

GAY RIGHTS IN INDIA: MATTER OF NAZ FOUNDATION DECISION

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Introduction

On December 12, 2013, the Supreme Court of India upheld a law punishing homosexual activity with life imprisonment.¹ In so doing, India's Court added to the lively and often contentious debate surrounding gay rights both in India and abroad.² While the decision is a setback for India's homosexual community, it may also illuminate the way to a more humane ruling in the future.

Indian Penal Code Section 377 criminalizes "unnatural offences" and states that "[w]hoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life . . . and shall also be liable to fine."³ The High Court of Delhi found that Section 377 specifically violated Articles 14, 15 and 21 of the Indian constitution.⁴ Article 14 guarantees that the "State shall not deny to any person equality before the law or the equal protection

¹ Koushal v. Naz Foundation, Civil Appeal No. 10972 (2013) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> Koushal v. Naz Foundation, Civil Appeal No. 10972 (2013) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> Koushal v. Naz Foundation, Civil Appeal No. 10972 (2013) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> Koushal v. Naz Foundation, Civil Appeal No. 10972 (2013) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>.

² See Amrita Madhukalya, *Rare unity: Religious leaders come out in support of Section 377*, DNA INDIA (December 12, 2013), <http://www.dnaindia.com/india/report-rare-unity-religious-leaders-come-out-in-support-of-section-377-1933612>; S J Mukhopadhaya, *Homosexuality is criminal offence: Supreme Court*, THE ECONOMIC TIMES (December 11, 2013), http://articles.economictimes.indiatimes.com/2013-12-11/news/45080584_1_apostolic-churches-alliance-decriminalisation-utkal-christian-council; *UN chief Ban Ki-moon calls for equality for lesbians, gays and bisexuals*, THE ECONOMIC TIMES (December 12, 2013), http://articles.economictimes.indiatimes.com/2013-12-12/news/45123244_1_lgbt-rights-ban-ki-moon-human-rights.

³ 16 I.P.C. §377, 1860.

⁴ Naz Foundation v. Government of Delhi, WP(C) No. 7455/2001 (Delhi H.C.) (2009) (India), available at <http://lobis.nic.in/dhe/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>.

of the laws.”⁵ Article 15 prohibits state discrimination on the basis of “religion, race, caste, sex or place of birth.”⁶ Article 21 guarantees that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”⁷

This note will present a brief history of this matter before the Indian courts, along with a synopsis of the opinion of the Supreme Court of India and the ways in which it contrasts with that of the High Court of Delhi. Next, it will discuss the social and legal issues which likely contributed to both opinions, as well as the doctrines contributing to each decision.

I. The *Naz Foundation* Matter

The case was instituted by the Naz Foundation (“Naz”),⁸ a non-governmental organization based in Delhi dedicated to HIV/AIDS issues. Brought originally before the High Court of Delhi and naming Delhi as a respondent, the Union of India was joined based on the constitutional nature of the matter.⁹ Alleging that its efforts to prevent HIV/AIDS were severely impeded by the societal effects of discriminatory laws, Naz sought a declaration that Section 377 was unconstitutional to the extent it was applicable to consensual sexual acts done in private, and sought a permanent injunction restraining the government from enforcing Section 377 on three grounds.¹⁰

First, Naz claimed that Section 377 was not equally applied but in fact was used as a weapon for police abuse thereby creating a “class of vulnerable people . . . continually victimi[z]ed and directly affected by the provision.”¹¹ Second, the complaint alleged a right to privacy to be implicit in the right to life and liberty guaranteed by Article 21 of the Indian constitution, and that the pursuit of happiness therein understood

⁵ INDIA CONST. art. 14.

⁶ INDIA CONST. art. 15.

⁷ INDIA CONST. art. 21.

⁸ *The Naz Foundation (India) Trust: Naz India*, THE NAZ FOUNDATION (last visited Dec. 10, 2014), <http://nazindia.org/about/naz-india/>.

⁹ *Naz Foundation v. Government of Delhi*, WP(C) No. 7455/2001 (Delhi H.C.) (2009) (India), available at <http://lobis.nic.in/dhe/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>.

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 7.

necessarily includes a right to pursue private, consensual sexual relations.¹² Finally, Naz alleged that Section 377's penalizing of "unnatural sexual acts"¹³ was not rationally related to the classification created by procreative and non-procreative sexual acts and thus violated Article 14 of the Indian constitution.¹⁴ Finding constitutional violations on each claim, the High Court of Delhi held themselves duty bound to invalidate Section 377 and did so accordingly on July 2, 2009, stating that their clarification would govern until the legislature amended the law.¹⁵

A. The Opinion of the Supreme Court of India

In an appeal to the Supreme Court of India brought by Suresh Kumar Koushal, a citizen of India, and supported on both sides by several parties, appellants argued three primary points. First, that the High Court erred in declaring Section 377 violated Articles 14, 15 and 21 of the Indian constitution as the allegations did not contain "foundational facts necessary for pronouncing upon [the] constitutionality of a statutory provision."¹⁶ Second, that Section 377 was entitled to the presumption of constitutionality since the legislature treated the defined sexual activity as an offense, and because Article 21 subjects the rights to life and liberty to the procedure prescribed by law.¹⁷ Third, that Section 377 is gender neutral and did not subject any class of persons to undue discrimination which can be said to violate Article 14 or 15.¹⁸

The Supreme Court of India began its opinion by expounding on the unique position of Indian courts. Having gained independence only after the cessation of World War II, Indian law remains heavily influenced by the system inherited from the British Empire. Many Indian laws were first adopted during that period. However, India adopted its constitution in 1950. Accordingly, Article 13 of the constitution vests courts with the power to strike down any law inconsistent with the fundamental rights guaranteed by the Indian constitution, regardless of when the law was first

¹² *Id.* ¶ 8.

¹³ 16 I.P.C. §377, 1860.

¹⁴ Naz Foundation v. Government of Delhi, WP(C) No. 7455/2001 ¶ 9 (Delhi H.C.) (2009) (India), available at <http://lobis.nic.in/dhe/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>.

¹⁵ *Id.* ¶ 105.

¹⁶ Koushal v. Naz Foundation, Civil Appeal No. 10972 ¶ 21 (2013) (India), available at <http://judis.nic.in/supreme court/ imgs1.aspx?filename=41070>.

¹⁷ *Id.* ¶ 24.

¹⁸ *Id.* ¶ 25.

adopted.¹⁹ Further complicating matters, the Court noted that given this unique situation, Indian jurisprudence recognized a duty on courts to assess the constitutionality of any law with an eye toward the “interpretive changes” that might be “affected by the passage of time.”²⁰ In other words, laws which may have been constitutional when adopted might be viewed as unconstitutional in light of a changed legal or social situation, whether the change comes from within Indian society or from outside via shifting international norms.²¹

Turning to its substantive analysis, the Supreme Court first addressed the notion that Section 377 is entitled to a presumption of constitutionality. The Court noted that a plain reading of the constitution empowers courts to overturn laws inconsistent with the rights guaranteed by the constitution.²² However, the Court also noted the great self-restraint historically exercised by Indian courts due to concern for a separation of powers, and the resulting doctrine of a presumption of constitutionality for all laws.²³ Continuing, the Court acknowledged a significant doctrine of Indian jurisprudence requires courts to uphold laws if some reading can render it constitutional.²⁴ Section 377, like all Indian laws, was entitled to such a presumption.

The Supreme Court noted the Indian Penal Code had been amended as recently as 2013 to deal specifically with Chapter 16 and sexual offenses, of which Section 377 is a part.²⁵ Moreover, it pointed out a Law Commission of India report in 2000 specifically recommended deletion of Section 377, and that the matter was debated, but ultimately not amended.²⁶ The Court felt these facts indicated a strong desire by the legislature, as representatives of the people of India, to leave Section 377 in place. This notion was further strengthened by the fact that even though India was not formally appealing the order of the High Court of Delhi, the legislature had not amended the law.²⁷ Opining that it is inappropriate for a court to strike down a law absent a clear constitutional violation,²⁸ it next

¹⁹ INDIA CONST. art. 13.

²⁰ *Koushal v. Naz Foundation*, Civil Appeal No. 10972 ¶ 54 (2013) (India), available at [http://judis.nic.in/supreme court/imgs1.aspx?filename=41070](http://judis.nic.in/supreme%20court/imgs1.aspx?filename=41070).

²¹ *Id.*

²² *Id.* ¶ 51.

²³ *Id.* ¶¶ 52, 54.

²⁴ *Id.* ¶ 57.

²⁵ *Koushal v. Naz Foundation*, Civil Appeal No. 10972 ¶ 61 (2013) (India), available at [http://judis.nic.in/supreme court/imgs1.aspx?filename=41070](http://judis.nic.in/supreme%20court/imgs1.aspx?filename=41070).

²⁶ *Id.*

²⁷ *Id.* ¶ 62.

²⁸ *Id.*

examined the historical uses of Section 377 for evidence of such violations.

Noting that sodomy laws in India dated back to 1828, and that Section 377 had been adopted in 1860,²⁹ the Supreme Court reviewed its application spanning from 1886 to 1992.³⁰ The cases reviewed showed that Section 377 had been used to prosecute consensual homosexual activity, but also instances of rape and child incest; all under the ambit of “carnal intercourse against the order of nature.”³¹ Therefore, the Court concluded that the application was not uniformly discriminatory, and that the law was facially neutral.³²

The Court was particularly concerned by the lack of specific examples of these alleged violations in Naz’s original petition. With especially harsh words for the Delhi High Court, the Supreme Court stated that the petition had been “singularly laconic” and “miserably failed” to identify the way(s) that Section 377 singled out any class of persons.³³ Unfortunately, the High Court left itself open to such a charge by concluding without any sort of explanation that Section 377 was not enacted to prevent any sort of sexual assault and also accepting almost out of hand Naz’s contention that Section 377 stymied efforts to prevent HIV/AIDS.³⁴

Next, the Supreme Court addressed the High Court’s finding of Article 14 and 15 violations. The Court noted the principle underlying Article 14 is not that the same laws must apply to all. Rather, the State has the power to identify classes for legislative purposes and even when such legislation produces an inequality, the law is “not open to the charge of denial of equal protection” so long as it applies to all classes.³⁵ Even where it is alleged that a statute is applied unequally, so long as the statute is clear in its goals, courts must defer to the administrative bodies tasked with carrying it out. Courts may only strike down such statutes if they were clearly crafted to discriminate.³⁶ Referencing again the historical usage of Section 377, the Supreme Court held it criminalized an activity,

²⁹ *Id.* ¶¶ 67-69.

³⁰ *Id.* ¶¶ 69-76.

³¹ *Id.* ¶ 77.

³² *Id.*

³³ *Id.* ¶¶ 78-79.

³⁴ *Naz Foundation v. Government of Delhi*, WP(C) No. 7455/2001 ¶ 76 (Delhi H.C.) (2009) (India), available at <http://lobis.nic.in/dhe/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>.

³⁵ *Id.* ¶ 80.

³⁶ *Id.* ¶ 81.

not a class of persons and thus, was not open to charges that it violated Article 14 or 15 without further evidence of such charges.³⁷

Considering whether Section 377 violated Article 21, the Court acknowledged that substantive due process and the right to privacy were both guarantees read into the Indian constitution.³⁸ While a certain level of privacy and bodily integrity in relation to sexual choices is present in Indian law, the Court noted it was also well-established that this is not an absolute right but rather may be lawfully restricted as the legislature sees fit.³⁹ In so doing, the Supreme Court rejected the High Court of Delhi's more expansive understanding of Article 21, which held that the sphere of privacy guards the development of human relations from all but the most minimal of outside interference.⁴⁰

Next, addressing allegations Section 377 was used to harass a certain class of persons, the Court stated that the legislature did not mandate or condone such action. Thus, any harassment was not a reflection of the statute itself.⁴¹ Noting again the lack of specific instances of harassment in the petition, the Court pointed out that while power may often be abused, it was not in a position to deny the existence of said power without a concrete showing of such abuse.⁴² Even in instances, such as this one, where the existence of harassment is likely, the legal standard involved called for concrete examples.

Concluding, the Court wrote that while the plight of homosexuals was real and their rights must be protected, their plight could not be a blindfold to overturn properly enacted legislation on constitutional grounds. The Supreme Court thus overruled the High Court of Delhi, holding Section 377 constitutional on all grounds.⁴³ After doing so, the Court's final words were 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" and that the legislature was free to delete or amend Section 377 per the suggestion of India's Attorney General.⁴⁴

³⁷ *Id.* ¶ 84.

³⁸ *Id.* ¶¶ 85-88.

³⁹ *Id.* ¶ 90.

⁴⁰ *Id.* ¶¶ 39-40.

⁴¹ *Koushal v. Naz Foundation*, Civil Appeal No. 10972 ¶ 91 (2013) (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>.

⁴² *Id.*

⁴³ *Id.* ¶ 97.

⁴⁴ *Id.* ¶¶ 97-98.

II. Analysis of the *Naz Foundation* Matter

The *Naz Foundation* cases show an Indian judiciary and society at large wrestling with several competing interests at once. India is the world's second largest nation by population, and the world's largest democracy.⁴⁵ Homosexuality is a hotly debated topic,⁴⁶ but there are clear signs that Indian society and its leaders are moving in the direction of full rights for all.⁴⁷

As proof, we need look no further than the opinion of the High Court of Delhi in this matter. India's judiciary is set up such that state high courts (Delhi is not only a city, but a state as well) are but one step removed from the Supreme Court of India. The High Court's opinion is equivalent to that of a United States Court of Appeals. The opinion relies in no small part on the ever growing international norm of equal rights regardless of orientation, as evidenced by its heavy referencing of international documents and court opinions.⁴⁸ With that said, the opinion is not without pleas to the unique characteristics of Indian society and their own constitution for its final ruling. With its allusions to a growing sphere of personal privacy in Indian society, the important primacy of constitutional morality versus a social-majoritarian morality, and its appeal for strict scrutiny of laws which affect certain classes more heavily; it is characteristic of an evolving social consciousness in India similar to that which has taken hold in the global West, and which recognizes a greater primacy for the individual.

Conversely, the Supreme Court opinion is perhaps best viewed as that of a judiciary which wishes not to be dragged in to debates that it sees as properly adjudicated in the legislative sphere, regardless of the social

⁴⁵ UN Country Profile: India, UNITED NATIONS, <https://data.un.org/CountryProfile.aspx?crName=INDIA> (last visited Dec. 10, 2014).

⁴⁶ See Soutik Biswas, *Fear and loathing in gay India*, BBCNEWS (May 17, 2005), http://news.bbc.co.uk/2/hi/south_asia/4304081.stm; Shyamantha Asokan, *India's Supreme Court turns the clock back with gay sex ban*, REUTERS (December 11, 2013), <http://www.reuters.com/article/2013/12/11/us-india-rights-gay-idUSBRE9BA05620131211>.

⁴⁷ See Randeep Ramesh, *India's Literary Elite Call for Anti-Gay Law to be Scrapped*, THE GUARDIAN (September 18, 2006), <http://www.theguardian.com/world/2006/sep/18/gayrights.books>; Kounteya Sinha, *Ramadoss to take up gay rights with issue with PM*, THE TIMES OF INDIA (January 20, 2011), <http://timesofindia.indiatimes.com/india/Ramadoss-to-take-up-gay-rights-issue-with-PM/articleshow/3545889.cms?referral=PM>.

⁴⁸ *Naz Foundation v. Government of Delhi*, WP(C) No. 7455/2001 ¶¶ 25-28 (Delhi H.C.) (2009) (India), available at <http://lobis.nic.in/dhe/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>.

merits of the debate, unless it has a proper evidentiary foundation to do so. The Supreme Court opinion is emblematic of extreme judicial deference to the legislature, justified additionally by a presumption of constitutionality. Both of these canons of statutory interpretation are recognizable in our own judicial system. Despite the unfortunate result of the case from a rights perspective, the canons themselves are not readily dismissed. Further, where such interpretive canons exist it is all the more necessary to have a solid foundation for allegations of unconstitutionality.

This foundation, or the lack thereof, seems to have been the deciding factor in this case. It is no coincidence that both Naz's original petition and the appeal opened with factual allegations. For Naz, that Section 377 was applied in a discriminatory manner. For Koushal, that the petition did not contain a sufficient foundation to decide on the constitutionality of Section 377. It is similarly no coincidence that the Supreme Court's opinion repeatedly referenced this and took great issue with the Naz petitions' claim that Section 377 hindered their efforts to curb HIV/AIDS prevalence in India while not detailing specific instances of such hindrances. Acknowledging that it was a high bar to cross, and even noting that homosexuals in India were discriminated against, the Court likely still felt that in order to make such a momentous ruling it needed a solid evidentiary foundation for the case and absent such specifics, it seems Naz's petition was viewed as simply too infirm to declare Section 377 unconstitutional on its face.

Unlike the High Court of Delhi, the Supreme Court relied less on international precedent for its opinion than in some of their prior decisions.⁴⁹ While the Court has taken valid criticism for this,⁵⁰ it is likely a mistake to conclude either that the Indian Court is turning its back on international precedent or shutting the door on gay rights in India. The Supreme Court did not countenance its opinion on a refutation of the views of the High Court of Delhi, but instead relied on a narrow factual finding in conjunction with established judicial precedent. In so doing though, the opinion implicitly acknowledges that India's homosexual community is likely discriminated against and makes reference to courts' Article 13 duty to find laws such as Section 377 unconstitutional *where specific cases support such allegations*.

⁴⁹ See, *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

⁵⁰ See, Rehan Abeyratne and Nilesh Sinha, *Insular and Inconsistent: India's Naz Foundation Judgment in Comparative Perspective*, YALE JOURNAL OF INTERNATIONAL LAW ONLINE (May 1, 2014), <http://www.yjil.org/docs/pub/o-39-abeyratneandsinha-insular-and-inconsistent-indias-naz-foundation.pdf>.

Taken as a whole, the Naz Foundation cases show a judiciary both aware of and sensitive to the precarious situation homosexuals in India face because of Section 377, but not yet prepared to take a firm stand on the issue without a rock solid case on which to build their constitutional opinion. However, the opinion can simultaneously be seen as a blueprint for the way to prepare the Court to take such a stand. The Naz Foundation has taken note of this implied blueprint, and has filed an appeal in the case with an eye toward remedying precisely this shortcoming.⁵¹

Conclusion

The holding of the Supreme Court of India is unfortunate but should not be viewed as the final word on the matter. Indeed, while certainly disheartening to many both in India and abroad, the Court's opinion can simultaneously be read as pointing the way for the ultimate declaration that Section 377 is unconstitutional.

⁵¹ See *The Naz Foundation (India) Trust: Advocacy*, THE NAZ FOUNDATION (last visited Dec. 10, 2014), <http://nazindia.org/programs/advocacysection-377/>.