non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article 14.

### **Decision of the Delhi High Court**

The Division Bench of the Delhi High Court extensively considered the contentions of the parties and declared that Section 377, in so far as it criminalizes consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. While dealing with the question relating to violation of Article 21, the High Court outlined the enlarged scope of the right to life and liberty which also includes right to protection of one’s dignity, autonomy and privacy, the Division Bench referred to Indian and foreign judgments, the literature and international understanding (*Yogyakarta* principles)

relating to sexuality as a form of identity and the global trends in the protection of privacy and dignity rights of homosexuals and held:

“The sphere of privacy allows persons to develop human relations without interference from the outside community or from the state. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice, and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality, and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

The criminalization of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs. The number of lesbians and transgender is said to be several lacs as well. This vast majority (borrowing the language of the South African Constitutional Court) is denied “moral full citizenship”. Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalizes consensual sexual acts between adults in private. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in *The Indian Constitution—Cornerstone of a Nation*: “[T]hey were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India”. In the words of Justice V.R. Krishna Iyer these rights are cardinal to a decent human order and protected by constitutional armour. The spirit of man is at the root of Article 21, absent liberty, other freedoms are frozen.

A number of documents, affidavits and authoritative reports of independent agencies and even judgments of various courts have been brought on record to demonstrate the widespread abuse of Section 377 IPC for brutalizing MSM and gay community persons, some of them of very recent vintage. If the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health *vis-a-vis* said section of society. The provision, from this perspective, should fail the “reasonableness” test.”

## Decision of the Supreme Court

An appeal was filed in the Supreme Court against the decision of the High Court. The Supreme Court in *NAZ Foundation*<sup>2</sup> observed that:

“The High Court discussed the question whether morality can be a ground for imposing restriction on fundamental rights, referred to the judgments in *Gobind v. State of Madhya Pradesh and Another* (1975) 2 S.C.C. 148, *Lawrence v. Texas* 539 U.S. 558 (2003), *Dudgeon v. UK*, European Court of Human Rights Application No. 7525/1976, *Norris v. Republic of Ireland*, European Court of Human Rights Application No. 10581/1983, *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, South African Constitutional Court 1999 (1) SA 6, the words of Dr. Ambedkar quoting Grotius while moving the Draft Constitution, Granville Austin in his treatise *The Indian Constitution-Cornerstone of A Nation*, the Wolfenden Committee Report, 172nd Law Commission of India Report, the address of the Solicitor General of India before United Nations Human Rights Council, the opinion of Justice Michael Kirby, former Judge of the Australian High Court and observed: “Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality.”

The Supreme Court further stated that:

“The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute. Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the *vires* of the section. In its

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<sup>2</sup> *Supra* note 1, at 9-10.

anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.

In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable. The appeals are accordingly allowed, the impugned order is set aside and the writ petition filed by respondent No.1 is dismissed.

While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. The Supreme Court reversed the order passed by the Delhi High Court holding that the NAZ Foundation had miserably failed to prove that section 377 was discriminatory to gays; the section was non discriminatory as it punished everyone who indulged in unnatural offences and not just homosexuals.”

### **Case Analysis**

After analyzing the decision it can be concluded that Supreme Court has not acted wisely while interpreting this section. The Supreme Court of India is well known for protecting the rights of not only of its citizens but also of aliens. Article 21 of Constitution is a proof to this where the Supreme Court has widely interpreted it giving numerous rights not only to citizens of Indians but also to aliens and thus upholding the human rights jurisprudence. The Supreme Court has always acted as anchor sheet for human rights.

But this decision of the Supreme Court in *NAZ Foundation* case is truly a regrettable one, a step towards backwardness for India where it has departed from its long tradition of protecting the human rights. India is a democratic country where under Article 14 of the Constitution everyone is equal before law and has equal protection of law. Article 21 gives right to privacy to individuals as interpreted by our honourable judiciary. If this is the case then why LGBT (Lesbian, Gay, Bisexual and Transgender) have not given the freedom of

consensual sex in privacy. Why such a discrimination for them by Supreme Court? The decision of the court is based on morality and religious values made by so called the leaders of different religions. If this is the case that Supreme Court wants to preserve the morality of the society then the question arises here is that: Is Live-in-Relationship not against the culture and morality of our society? Is it good to approve such relation where two individuals can live together with their consent and have sex also and procreate children also? Why not here the judiciary bans such relationships which is hitting the institution of marriage and making it a mockery.

The decision of the Supreme Court has reminded me here the *Hart Devlin* controversy. Devlin has disputed the conclusion of the Wolfenden Report of 1957, which contained the results of a committee investigation into homosexuality and prostitution. The writers of that report recommended to the United Kingdom Parliament that have English law prohibiting homosexual behaviour between consenting adults in private should be repealed. According to the writers of the report, such private conduct is not the proper concern of the criminal law. Devlin criticized the findings of the report and argued for a much different conclusion i.e., the proper concern of the criminal law is to protect society and that concern may require prohibition of immoral acts, even those carried out in private and with no outward other regarding effects.<sup>3</sup> But Hart was opposed to all this and claimed that law must not interfere in the private acts of the individuals. Law must not extend its boundaries to such an extent that it becomes difficult for the individuals to breath in their privacy and even acts done in privacy make them criminals.

It is true that the Supreme Court is known as the protector of the fundamental rights enshrined in Part III of the Indian Constitution but in the present case it has shocked everyone by giving such a regressive decision. But still there is a hope for LGBT community as review petition has been filed in the Supreme Court and it is believed that the court will reverse the decision given by Justice G.S. Singhvi and will restore the decision given by Delhi High Court. At this point of time when India is changing at a rapid pace and is becoming more open than our courts should also walk along with this change.

To criminalize private and consensual sex violates the right to privacy enshrined in Article 21 of the Constitution. Homosexuality is prevalent in Indian society since time immemorial and one cannot shut its eyes to this reality. Sexual orientation is not acquired

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<sup>3</sup> READING IN THE PHILOSOPHY OF LAW 32 (Keith Culver ed., Broadview Press Ltd., 1999).

willfully by any human being but it is natural and so our society has to accept this. When we have allowed LGBT's to live in our society then why to violate their rights? Hopefully, the Supreme Court will correct its decision and if not then our Parliament has to pass a law in the interest of the LGBT's and uphold their rights. The 172nd report of Law Commission has to be implemented as soon as possible which advocates for repealing Section 377 of IPC. It is high time when Indian Parliament must take strong step and should bring our penal code in line with the international standards adopted for protection of human rights of all the communities.

