

# CONSTITUTIONALITY OF SECTION 377, INDIAN PENAL CODE – A CASE OF MISPLACED HOPE IN COURTS

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*Amidst strong reactions against the decision of the Supreme Court in Suresh Kumar Koushal v. Naz Foundation, this paper argues that the Court has done all that it is expected to do under the Constitution and the law established under it. The respondents, especially the Union of India, have unsuccessfully asked it to do what the Constitution does not expect it to do. The remedy against § 377 lies with the people through their Parliament, and not in the courts.*

“I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.”

—Judge Learned Hand, The Spirit of Liberty<sup>1</sup>

## I. INTRODUCTION

Before contextualising the foregoing statement, in view of sharp reactions to my comment on the decision of the Delhi High Court,<sup>2</sup> let me clarify that I am neither insensitive to the issues of LGBTs or LGBTQs, nor am I opposed to their claim for rights and liberty in their private and personal lives. As a student of constitutional law, my limited concern is to examine whether the courts have the power to invalidate § 377 of the Indian Penal Code (‘IPC’). In my understanding of the Constitution and its interpretation, the courts lack the power to invalidate the section.<sup>3</sup> I am not surprised that on appeal in *Suresh*

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<sup>1</sup> Judge Learned Hand, The ‘Spirit of Liberty’ Speech presented during the annual ‘I am an American Day’ event (May 21, 1944).

<sup>2</sup> *Naz Foundation v. Govt.* (NCT of Delhi), (2009) 160 DLT 277.

<sup>3</sup> See M.P. Singh, *Decriminalisation of Homosexuality and the Constitution*, 2 NUJS L. REV. 361 (2009).

*Kumar Koushal v. Naz Foundation* ('Koushal')<sup>4</sup>, the Apex Court has also come to the same conclusion.

Sharp reactions against Koushal in the mass media and a few academic writings reminded me of the above mentioned words of Judge Learned Hand which he spoke to a gathering of United States citizens at the Central Park of New York towards the end of World War II. A few days after Koushal, I chanced to watch a meeting of a group of LGBTs at Delhi University campus during which, following expressions of disappointment and anger against the decision by several speakers, the convener of the group said something similar to what Judge Learned Hand had said. He asked his co-workers and the audience not to rely too much on the courts. The rights of LGBTs could not be realised through court decisions, he said; they required an attitudinal change in the society at large, which was possible only by informing and enlightening people about the legitimacy of their claims. In Koushal, the Supreme Court also seems to be expressing a similar view when in response to some allegations of discrimination by the first respondent – Naz Foundation – it says: “These details are wholly insufficient for recording a finding that homosexuals, gays, etc. are being subjected to discriminatory treatment either by the state or its agencies”.<sup>5</sup>

## II. ANALYSIS OF THE ROLE OF THE GOVERNMENT AND THE COURT IN THE PRESENT CASE

While the outrage in the media and amongst legal scholars is understandable, the claims of the Attorney General induced by the Government of the day, first to only assist the Court in the hearing of the appeal and later for the review of the decision, are unprecedented and unprincipled. The government is expected to honour and defend the Constitution as much, if not more, as the Court and to insert and retain in the statute book only such laws which it considers constitutional, and to ask the Attorney General to defend them against any challenge before the courts. In Koushal, on the contrary, the government admits its law to be unconstitutional, and instead of removing it from the statute book, asks the Attorney General to get it struck down by the Court. How strange is it that a government which often blames the courts of overreach and excessive interference with laws and policies, unprecedentedly asks the Court to invalidate a legislation, which the Constitution allows to “continue in force...until altered or repealed or amended by a competent legislature or other competent authority”?<sup>6</sup>

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<sup>4</sup> (2014) 1 SCC 1.

<sup>5</sup> *Id.*, ¶ 63. The expression ‘the society’, which I have omitted from the quote, in my view, means society as an organisation as opposed to families and small groups of people.

<sup>6</sup> Constitution of India, 1950, Art. 372. The continuation is, however, subject to the Constitution.

At one point of time, the Attorney General asked the Court to hold that not only liberties but even life of any person could be taken by the petty police officers without any procedure established by law.<sup>7</sup> It is incomprehensible that the Attorney General now expects the Court to invalidate a law which has remained unaltered in the statute book for over one hundred and fifty years, including sixty four years since the commencement of the Constitution. Except in a federal arrangement where the Centre and the States can challenge each other's laws on the ground of encroachment in the jurisdiction of one by the other, only an individual or a group of individuals who perceives an unconstitutional encroachment on their rights or interests by such laws are entitled to get them invalidated by the courts.<sup>8</sup> Even in this limited field, Justice Holmes advised that the nation could not come to an end if the courts lost the power to declare federal legislation unconstitutional but it could be imperilled if the courts could not make that declaration as to the laws of several states.<sup>9</sup> The Attorney-General's approach in the present matter implies the government's lack of both confidence in itself and faith in democracy – the cornerstone of the Constitution and one of its basic features – and expects the courts to do what the Constitution assigns to the people's elected representatives. It amounts to subversion of the Constitution and beginning of the end of our liberty.

As custodian of the Constitution, the Court in Koushal, on the other hand, has performed its job of protecting and preserving the Constitution from this kind of unexpected and unacceptable design of the government in refusing to invalidate or even read down § 377 of the IPC. Admitting its plenary power of judicial review, it clarified that “keeping in mind the importance of separation of powers and out of sense of deference to the *value of democracy* that *parliamentary Acts* embody, self-restraint has been exercised by the judiciary when dealing with the constitutionality of laws”.<sup>10</sup> Alluding to the presumption of constitutionality and the doctrine of severability, the Court admitted that “[d]eclaring the law unconstitutional is one of the last resorts taken by the courts”<sup>11</sup> and they “would preferably put into service the principle of ‘reading down’ or ‘reading into’ the provision to make it effective, workable and ensure the attainment of the object of the Act”.<sup>12</sup> Applying these principles to § 377 of the IPC, which has survived as such ever since the making of IPC

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<sup>7</sup> See ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521. For some revealing details see H.R. KHANNA, NEITHER ROSES NOR THORNS 82 (2010).

<sup>8</sup> The statement may be read subject to the practice of public interest litigation, in which any person or body of persons having sufficient interest in the matter may also approach the courts for the invalidation of laws.

<sup>9</sup> See O.W. Holmes, *Law and the Court* in COLLECTED LEGAL PAPERS 295 (1920).

<sup>10</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 32 (emphasis supplied).

<sup>11</sup> *Id.*, ¶ 40.

<sup>12</sup> *Id.*, referring to and relying upon the principles laid down in Namit Sharma v. Union of India, (2013) 1 SCC 745. See also summarised version of the principles at Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 44.

even though it has been amended about thirty times and the Law Commission recommended its deletion, the Court concluded:

“It is, therefore, apposite to say that unless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its needs”.<sup>13</sup>

On examining the prosecutions and convictions under § 377 of the IPC in the light of these principles, the Court found that all these cases related to “non-consensual and markedly coercive situations and keenness of the Court in bringing justice to the victims who were either women or children cannot be discounted while analysing the manner in which the section has been interpreted” and expressed its doubt “whether the court would rule similarly in a case of proved consensual intercourse between adults”.<sup>14</sup> However, going by the plain meaning and legislative history of the section, it held “that § 377 of the IPC would apply irrespective of age and consent”.<sup>15</sup> The Court further clarified that:

“Section 377 IPC 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”.<sup>16</sup>

The Court also found that the petitioners before the Delhi High Court did not produce adequate proof of the fact that “homosexuals, gays, etc. are being subjected to discriminatory treatment either by the State or its agencies or the society”.<sup>17</sup> In my view, even if discrimination by society is established, invalidity of § 377 will not help LGBTs because the section empowers the state or its agencies to take action and not the society.

On the question of discrimination, relying upon the established law, the Court came to the conclusion:

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that § 377 suffers

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<sup>13</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 46.

<sup>14</sup> *Id.*, ¶ 60.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, ¶ 63.

from the vice of arbitrariness and irrational classification....  
Therefore, the High Court was not right in declaring § 377  
IPC *ultra vires* Articles 14 and 15 of the Constitution”.<sup>18</sup>

The miniscule population of LGBTs and the fact that there were less than 200 prosecutions, also weighed in the mind of the Court in rejecting the plea of invalidity under Articles 14, 15 and 21.<sup>19</sup> I need not repeat what I had said in reaction to the Delhi High Court decision in arriving at the same conclusion.<sup>20</sup> Contrary to my understanding of the judicial decisions and their application, the Court read substantive due process in the combined reading of Articles 14, 19 and 21. But without arriving on any conclusion on that issue, even on the allegations of torture, harassment and blackmail of LGBTs on account of § 377, it held that “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 on the vires of the section”.<sup>21</sup> Mere possibility of abuse of law, the Court observed, does not *per se* invalidate a law.

Professor Baxi has strongly argued against the understanding and application of Article 14 by the Court to different kinds of sexual acts,<sup>22</sup> but as I have said before, until a bench of nine judges changes the existing law on Article 14, the smaller benches are bound by the decision.<sup>23</sup>

Finally, on the question of foreign precedents and laws, the Court expressed “grave doubts about the expediency of transplanting Western experience in our country”.<sup>24</sup> Citing the example of the death penalty and the Law Commission’s views on it and some cases in which the Court has cautioned against being blinded by foreign precedents, the Court concluded that “§ 377 IPC does not suffer from the vice of unconstitutionality”.<sup>25</sup> It further stated that “the competent legislature was, however, free to consider the desirability and propriety of deleting § 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General”.<sup>26</sup> I add that, on the lines of Justice Holmes’ advice cited above, the Court shows due deference to major pre-Constitution codes and Acts of Parliament. Even § 303 IPC was invalidated because it encroached upon the judicial power. All other challenges have uniformly been rejected. In the United States of America, same sex relationships

<sup>18</sup> *Id.*, ¶ 65.

<sup>19</sup> *Id.*, ¶ 66.

<sup>20</sup> See Singh, *supra* note 3, 361.

<sup>21</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 76.

<sup>22</sup> Upendra Baxi, *Naz 2: A Critique*, 49(6) EPW (February 8, 2014).

<sup>23</sup> See Singh, *supra* note 3, 361, 371, 380 as well as the discussion on reasonableness in Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 352.

<sup>24</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 77.

<sup>25</sup> *Id.*, ¶ 80.

<sup>26</sup> *Id.*, ¶ 82.

in State laws have been the subject matter of litigation<sup>27</sup> and in most other jurisdictions in the West, change has been brought by legislation.

### III. CONCLUSION

To conclude, in *Koushal*, the Court has lived by its *dharma* of upholding the Constitution and the laws consistent with it even in the face of government's collusion with the respondents. The stand of the government has, however, gone against its *dharma* of defending its laws or to repeal them if it considers them to be unconstitutional. The media and scholars must enlighten the people, including the legislators, about the plight of LGBTs and the injustice, if any, to which law subjects them instead of pinning all the hopes in the courts.<sup>28</sup>

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<sup>27</sup> However, the United States Supreme Court, by a majority of 5 to 4, has invalidated a federal law which for claiming tax benefits, defined marriage only between a man and a woman. The reasons for such invalidation were multifarious, though the main reason appears to be the violation of liberty without due process of law that included equal protection of laws also. *See United States v. Windsor*, 186 L.Ed 2d 808: 570 US 12 (2013).

<sup>28</sup> At the time of writing this comment, elections were due for Parliament. The people could have asked the political parties to include the demand for repeal of §377 in their manifesto as the Communist Party of India (M) did or after the constitution of new Parliament they should ask their elected representatives to repeal that section.