

LOST IN APPEAL: THE DOWNWARD SPIRAL FROM NAZ TO KOUSHAL

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The Supreme Court in Suresh Kumar Koushal v. Naz Foundation has missed an opportunity to build on the earlier Delhi High Court decision and shape rights jurisprudence in a creative and rights enhancing manner. Instead it has reverted to a restrictive reading of the law that is full of logical and analytical inconsistencies and the incorrect use of precedent. This demonstrates an unwillingness to appreciate and assess the compelling evidence that was placed before it. In this piece, I will focus on the mass of material that the court did not take into account while arriving at its decision. These include the Attorney General's submissions, affidavits of parents of Lesbian Gay Bisexual and Transgender persons, and scientific material placed before the Court. I will also examine the arguments in the judgment related to presumption of constitutionality, vagueness of law and the dichotomy between the sexual act and homosexual identity.

I. INTRODUCTION

The Supreme Court's judgment in *Suresh Kumar Koushal v. Naz Foundation* ('Koushal')¹ is a remarkable decision. It is remarkable not so much for what it accomplished, but for what it failed to. In overturning the Delhi High Court's decision in *Naz Foundation v. Govt. of NCT of Delhi* ('Naz')² the Court not only chose to challenge the wisdom of the legal logic of the High Court, but also ignored a range of additional material placed before it during the hearings in the Supreme Court.

The Court failed to appreciate the evidence of discrimination, harassment and torture faced by Lesbian Gay Bisexual and Transgender ('LGBT') persons that was placed before it in the form of FIRs, personal affidavits, fact-finding reports, official statistics, peer reviewed articles and reported judgments. Instead, the Court observed that the respondents "miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them".³

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¹ (2014) 1 SCC 1.

² (2009) 160 DLT 277.

³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶ 63.

Koushal has effectively re-criminalized the acts and identities of millions of LGBT Indians, turning the clock back on four and a half years of citizenship affirmed by the Delhi High Court, and three decades of gains made by the LGBT movement in India. This decision puts the law in direct conflict with the lived experience of LGBT Indians, many of who publicly identify as homosexuals. In this paper, I will examine four themes that form the basis of the decision in Koushal. The *first* is that there is a presumption of constitutionality of § 377 of the Indian Penal Code, 1860 ('IPC') since it has not been amended or abrogated by Parliament even though it had a chance to do so while amending the IPC provisions related to sexual assault. The *second* is that there was not enough evidence before the Court to conclude that LGBT persons in India were being discriminated against. The *third* is the distinction that the Court makes between sexual acts and identities as if the two are not linked in any way. The *fourth* theme that I examine is the Court's rejection of the argument that the wording of § 377 was vague and uncertain, and thereby constitutionally invalid.

II. PRESUMPTION OF CONSTITUTIONALITY

The Court recognized that pre constitutional laws like § 377 of the IPC can be declared void if they are inconsistent with the Constitution and to the extent that they abrogate fundamental rights. However, it then invoked the principle of presumption of constitutionality to uphold the constitutionality of the provision.⁴ The judges stated that the legislature has had a chance to amend the law but had not made any changes so far. Thus, it could be presumed that the provision was constitutionally valid. They then went on to make the puzzling statement that "both pre and post constitutional laws are manifestations of the will of the people through the Parliament and are presumed to be constitutional"⁵. It is argued that this is incorrect in law as Article 13(1) of the Constitution of India clearly states that all laws in force in the country before the commencement of the Constitution will be void to the extent that they are inconsistent with Part III of the Constitution (the chapter on Fundamental Rights).⁶

Further, when the legislature has not acted to correct this inconsistency, it becomes the prerogative of the courts to step in. The Indian judiciary has a long history of judicial activism and has been touted as a role model for stepping into the legislative domain when the legislature has not acted to

⁴ *Id.*, ¶ 45.

⁵ *Id.*, ¶ 38.

⁶ The Constitution of India, 1950, Art. 13(1):

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void".

protect the rights of vulnerable communities.⁷ The history of judicial activism is directly linked to an attempt by the Court to expiate the guilt caused by its failure to stand up to the excesses of the internal emergency declared by Prime Minister Indira Gandhi in the 1970s.⁸ The late Professor S.P. Sathe, remarking on this ping-pong between the judiciary and the legislature with respect to the issue of rights of LGBT persons, remarked:

“Judicial activism obtains its legitimacy from the fact that the courts provide voice to those issues, interests and groups whose own voices would be drowned in the pell mell of majoritarian democracy. If these voices start to get silenced in judicial discourse then a major justification for judicial activism would stand defeated.... It is those who make unpopular choices that require the protection of rights and courts. Conformity to the populist is obtained by social sanctions and the numerical force of the majority. Judges do not need to add to their numbers.”⁹

The Court considered, and subsequently rejected, the option of using the doctrine of severability to declare § 377 unconstitutional to the extent that it violates fundamental rights such as the right to equality and the right to live with dignity.¹⁰ This is contrary to the approach that the Delhi High Court took in declaring § 377 unconstitutional and reading down the provision to exclude from its ambit consensual sexual acts between adults. This approach would have satisfied the doctrine of presumption of constitutionality while at the same time protecting against rights violations. The Court, while recognizing this principle, says courts have to exercise self-restraint and that they should not exercise this prerogative unless a clear constitutional violation is proved.¹¹ The Supreme Court in failing to take this approach, has gone against the spirit of Article 13(1) and allowed for violation of human rights of LGBT persons.

III. EVIDENCE OF DISCRIMINATION

It is at this point in its judgment that the Court’s viewpoint became completely at odds with the wealth of material placed before it. The judges claimed that the respondents (Naz Foundation and others) “miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by State agencies towards sexual minorities and consequential denial of basic

⁷ S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 249-251 (2002).

⁸ See MAYUR SURESH & SIDDHARTH NARRAIN, THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA 9 (2014) (For a more detailed account of the history of judicial activism).

⁹ S.P. SATHE, *Sexuality, Freedom and the Law* in REDEFINING FAMILY LAW IN INDIA 190 (2008).

¹⁰ Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1, ¶¶ 39-46.

¹¹ *Id.*, ¶ 46.

rights to them.”¹² However, a bare glance at the material placed before the Court shows us that this is far from the truth. In fact, it would be more accurate to say that it was the Court that ‘miserably’ failed to appreciate the mass of evidence put before it that was indicative of the serious violations of rights that ensued directly and indirectly from § 377.

For instance, Naz Foundation placed before the Court evidence of how laws that criminalize same sex activity drive homosexuals or men who have sex with men (‘MSM’) underground on account of fear of prosecution, thus adversely impacting HIV/AIDS outreach work.¹³ This account was corroborated by the National AIDS Control Association (‘NACO’), the nodal body on HIV/AIDS related government programs that functions under the Union Ministry for Health and Family Welfare. NACO, in its affidavit before the Delhi High Court, had stated that the enforcement of § 377 could adversely contribute to pushing HIV/AIDS infection underground, thereby making risky sexual practices go unnoticed and unaddressed. In this affidavit, NACO also stated:

“The fear of harassment by law enforcement agencies leads to sex being hurried, leaving partners without the option to consider or negotiate safer sex practices [...] The hidden nature of MSM groups further leads to poor access to condom, healthcare services and safe sex information. This constantly inhibits/impedes interventions under the National AIDS Control Programme aimed at preventing spread of HIV/AIDS by promoting safe sexual practices [...]”¹⁴

Further, the respondents placed before the Court evidence of specific incidents when § 377 has been used to target HIV/AIDS outreach workers.¹⁵ This included the imprisonment of four HIV/AIDS outreach workers (staff members of Naz Foundation International and Bharosa Trust) in 2001 for 47 days without being granted bail¹⁶ and the arrest of four HIV/AIDS outreach workers in 2006 in Lucknow under § 377.¹⁷ Both these incidents have been

¹² *Id.*, ¶ 63.

¹³ Naz Foundation, *Written Submissions*, ¶ 162-163, available at <http://www.lawyerscollective.org/files/Written%20Submissions%20FINAL%20AS%20FILED.pdf> (Last visited on September 1, 2014).

¹⁴ NACO, *Affidavit before Delhi High Court*, ¶ 5, available at <http://www.lawyerscollective.org/files/NACO%27s%20Affidavit.pdf> (Last visited on August 23, 2014).

¹⁵ Voices Against 377, *Written Submissions*, ¶ 26, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf (Last visited on September 1, 2014).

¹⁶ Human Rights Watch, *India: Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*, available at http://www.hrw.org/reports/2002/india2/india0602-05.htm#P396_70923 (Last visited on January 26, 2014).

¹⁷ The Hindu, *Cases against Homosexuals were Fabricated says Report*, January 13, 2006, available at <http://www.hindu.com/2006/01/13/stories/2006011301731700.htm> (Last visited on January 26, 2014).

well documented, and copies of the relevant First Information Reports were produced before the Supreme Court.¹⁸

The Court even ignored the powerful testimonies of individuals who testified that the law impacted their lives negatively, which made them vulnerable to harassment and subjected them to violence, thus affecting their self-esteem.¹⁹ The intervention filed by Dr. Shekhar Seshadri and other mental health care professionals also detailed the enormous mental and psychological impact of § 377, placing LGBT persons at a significantly higher risk of psychiatric morbidity and suicide.²⁰

A powerful example of the indirect impact of § 377 is from 2001, when the National Human Rights Commission (‘NHRC’) refused to provide relief to a homosexual man who was being administered ‘conversion therapy’- a form of shock therapy given to homosexual patients to ‘change’ their sexual orientation.²¹ Here, the complainant stated that he had suffered serious psychological and emotional trauma as a result of this treatment over a period of four years at the psychiatric department of the All India Institute of Medical Sciences, New Delhi.²² The main reason for the NHRC to dismiss the complaint was that homosexuality was a criminal offence.²³ But even this was not enough for the Court to recognize the ramifications of the operation and existence of § 377.

Further, even the parents of LGBT persons –through personal affidavits and submissions before the Supreme Court– made a strong case for how the operation and existence of § 377 impacted Indian families by impeding the right to peacefully enjoy one’s family life.²⁴ They stated that the fear of arrest affected the entire family, placing enormous strain on their lives.²⁵

The judges, turning a blind eye to this evidence, observed that the LGBT community is only a “miniscule fraction of the country’s population”,²⁶ thereby implying that they are not in need of protection from the law. This is counterintuitive to the notion of discrete and insular minorities who are unable

¹⁸ Naz Foundation, *Written Submissions*, 37-38, April 9, 2012, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_Naz_WrittenSubmissions.pdf (Last visited on January 26, 2014).

¹⁹ Voices Against 377, *Written Submission*, 7, April 10, 2012 available at http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf (Last visited on January 26, 2014).

²⁰ Dr. Shekhar Seshadri and Ors., *Written Submissions*, ¶ 54-56, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_MentalHealthProfessionals_WrittenSubmissions.pdf (Last visited on January 26, 2014).

²¹ *Id.*, ¶ 40.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*, ¶ 43.

to fend for themselves. The smaller the minority, the more difficult it is to use the political process, and therefore they are in need of judicial intervention to protect their rights and freedoms. One of the roles of the courts is to act as a counter majoritarian institution, a role that was highlighted by the Delhi High Court in *Naz*.²⁷ Moreover, the Court also said that there were “only 200 persons”²⁸ prosecuted under § 377 in the last 150 years, ignoring the fact that these are only 200 recorded judgments of the High Courts and Supreme Court, which is only a fraction of the unreported cases at the trial level. Most importantly, this does not take into account the impact of having the law on the statute book, and the threat of its use by the authorities that LGBT persons face on an everyday basis.

IV. THE FALSE DICHOTOMY BETWEEN ‘ACT’ AND ‘IDENTITY’

The Court held that § 377 regulates sexual conduct regardless of sexual orientation and gender identity.²⁹ By claiming that the law is applied indiscriminately against both heterosexuals and homosexuals, the judges appeared to be willfully blind to the plethora of evidence produced before them. It is clear from the colonial history of anti-sodomy laws and the manner in which the courts have enforced these laws across the world that the law was meant to target LGBT persons.³⁰

Integral to their assertion that § 377 applies irrespective of sexual orientation, is the argument that the law targets acts, not identities. The problem with this assertion is that it creates a false dichotomy. This implies that when the law criminalizes all non-penile-vaginal sex, in effect it criminalizes all sexual activity between same sex partners. This in turn impacts the dignity, liberty and privacy of LGBT persons, thereby adversely impacting their right to love and right to be sexually intimate.

The judges’ insistence on reading § 377 as governing sexual acts and not identities, is indicative of their discomfort in recognizing that homosexuality is both about sexual acts and identity. Homosexuality is about a mode of life that the judges find disturbing and are unable to recognize. The French philosopher Michel Foucault described why this dichotomy between ‘act’ and ‘identity’ is flawed:

²⁷ *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277, ¶ 120.

²⁸ *Id.*

²⁹ *Id.*, ¶ 38.

³⁰ Human Rights Watch, *This Alien Legacy: Origins of Sodomy Laws in British Colonialism*, December 17, 2008, available at <http://www.hrw.org/reports/2008/12/17/alien-legacy-0> (Last visited on January 26, 2014).

“One of the concessions one makes to others is not to present homosexuality as anything but a kind of immediate pleasure, of two young men meeting in the street, seducing each other with a look, grabbing each other’s asses and getting each other off in a quarter of an hour. There you have a kind of neat image of homosexuality without any possibility of generating unease, and for two reasons: it responds to a reassuring canon of beauty, and it cancels everything that can be troubling in affection, tenderness, friendship, fidelity, camaraderie, and companionship, things that our rather sanitized society can’t allow a place for without fearing the formation of new alliances and the tying together of unforeseen lines of force. I think that’s what makes homosexuality ‘disturbing’: the homosexual mode of life, much more than the sexual act itself. To imagine a sexual act that doesn’t conform to law or nature is not what disturbs people. But that individuals are beginning to love one another—there’s the problem.”³¹

Thus, the Court’s act-identity dichotomy is steeped in prejudice and its inability to step outside this ‘neat image’ of homosexual individuals. We can see exactly how this false dichotomy plays out by contrasting the approach of the United States Supreme Court in two cases that challenged the state’s anti-sodomy laws. *First*, in *Bowers v. Hardwick* (‘Bowers’)³², the Supreme Court had to answer whether homosexuals have the fundamental right to engage in sodomy, which the court answered in the negative. On the other hand, Justice Kennedy, writing for the majority in *Lawrence v. Texas* (‘Lawrence’)³³, commented:

“To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”³⁴

³¹ Michel Foucault, *Friendship as a Way of Life* in *ETHICS: SUBJECTIVITY AND TRUTH* 136-37 (1998).

³² 92 L Ed 2d 140: 478 US 186 (1986).

³³ 539 US 558 (2003).

³⁴ *Id.*, 567.

One of the reasons why the judges in *Lawrence* were able to overturn the Supreme Court's decision in *Bowes* was their ability to step outside of the act-identity dichotomy. They appreciated how homosexuality was not only about homosexual acts, but also about the homosexual identity. In *Koushal*, however, the Supreme Court failed to appreciate these nuances and based its decision on this false dichotomy.

V. VAGUENESS AND UNCERTAINTY OF THE LAW

The argument that § 377 should be struck down for fear that it will be misused, is linked to the argument that the words of the said provision are vague and uncertain. The judges in *Koushal*, while discussing the meaning of 'carnal intercourse against the order of nature' as provided under § 377, admitted that they could not draw an exhaustive list of acts covered by the provision.³⁵ Given that the scope of the law itself is uncertain, and that the law takes away the right to liberty, equality and dignity of LGBT persons in India, there is a strong case to be made that the law should be held unconstitutional. The invalidity here arises from the probability of misuse of the law. The Court quotes a paragraph from *K.A. Abbas v. Union of India* ('K.A. Abbas')³⁶ in *Koushal* that describes exactly this principle:

"However it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases."³⁷

³⁵ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 59.

³⁶ (1970) 2 SCC 780.

³⁷ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 68.

The Court, responding to the argument that the vague and arbitrary language of the law enables its misuse, and makes it susceptible to a constitutional challenge under Article 14, held that the criminal law and the Constitution do not require impossible standards.³⁸ All that is required is adequate warning of the prescribed limit of conduct with reference to common understanding.³⁹ The Court cited its judgment in *A.K. Roy v. Union of India* ('A.K. Roy')⁴⁰, which dealt with a challenge to the constitutional validity of a national security legislation, to come to this conclusion. However, what the Court omitted to mention were the lines immediately following the text from *A. K. Roy* that was quoted in *Koushal*.

"[...] We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' which are mentioned in section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concept a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in section 3, which are fraught with grave consequences to personal liberty, if construed liberally."⁴¹

Thus, according to *A.K. Roy*, courts are bound to give the narrowest of constructions to the wording of the law to restrict their application if they have to uphold the validity of laws that have grave consequences for personal liberty. Going back to the Court's reference to *K.A. Abbas*, when there is a probability of misuse of § 377 to the detriment of LGBT persons, the court is well within its power to demarcate the scope of the law. This means that the Court could have read down the law to exclude consensual sex between adults by specifically interpreting the phrase 'carnal intercourse against the order of nature' as not applying to consensual acts between adults. Instead it relied on the 'plain meaning of the section'⁴² to hold that the section applies irrespective

³⁸ *Id.*, ¶ 67.

³⁹ *Id.*, ¶ 67.

⁴⁰ (1982) 1 SCC 271.

⁴¹ *Id.*, 318.

⁴² *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, ¶ 59.

of consent and age.⁴³ Consequently, in one stroke the Court deprived LGBT persons of all agency to consent to sexual relations or intimacy.

VI. CONCLUSION

At the heart of the difference between the judgments of the Supreme Court and the Delhi High Court, is the face of the judiciary that the two courts in question displayed – the first was a court that showed both legal acumen and empathy in invoking its counter-majoritarian role to protect the rights of persons facing prejudice and discrimination, the second was a self-avowed activist court that decided that it did not need to exercise its power to protect the rights of a ‘miniscule fraction’.⁴⁴ What accounts for this difference? From the material discussed above, it appears that it had nothing to do with the quality and breadth of the evidentiary material placed before it. The difference lies in something much deeper – an inability (some would say refusal) to step outside of a milieu of ‘traditional’ social values, and to appreciate the seriousness of the claims being made before it.

Koushal, in this way, stands in stark contrast to Naz. Even though both judgments were given by appellate courts and by two judge benches in a small span of four and a half years, they appear to be from parallel worlds. Koushal will be remembered for its use of the insensitive language of ‘so called LGBT rights’⁴⁵ and ‘miniscule fraction’.⁴⁶ Naz, on the other hand, will be remembered for its path-breaking use of the language of constitutional morality, inclusiveness, autonomy, dignity and self-determination. While Koushal is the law today, it is the spirit of Naz that will stand the test of time.

⁴³ *Id.*, ¶ 59.

⁴⁴ *Id.*, ¶ 66.

⁴⁵ *Id.*, ¶ 77.

⁴⁶ *Id.*, ¶ 66.