

On Section 377: Question of equality (GS 2 ,UPSC IAS mains)

The Supreme Court has an opportunity to reconsider its 2013 order criminalising gay sex

The time has come to undo the judicial wrong done to homosexual individuals in 2013, when the Supreme Court upheld the validity of Section 377 of the Indian Penal Code, which criminalises gay sex. A reconsideration of the flawed verdict in Suresh Kumar Koushal is now in prospect. A three-judge Bench has opened up an opportunity to reconsider that verdict, which came to the disturbing conclusion that the LGBT community was just a “minuscule fraction” of the population and also ruled that those having sexual intercourse “against the order of nature” constituted a separate class on which the law could validly impose penal sanctions. Although the matter is already before a Constitution Bench by way of a curative petition against the earlier judgment, the latest order is on a fresh petition challenging Section 377. It draws from the observations in the nine-judge Bench judgment in the ‘right to privacy’ case. The majority observed in Justice K.S. Puttaswamy v. Union of India that “equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.” The Bench has rightly observed that social morality changes from age to age, that “the morality that public perceives, the Constitution may not conceive of,” and that what is “natural to one may not be natural to another”. Thus, there is fresh hope that the Delhi High Court judgment of 2009, which read down Section 377 to decriminalise consensual sex between adults, may be restored. Ever since the court, in National Legal Services Authority v. Union of India (2014), concerning the rights of transgender persons, questioned the Koushal reasoning, there has been a body of

jurisprudence that sees gender identity and sexual orientation as an aspect of privacy, personal freedom and dignity. It is not yet clear if the present petition and the curative petition will be heard together. A curative petition is normally allowed only on the limited grounds of violation of principles of natural justice and circumstances suggesting possible bias on the part of judges. In contrast, the latest petition has paved the way for a comprehensive hearing on all dimensions of the right of individuals to affirm their sexual orientation. In this, the court must not confine itself to the issue of privacy, but also address the discrimination inherent in Section 377 on the basis of sexual orientation. The formulation in *Koushal* that constitutional protection is not available to a tiny fraction of the population can be overturned only on the touchstone of Article 14, which protects the right to equality.

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