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**Legislation:** Penal Code 1860 (India) s.377
Constitution of India art.14, art.15, art.21, art.372

**Case:** Suresh Kumar Koushal v NAZ Foundation Unreported 2013 (Sup Ct (Ind))

*P.L. 344* The Indian Penal Code 1860 in s.77 makes "carnal intercourse against the order of nature with any man, woman or animal" punishable with imprisonment for life. In *Suresh Kumar Koushal v NAZ Foundation*, reversing a 2009 decision of the Delhi High Court, the Supreme Court concluded that the provision is constitutionally valid. As a result, India now rejoins 76 other jurisdictions in criminalising same-sex behavior. The decision is for the most part poorly written and insufficiently reasoned, and the four strands of arguments, individually and collectively, leave much to be desired.

The Penal Code is a piece of colonial legislation. But the court held that the Code still enjoys the same presumption of constitutionality that is granted to legislation enacted by the Indian Parliament. The presumption, the court clarified,

"is founded on the premise that the legislature, being a representative body of the people and accountable to them, is aware of their needs and acts in their best interest within the confines of the Constitution." (at [28])

And "there is nothing to suggest that this principle would not apply", the court added "to pre-Constitutional laws which have been adopted by Parliament and used with or without amendment" (at [28]).

This assessment militates against art.372(1) of the Constitution. The provision states that

"all law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority". *P.L. 345*

The Penal Code was never "adopted by Parliament"; it was automatically received into India’s new (independent) order by a deeming provision. Also, there is some evidence to suggest that laws so incorporated do not stand on the same footing as laws enacted by the Indian Parliament. Article 372(2), for example, authorised the President to make adaptations and modifications "for the purpose of bringing the provisions of [such] law … into accord with the provisions of this Constitution". Such presidential adaptations or modifications were declared final; they cannot "be questioned in any court of law". This power was vested personally in the President; approval of the two Houses of Parliament was not necessary. Notice; no equivalent provision exists by which the President may adapt or modify legislation enacted by the post-independence Indian Parliament. Clearly, in this constitutional scheme there are two distinct types of parliamentary legislation: those enacted under the provisions of the current Constitution, and those incorporated into the Constitution. It is far from clear if both kinds of legislation must be—or can be—treated alike.

The presumption of constitutionality having been conferred, the court went on to observe that

"around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs". (at [32])
In addition, "the 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate" (at [32]). But Parliament chose not to deal it, i.e. amend the law or revisit the issue. This inaction, the Court felt, was evidence that "Parliament ... has not thought it proper to delete the provision" (at [32]). The constitutional challenge, therefore, the court said, must be assessed keeping in mind these legislative "developments". This deferential attitude towards parliamentary inaction, sits uneasily with the court's otherwise activist stance on matters, constitutional and beyond, for decades. This new found voice of restraint is perhaps welcome, though misplaced in this instance.

The court went on to review a series of prosecutions under Penal Code s.377 only to conclude that "all the aforementioned cases refer to non consensual and markedly coercive situations" (at [38]). And the judges were skeptical if courts "would rule similarly — that is, convict persons — in a case of proved consensual intercourse between adults". Nonetheless, they immediately added:

"In the light of the plain meaning and legislative history of the section, we hold that section 377 IPC would apply irrespective of age and consent". (at [38])

This statement of the law as well as the doubt about its application sit uncomfortably together in the judgment. If s.377 applies irrespective of consent, then judges must apply the law in a case of "proved consensual intercourse". A refusal to do so would be a clear case of judicial misconduct.

On the question of classification of sexual acts, the court explained that

"those who indulge in carnal intercourse in the ordinary course and those who ... [do so] against the order of nature constitute different classes" (at [42]). Therefore, people falling in the "latter category cannot claim that s.377 suffers from the vice of arbitrariness and irrational classification" (at [42]). But for this reasoning to hold up, some test is necessary by which to distinguish "ordinary intercourse" from "intercourse against the order of nature". The court offered none. If anything, based on a review of the prosecutions under s.377, it conceded that "no uniform test [could] be culled out to classify acts as ‘carnal intercourse against the order of nature’" (at [38]). This is particularly important because in India today, statutes are unconstitutional unless clear classifications exist, and they are "fair and reasonable". In Suresh Kumar Koushal the court upheld the classification of sexual acts immanent in s.377 without explaining what the different classes were, or the justification for treating the classes differently. In this respect, the judgment falls significantly short of the minimum standards of judicial reasoning that may be expected from the Supreme Court.

The respondents alleged that the provision under challenge violated arts 14 and 15 (that guarantee the right to equality) and art.21 (that guarantees the right to life and personal liberty) of the Constitution. In overturning the decision of the Delhi High Court, the Supreme Court held

"that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in the last more than 150 years less than 200 persons have been prosecuted ... under section 377 IPC." (at [43])

. This, therefore, "cannot be made sound basis for declaring that section ultra vires the provisions of the Constitution" (at [43]).

The claims are both numerically and analytically suspect. In declaring India’s LGBT population as a "miniscule fraction", the court offered no evidence of any kind. It is as if the LGBT population is a miniscule fraction merely because the court says so. But even if correct, the claim is novel in Indian constitutional law with alarming implications for other minority groups. Several religious and linguistic minorities can easily be shown—not merely conjectured—to be no more than a "miniscule fraction" of India’s population. And if the Supreme Court is correct, they may not be entitled to the full array of constitutional protections by virtue of their lesser numbers. By the court's reasoning, there are two kinds of minorities in India now: sufficiently "big" minorities who may claim all rights guaranteed in the Constitution, and relatively "insignificant" minorities who may enjoy only some of these protections.

Finally, the court repelled the argument that the provision has been used to "perpetuate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community" (at [51]). Misuse "by police authorities and others is not a reflection of the vires of the section", the court said (at [51]). But this otherwise constitutionally correct claim does not wrestle with the fact that the provision merely by virtue of being in the statute books criminalises an entire category of people.
There is a quality of "misuse" inherent in the law—one that is independent of its use. As the Delhi High Court put it earlier,

"even when the penal provisions are not enforced, they reduce gay men or women ... to 'unapprehended felons', thus entrenching stigma and encouraging discrimination in different spheres of life". (2010 Crim. L.J. 94 at [50]) *P.L. 347

Those who sponsored the law in colonial times have cause to be proud of the current Court's unexpected swoon of judicial modesty and tender regard for the morals of the empire.

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