

Briefing Paper: The Section 377 Curative Petition

On February 2, 2016, the Supreme Court of India referred a “Curative Petition” in the matter of *Suresh Kumar Koushal and another v. NAZ Foundation and others* to a five-judge bench of the same Court.

This is a significant new chapter in the litigation that began in the year 2001 challenging the constitutionality of Section 377 of the Indian Penal Code (IPC). Under section 377, “voluntarily ha[ving] carnal intercourse against the order of nature with any man, woman or animal” is a criminal offence and has been used to persecute people for their real or purported engagement in consensual same-sex sexual conduct.

The following document provides answers to some key questions regarding the nature of a Curative Petition; the history and significance of the *Naz Foundation* case; and the responsibilities of the Indian government in ensuring equality and non-discrimination on the grounds of sexual orientation and/or gender identity.

1. What is a Curative Petition?

The Indian Supreme Court expressly articulated a Curative Petition as a judicial remedy for the first time in *Rupa Ashok Hurra v. Ashok Kumar Hurra*, a 2002 decision.

Through the Curative Petition, the Supreme Court upheld the principle that no technicality should hamper the interests of justice. It further stated: “rendering justice in a cause is not less important than the principle of finality of its judgment”. A curative petition – through which a Supreme Court decision may be challenged – is presided over and decided by a bench comprising the three most senior judges of the Supreme Court along with the two judges who originally deliberated on the decision under challenge.

Prior to this, all decisions of the Supreme Court were only subject to a review petition, whereby the very same judges who had deliberated on and adopted the decision that the review petition challenged, assessed whether their decision disclosed any “errors apparent on the face of the record”.

2. What are the grounds for a Curative Petition?

The Supreme Court in *Rupa Ashok Hurra* noted that it was neither advisable nor possible to enumerate all the grounds on which a Curative Petition might be entertained. It did expressly note that relief would be available to a petitioner if the decision challenged disclosed a violation of the “principle of natural justice” or was vitiated by “an apprehension of bias” vis-à-vis one or both of the judges who had made the original decision. Additionally, the Supreme Court set out other circumstances in which a Curative Petition may succeed, including where upholding the original judgment would be “oppressive to judicial conscience” and where declining to reconsider it would cause the “perpetuation of irremediable injustice”.

3. What were the grounds raised in the Naz Foundation “Curative Petition”?

The original petitioner along with the seven interveners, all filed a Curative Petition before the Supreme Court. The different curative petitions filed in the matter raised a vast number of grounds. Some significant ones include:

- The original bench’s failure to hear the petitioners on the impact that the 2013 amendments to the Indian Penal Code relating to sexual violence had on their case challenging the constitutionality of Section 377. The amendments took place subsequent to the hearings, but many months before the judgment was delivered, with the judges making an explicit reference to these changes.
- The original Court’s failure to consider the affidavits of LGBT persons, their parents and health organizations placed before it and attesting to the discriminatory attitudes that the existence of Section 377 fostered and helped propagate;
- The Court’s failure to consider whether sexual orientation was a prohibited ground of discrimination under the Constitution;
- The Court’s failure to correctly apply the existing legal test of constitutional equality in Indian law. The test contains two clear strands, of which only one was even considered by the court, while the other was ignored, leading to an incomplete application of the law; and,
- The fact that the Supreme Court's subsequent judgment in *National Legal Services Authority v. Union of India* (the NALSA decision) attacked the underlying basis of the *Suresh Kumar Koushal* decision. In its 2013 NALSA decision the Supreme Court recognized a range of transgender individuals’ rights. Furthermore, since the NALSA decision pertained to equal rights for transgender individuals, it potentially undermines the findings in the *Suresh Kumar Koushal* judgment. In particular, in NALSA the Supreme Court noted that although Section 377 referred to sexual acts, it effectively targeted

people on the basis of their gender identity or sexual orientation, while in its *Suresh Kumar Koushal* decision the Supreme Court had held that section 377 merely targeted a category of acts.

4. What is the success rate of a Curative Petition?

Since the Curative Petition was introduced in 2002, only three petitions have been successful in reversing a prior Supreme Court's decision. In one of these, the Supreme Court allowed the Curative Petition on the grounds that its original decision violated the principles of natural justice. In the other two cases in which the "Curative Petition" remedy was successfully invoked, the Supreme Court went even beyond the grounds that it had expressly articulated in its 2002 *Hurra* decision when it had expounded the "Curative Petition" as a judicial remedy; it drew on its powers under Article 142 of the Constitution empowering the Supreme Court in the exercise of its jurisdiction to make whatever "order as is necessary for doing complete justice in any cause or matter pending before it".

In the most recent of these three decisions, the Supreme Court held that a Curative Petition may be successful in circumstances where the original decision of the Supreme Court is being challenged on the grounds that a different bench of the Supreme Court has – subsequently to the challenged decision – taken a different decision bringing about a change in the law, and the Curative Petition is grounded on the said change in the law.

5. What is a Constitutional Bench?

Article 145 (3) of the Indian Constitution states that for cases involving a substantial question of law as to the interpretation of the Constitution, the minimum number of judges required to sit on the bench is five. In practice, the Court has often failed to comply with this provision when deciding on cases that raised questions of interpretation of the Constitution - the *Suresh Kumar Koushal* case, for instance, would have been a prime candidate for being heard by a Constitution Bench.

6. What questions will the Court be deciding on?

The order of the Court on the 2nd of February notes that the "Petitioners request the matter to be admitted to a full-fledged hearing and examined in all its dimensions". Up to now, the Court has not delved into the merits of the submission; however, it has acknowledged that the issues raised in the various

Curative Petitions in this case "are of considerable importance and public interest" and that "some of the issues have constitutional dimensions". Taking these observations along with the ultimate referral to a five-judge bench, i.e. a Constitution Bench of the Supreme Court, it is likely that the Court will reconsider the matter on the basis of the broader constitutional arguments that the *Suresh Kumar Koushal* case has raised since inception.

7. What are the immediate next steps and what is the possible time line?

As per the Court's order, the Chief Justice will constitute a Constitutional Bench to hear the petitions. Beyond that, there is not much in the way of a time line. One important factor that may have a bearing on the way in which the case proceeds is the fact that the current Chief Justice is due to retire on the 4th of January 2017.

8. When was the original petition filed? What were the steps it took to reach this stage?

By criminalizing "carnal intercourse against the order of nature", Section 377 has been used to persecute the LGBT community in the country since its introduction in 1860. The original *Naz Foundation* petition challenging the constitutionality of Section 377 was originally filed in 2001, at the Delhi High Court. Initially, the High Court dismissed it in 2004; however, the petitioners filed a review petition, asking the High Court to reconsider its decision. The *Naz Foundation* case challenged the constitutionality of Section 377 on a number of grounds, including: that it violated the right to health by impeding HIV/AIDS prevention efforts; that it violated the right to equality through the persecution and prosecution of LGBT individuals under the guise of a seemingly neutral law; and that it violated the right to privacy through controlling the intimate personal lives of individuals.

In a landmark 2009 judgment, the Delhi High Court interpreted Section 377 to exclude consensual same-sex intercourse from the range of conduct that the same provision criminalized. However, various non-state groups appealed this ruling before the Supreme Court. With the *Suresh Kumar Koushal* decision in December 2013, the Supreme Court reversed the 2009 Delhi High Court ruling, effectively recriminalizing homosexuality.

9. What can the other branches of government do?

In the final paragraphs of the December 2013 *Suresh Kumar Koushal* decision, the Supreme Court panel pointed out that the competent legislature was free to consider the desirability of deleting Section 377 from the Indian Penal Code, even while the Supreme Court panel had found no constitutional infirmity in the provision. There have been limited voices in support of legislation amending or deleting Section 377 from different political parties, and it is noticeable that the ruling NDA government has been largely silent on the issue. The government's position was made clearer in December 2015 when Shashi Tharoor, an MP from the opposition Congress party, attempted to introduce a Bill to repeal Section 377 in the Lower House of Parliament. His Bill was not even introduced for discussion, and was defeated by a vote of 71-24. He made another attempt to do so in March 2015, which met with a similar result.

Another legislative route is for individual states to amend the state Penal Code so as to ensure that LGBT individuals are not criminalized within their jurisdictions.

10. What are India's international legal obligations on this issue?

Section 377 and the manner in which it has been used violates a number of internationally recognized rights, including several that India is obliged under international law to respect, protect and fulfill such as the right to life, liberty, non-discrimination, equality before the law, equal protection of the law, free expression, health, and privacy.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR), by which India is bound, reads, "Each State party to the present Covenant undertakes to respect and to ensure to all individuals in its territory and subjects to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin property, birth or other status." Similarly, Article 26 of the ICCPR provides for equality and equal protection of the law. The right to equal protection of the law requires states to give the same legal protection to sexual minorities from hate crimes, in child custody cases, and in exercising their civil liberties, such as their freedom of expression, free from arbitrary restriction. Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation and that everyone has the right to protection of law against such interference or attacks.

In 1992, in the case of *Toonen v. Australia*, the UN Human Rights Committee held that sexual orientation should be considered a status protected against discrimination under ICCPR Articles 2 and 26. It also found that it was "undisputed that adult consensual sexual activity in private is covered by the concept of "privacy"", and therefore, a law criminalizing the same violated Article 17 of the ICCPR.