



CASE COMMENT ON NAZ FOUNDATION VERSUS GOVERNMENT OF NCT OF DELHI, 2009

*By Nandini Arora and Aindri Saha
From Christ(Deemed to be University)
Lavasa, Pune*

Date of Decision: 2nd July 2009

Judges: Chief Justice of India Honourable
DR. Justice S. Murali Dhar

Citation: WP (C no.7455/2001)

In this case, a writ petition was filed by NAZ
Foundation.

The core controversy involved in this case is Penal provision of section 377 of IPC which criminalises sex other than Heterosexual penile- vaginal. The legislative history of this subject undictated the first records of sodomy as a crime at common law in England were focused in Fleta 1290 and later in Britton 1300. Both texts prescribed that Sodomites should be burnt alive. Acts of sodomy later became penalised by hanging under the Buggery act of 1533 which was re-enacted in 1563 by Queen Elizabeth 1, after which it became the character for subsequent criminalisation of sodomy in British Colonies. Oral genital sexual acts were later removed from the definition of Buggery in 1817 and in 1861, the death penalty for Buggery was formally abolished in England.

NAZ Foundation a Non-Governmental organisation working closely with HIV/AIDS patients filed a writ petition challenging the constitutional validity of Section 377 of the Indian Penal Code (IPC). They also challenged that sexual acts

between consenting adults infringe the fundamental rights guaranteed under articles 14, 15, 19 and 21 of the Constitution of India. They claimed that they were not able to help the people who were suffering from HIV/AIDS as Section 377 makes Homosexuality a punishable offence. This whole movement was started in 1994 when the first petition was filed in the same year by the AIDS Virodhi Andolan group. The initial writ case filed by the NAZ Foundation was dismissed by the Delhi High Court in 2004 due to a lack of cause of action. Nevertheless, the Delhi High Court was instructed to hear the case on the qualities after the Supreme Court of India overturned the dismissal of the civil appeal.

The petitioner said that Section 377 of the IPC promotes discriminatory attitudes, abuse, and harassment toward the LGBT population and symbolically hinders the efforts to prevent HIV/AIDS and access to care for the same. An alliance of women, LGBT, and human rights activists from Delhi known as "Voices Against 377" also intervened in the case at the same time and backed the appeal to "read down" and repeal Section 377 to remove adult consensual sex from its definition. As Indian Penal Code was drafted by Lord Macaulay which was introduced in British India. The Wordings of Section 377 are as follows- "Whoever voluntarily has a carnal intercourse against the order of nature with any man, women or animal shall be punished with imprisonment for life or with the imprisonment which may extend to 10 years and shall also be liable to fine. Here the major content of this section is that mere penetration is sufficient to constitute a carnal intercourse necessary for this offence. Here in this case the reference of



judgements like *R v. Jacob*¹ and in *Lohana Vasantlal Devchand v State*². In both the cases the court held that inserting the Penis into the mouth or any form of Oral sex will not attract Section 377. Here the major contention is that the Indian Penal code which is based on the English criminal law constitutes unnatural Sex as an offence, but on the contrary the English law was reformed in Britain by sexual offences Act 1967, which decriminalised homosexuality and acts of Sodomy between two adults (above the age of 21).

Here the NAZ foundation raised the contention that section 377 of the IPC is based on tradition Judeo- Cristian moral and ethical standards which conceive sex in purely functional terms i.e. for Procreation only. Here, under the garb of Section 377 the police officers often used to detain, question and harass the people who were in a same sex relation, so the people were harassed and were vulnerable towards the police brutalities. It is to be noted that in the fields of psychiatry and psychology, it was held that Homosexuality is no longer a disease, perhaps sexual orientation is to be deeply held as a core part of individual identities. The great impact of Section 377 of IPC is that it impacts the life of homosexuals in such a way that it not only perpetuates social stigma but also drives homosexual activity underground thereby Jeopardizing HIV/AIDS prevention efforts and thus rendering gay men to be vulnerable to HIV/AIDS. The prohibition of Homosexuality under Section 377 of IPC is discriminatory on the basis of sexual orientation. Further this Section also curtails

and infringes the basic freedom guaranteed under Article 19(1) (a), (b), (c), (d).

The peculiar feature of this case is that there were two contradictory affidavits filed by two wings of Union of India. Firstly, Ministry of Home Affairs (MHA) sought to justify retention of Section 377 of Indian Penal Code, 1860, whereas Ministry of Health and Family Welfare insisted the continuance of Section 377 of IPC. This case also gives the reference of “Bangalore incident 2004” showing the instances of Custodial torture of LGBT persons. In this incidence the victim of torture was Eunuch (Hijra) from Bangalore. This hijra was subjected to a gang rape and forced to have oral and anal sex by a group of Hooligans. This hijra was later taken to a police station where this hijra was stripped naked, handcuffed to window and grossly tortured merely due to his sexual identity. In *Jayalakshmi v. State of Tamil Nadu*³ in which this Eunuch had committed suicide due to Harassment and torture by the police officers on the allegation of his involvement in Theft.

In this judgment, reference of Canadian Supreme Court’s judgment is given⁴. It says that human dignity means that an individual or group feels self -respect and self -worth. It is also concern with the physical and psychological integrity and empowerment. Human dignity is harm by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to needs, capacities and merits of different individuals taking into account the context underlying their differences. Human dignity

¹ (1817) Russ and Ry 331 C.C.R

² AIR 1968 GUJ 252

³ (2007) 4 MLJ 849

⁴ *Law v Canada* (Ministry of Employment and Immigration), 1999 1SCR 497



is harm when individuals and groups are marginalised, ignored or devalued and is enhanced when laws recognized the full place of all individuals and groups within Canadian society. Here we need to consider that while justifying the decriminalization of Section 377 a broad recognition was given to Human Rights at large, so the reference of various foreign judgments has been given under this case.

Is Section 377 of the Indian Penal Code, 1860 is an infringement of the rights to dignity and privacy of an individual-

The right to privacy has been held to protect private space of an individual. This is an ability to work with an individual autonomy. In this context Article 12⁵, it says that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks”. Further in this context Article 17⁶ says that privacy means “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and his reputation. In continuance of this European convention on human rights⁷ states that everyone has the right to respect for his private and family life, his home and his correspondence. There shall not be interference by any public authority except as in accordance with the law and is necessary in a democratic society and in the interest of national security, public safety or the economic wellbeing of the country, for the

protection of health or morals of the individual.

Indian constitution does not contain any specific provision as to privacy but the right of privacy has been spelt by our Supreme court from the provisions of Article 19(1) (a) dealing with the Freedom of Speech and Expression. In this celebrated case of Bernstein and Ors vs Bester and Ors⁸. In this case, Justice Ackermann pointed out that scope of privacy had been closely related to the concept of identity and the rights like Right to privacy which are not based on a notion of Unencumbered self, but on the notion of what is necessary to have once autonomous identity. In this context, privacy means the inner sanctum of a person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of a community.

From the above elaborate discussion, we can definitely say that individual privacy is the core attribute of an individual which has to be protected and preserved under all circumstances. Further, various international conventions and Constitutional provisions also highlights the significance and importance of privacy. By having the provision of Section 377 there was an absolute curtailment of this golden freedom.

Impact of Criminalization on Homosexuals-

Here, criminalization of sodomy re enforce public abhorrence of lesbians and gays the resulting in an erosion of self-esteem and self-worth in number of ways which includes self-reflection, reflection of self through

⁵ Universal declaration of human rights 1948

⁶ International covenant of civil and political right 1976

⁷ European Convention on Human Rights, 1950

⁸ 1996 4(BCLR)449 (CC)



family, verbal assessment and disputes, residential zones and migrations, restricted public places, restricted movement and gestures, safe places and lastly conflict with the law enforcement agencies. The studies conducted in different parts of the world including India shows that criminalisation of same sex conduct has a negative impact on the lives of these people, even the penal provisions are not enforced they reduce gay men or women to what one author has referred as unapprehended felons. Thus, entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear few of more obvious consequences are harassment, blackmail, extortion and discrimination. There is an extensive material placed on record in the form of affidavits, autoreactive reports by well-known agencies and judgements that testify a wide spread use of section 377 of Indian Penal Code to brutalise Gay community. During the colonial period in India Eunuchs (Hijra) were criminalised by virtue of their identity. The criminal tribes act 1871 was enacted by British in an effort to police those tribes and communities who were addicted to systematic commission of non bailable offence. These communities and tribes were deemed criminal by their identity, and merely belonging to one of those communities rendered the individual criminal. In 1897, the criminal tribes act was amended to include Eunuchs (Hijras). According to the amendment the local government was required to keep a register of the names and residences of all Eunuchs (Hijras) who were reasonably suspected of Kidnapping or castrating children or of committing offences under section 377 of the

Indian Penal code. Criminalisation of Homosexuality condemns in perpetuity a sizable section of the society and forces them to live their lives in shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of law enforcement machinery. Section 377 of Indian Penal Code grossly violates right to privacy and liberty given in article 21 of the constitution of India and it punishes sexual acts between adults in private.

Is Section 377 and Impediment to Public Health?

Article 12⁹ makes it obligatory on the “state to fulfil everyone’s right to the highest attainable standard of health.” The Supreme Court of India while interpreting article 21 of the constitution of India in the light of article 12 held that right to health is inherent in the fundamental right to life under article 21 of the constitution of India¹⁰. The National AIDS Control Organisation¹¹ held that section 377 is a serious impediment to successful public health intervention. According to NACO, those in the high-risk group are mostly reluctant to reveal same sex behaviour due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection and making it very difficult for public health workers to even assess them. The situation is aggravated by strong tendencies created within the community who deny same sex behaviour itself. Since many people with same sexual orientation are married or have sex with women, their female sexual partners are consequently at a risk of HIV infection. The National AIDS control Organisation views that it is imperative that

⁹ International covenant on economic, social and cultural rights 16 December 1966

¹⁰ Paschim Bnaga Khet Mazdoor Samity v. State of W.B (1996) 4 SCC 37

¹¹ Also Known as NACO



Gay community have the ability to be safely visible which HIV/AIDS prevention may be successfully conducted. Clearly the main Impediment is that sexual practices of Gay community are hidden because they are subject to criminal sanction.

There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease nor a disorder and is just another expression of human sexuality. It is to be noted that public morality is not the province of criminal law and Section 377 of Indian Penal Code, 1860 does not have legitimate purpose. Section 377 makes more distinction between acts engaged in public sphere and acts engaged in private sphere. It also makes no distinction between consensual and non-consensual acts between adults. Consensual sex between adults in a private does not cause any harm to anyone. Thus it is evident that disparate grouping in Section 377 of IPC does not take into account relevant factors such as consent, age and the nature of act or the absence of harm cause to anybody. Public amicus and disgust towards a particular social group or vulnerable minority is not a valid ground for criminalization of Section 377 of IPC.

Section 377 targets homosexual community as a class and is motivated by an animus towards this vulnerable class of people. Section 377 of IPC is meant to protect women and children, the spread of HIV/AIDS and enforce societal morality against homosexuality. It is clear that Section 377 of IPC, whatever it present pragmatic application, was not enacted keeping in mind the instances of child sexual abuse or to fill the lacuna in rape laws. It was based on conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness.

The finality of the judgment says that Section 377 of the Indian Penal Code 1860 criminalizes consensual acts of adults in a private is violation of Article 21, 14 and 15 of the Constitution. The provision of Section 377 will continue to govern non-consensual penile non vaginal sex and penile non vaginal sex involving minors. By adult we mean everyone who is 18 years of age and above, a person below the 18 years of age would be presume not to be able to consent to a sexual act. This clarification will hold till of course Parliament chooses to amend the law to effectuates the recommendation of law commission of India in its 172 report which we believe remorse a great deal of confusion. Secondly it is clarified that judgment will not result in reopening of criminal case involving Section 377 of IPC that has already attained the finality.
