

# Naz Foundation v. Government of NCT of Delhi and Others

## ERT Case Note

On 2 July 2009, the High Court of Delhi ended over a century of discriminatory treatment against people because of their sexual orientation by declaring the application of significant elements of Section 377 of the India Penal Code (IPC) unconstitutional. Section 377 is a relic of the British legal system and in effect it criminalised same-sex conduct. This case note sets out the facts of the case, examines the judicial reasoning behind the judgment and comments on some of the implications of the decision.

## Facts

*Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001 concerned a writ petition (a public interest action taken before the court) brought by the Naz foundation, an NGO working with HIV/AIDS sufferers, which argued that Section 377 of the Indian Penal Code was unconstitutional. Section 377 entitled “Of Unnatural Offences” has been on the statute books since 1861 and has effectively been interpreted as criminalising consensual sexual acts between persons of the same sex. Section 377 states:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”

The Naz Foundation submitted that Section 377 violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. It brought the action in the public interest on the grounds that its work on combating the spread of HIV/AIDS was being hampered by discrimination experienced by the gay community as a result of Section 377. This discrimination, the petitioners submitted, resulted in the denial of fundamental human rights, abuse, harassment and assault by public authorities, thus driving the gay community underground and subjecting them to greater vulnerability in violation of their fundamental rights.

## The Legal Arguments Submitted

### *The Naz Foundation*

The Naz Foundation submitted that the harassment and discrimination of the gay and transgender community in India resulting from the continued existence of Section 377 affected the rights of that community which were guaranteed under the Constitution, including the right to equality, the right to non-discrimination, the right to privacy, the right to life and liberty, and the right to health.

They argued that the Constitution protects the right to privacy (which is not expressly mentioned) under the right to life and liberty enshrined in Article 21. Furthermore, they submitted that the right to non-discrimina-

tion on the ground of sex in Article 15 should not be read restrictively but should include “sexual orientation”. They also contended that the criminalisation of homosexual activity by Section 377 discriminated on the grounds of sexual orientation and was therefore contrary to the Constitutional guarantee of non-discrimination under Article 15.

Finally, the Naz foundation stressed that courts in other jurisdictions have struck down comparable provisions relating to sexual orientation on the grounds that they violated the rights to privacy, dignity and equality.

### *The Government of India*

Both the Ministry of Home Affairs (MHA) and the Ministry of Health and Family Welfare submitted legal opinions in respect to the writ petition. Interestingly, however, the two ministries came down on opposite sides of the legal argument offering “completely contradictory affidavits”. The MHA, on one hand, argued for the retention of Section 377 on several grounds. First, that it provided for the prosecution of individuals for the sexual abuse of children. Second, that it filled a gap in the rape laws. Third, that if removed it would provide for “flood gates of delinquent behaviour” which would not be in the public interest. Finally, MHA submitted that Indian society does not morally condone such behaviour and law should reflect societal values such as these.

By contrast, the Ministry of Health and Family Welfare (in conjunction with the National Aids Control Organisation) presented evidence in support of the Naz Foundation’s submission – that the continued existence of Section 377 is counter-productive to the efforts of HIV/AIDS prevention and treat-

ment. They argued for the removal of Section 377 stating that it makes a large number of people in high risk categories in relation to HIV/AIDS reluctant to come forward for treatment due to a fear of law enforcement agencies, and that in driving homosexuality underground it increases risky behaviour such as unprotected sex.

### **The Judgment**

In a decision that has been applauded not only as a landmark victory for equality and social justice but also in terms of its robust legal reasoning the High Court of Delhi concluded that “Section 377 IPC, insofar as it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution”.

While many elements of the decision will be far-reaching for LGBT rights in India, the High Court’s emphasis on the right to equality (Article 14 and 15 of the Indian Constitution) is particularly praiseworthy, for at least two reasons. First, the judgment must be praised for its completeness. In undertaking a comprehensive and detailed analysis of the law of India in respect to discrimination on the grounds of sexual orientation, the High Court has left little margin for the decision to be overturned on the basis of misinterpretation or misapplication of the law. Second, the High Court’s reference to and application of the highest international standards on equality to the Indian context set a positive example which should inspire judicial decision-making in countries which presently criminalise same-sex conduct.

The High Court began its Article 14 analysis by setting out that any distinction or classification must be based on an intelligible differentia which has a rational relation to the

objective sought and must not be unfair or unjust. Section 377, the Court said, does not distinguish between public and private acts, or between consensual and non-consensual acts, therefore does not take into account relevant factors such as age, consent and the nature of the act or absence of harm. Thus, such criminalisation in the absence of evidence of harm seemed arbitrary and unreasonable.

In considering the legal principles imposed by Article 14 of the Constitution, the Court took into account the Equal Rights Trust's Declaration of Principles on Equality as "the current international understanding of Principles on Equality". Citing in full Principles 1 (right to equality), 2 (equal treatment) and 5 (definition of discrimination) of the Declaration, together with landmark jurisprudence from the Canadian, South African and United States courts, the High Court emphasised that there was a need to include sexual orientation among protected grounds of discrimination and build indirect discrimination and harassment into any consideration of the right to equality.

Thus, dealing with the argument that Section 377 was neutral, as submitted by the MHA, the High Court stated that although the provision on its face was neutral and targeted acts rather than persons, in its operation it unfairly targeted a particular community, having the result that all gay men were considered criminal and it therefore violated Article 14 of the Constitution.

Moving on to consider whether the reference to "sex" in Article 15 of the Constitution should be interpreted as including sexual orientation on the basis that discrimination on the grounds of the latter is based on stereotypes of conduct on the basis of sex – as was argued by the Naz Foundation, the High

Court referred to the Human Rights Committee's decision in *Toonen v. Australia*, (No.488/1992, CCPR/C/50/D/488/1992, March 31, 1994) in which the criminalisation of sexual acts between men was considered a violation of Article 2 of the International Covenant on Civil and Political Rights, where a reference to "sex" was taken as including sexual orientation. On the basis of the analysis of Indian and international human rights jurisprudence the High Court declared that Section 377 was also unconstitutional on the basis of Article 15:

"We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15."

Summing up its judgment, the High Court stressed the importance of upholding the values of equality, tolerance and inclusiveness in Indian society by stating:

"If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised."

## Some Implications

For the moment, the decision of the High Court of Delhi has invalidated the criminalisation of consensual same-sex conduct between adults across all of India. As the writ petition involved a constitutional matter, the judgment applies throughout India. However, the judgment is restricted to adults. Therefore, "Section 377 (...) will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."

The Central government has reportedly decided not to contest the decision. At the same time, according to author Ratna Kapur,

"at least nine other petitions have been filed in the Supreme Court, the most famous being that of Baba Ramdev, the brand ambassador for Ayurveda and Pranayama yoga. The challenges are based on arguments that range from assertions that homosexuality is an illness for which there is a cure to expressions of anxiety over the crisis of cultural identity produced by the decision. Most of the challenges allege that homosexuality is associated with rampant promiscuity of the West, which centres hedonism and pleasure that are not apparently a part of our genetic cultural make-up."<sup>1</sup>

It is expected that it will be many years before the decision is handed down by the Supreme Court. Yet it is noteworthy that the level of criminal conviction over the lifespan of Section 377 was low. In practice the true danger of Section 377 was that it permitted and promoted the harassment, victimisation and persecution of LGBT people by law enforcement and other officials, to the extent that LGBT people have suffered extreme violations of their human rights and have been unable to live their lives in equal dignity with others in Indian society. Such harassment and discrimination will not automatically go away. LGBT people will still face harassment and discrimination from law enforcement officials and wider society, albeit from now on these will be clearly in violation of the law. Furthermore, it will take time for the judgment to "bed-in" and activists have already reported that the message that homosexuality is no longer a criminal offense has not reached some law enforcement agencies. Consequently, there is an urgent need for awareness-raising among both LGBT people and law enforcement agencies, to reinforce the impact of the decision and inform LGBT people about their new legal rights and public officials about their concurrent obligations.

Case note prepared by Jarlath Clifford

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<sup>1</sup> Kapur, R., "Out of the Colonial Closet, but Still Thinking 'Inside the Box': Regulating 'Perversion' and the Role of Tolerance in De-radicalising the Rights Claims of Sexual Subalterns", *NUJS Law Review*, Vol. II, No. 3, July-September 2009, p. 382.