

# **Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001**

## **1) Reference Details**

Jurisdiction: High Court of Delhi at New Delhi

Date of Decision: 2 July 2009

Case Status: Concluded

Link to full case:

<http://lobis.nic.in/dhc/>

## **2) Facts**

This case concerned a writ petition (a public interest action taken before the court) brought by an Indian 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 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 and others submitted that this interpretation of Section 377 violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. The Foundation 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 against the gay community. 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.

## **3) Law**

### *Legislation*

#### *Constitution of India*

- Articles 14 (Equality before law);
- Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth);
- Article 19 (Protection of certain rights regarding freedom of speech, etc.);
- Article 21 (Protection of life and personal liberty).

#### *Indian Penal Code 1861*

- Section 377.

#### *Case Law – Indian*

- *Maneka Gandhi v. Union of India* (1978) 1 SCC 248;
- *Kharak Singh v. The State of U.P.* (1964) 1 SCR 332;
- *State of Madras v. V.G.Row* AIR 1952 SC 196.

### *Case Law – Non-Indian*

- *Roe v. Wade* 41 US 113 (1973);
- *Planned Parenthood of South-eastern Pa v. Casey* 505 US 833 (1992);
- *Dudgeon v. The United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981);
- *Norris v. Republic of Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988);
- *Toonen v. Australia* , (No.488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994).

### *Other International Standards*

- *Declaration of Principles of Equality*;
- *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity*.

## **4) Legal Arguments**

### *Petitioner*

The petitioner, 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 of the Indian Penal Code [IPC] affected the rights of that community 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-discrimination on the grounds 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 is therefore contrary to the Constitutional guarantee to non-discrimination under Article 15.

Finally, the petitioner put forward that courts in other jurisdictions have struck down comparable provisions relating to sexual orientation on the grounds that they violate the rights to privacy, dignity and equality.

### *Respondents*

Two Government departments responded to the petition, however, as stated by the High Court, they presented 'completely contradictory affidavits' (submissions).

### *Ministry of Home Affairs (MHA)*

The MHA argued in favour of 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.

On behalf of MHA, the Additional Solicitor General [ASG] submitted, in response to claims of a right to privacy, that such a right is not absolute and can be restricted where there is a compelling state interest in doing so, such as public decency and morality. Furthermore, he argued that Section 377 does not discriminate on the grounds of sex because it is gender neutral.

#### *Interveners*

##### *National Aids Control Organisation (NACO) and the Ministry of Health and Family Welfare*

NACO responded on behalf of the Ministry of Health and presented evidence in support of the petitioner's submission that the continued existence of Section 377 is counter-productive to the efforts of HIV/AIDS prevention and treatment. NACO argued for the removal of the section stating that it makes a large number of people in high risk categories in relation to HIV/AIDS reluctant to come forward due to a fear of law enforcement agencies, and that in driving homosexuality underground it increases risky behaviour such as unprotected sex.

##### *'Voices against Section 377 IPC'*

A coalition of 12 NGOs submitted evidence also in support of the petitioner's arguments which demonstrate the high number of violations of human rights suffered by the LGBT community in India as a consequence of Section 377.

## **5) Decision**

The High Court (Court) firstly reiterated the test for any law which interferes in personal liberty, as set out in *Maneka Gandhi v. Union of India* (1978) 1 SCC 248: that (i) there must be a procedure; (ii) that procedure must be tested against one or more of the fundamental rights conferred under Article 19 which are applicable; and (iii) it is also susceptible to be tested against Article 14, and must be right, just, fair and not arbitrary.

#### *Right to Privacy*

The Court noted that the Indian Constitution does not contain an explicit provision in relation to the right to privacy, however the Supreme Court has interpreted such a right on the basis of Article 19 protecting freedom of expression and movement, and Article 21 protecting the right to life and liberty.

The Court made extensive reference to United States jurisprudence on the right to privacy as read into the Constitution, including *Roe v. Wade* 41 US 113 (1973) and *Planned Parenthood of South-eastern Pa v. Casey* 505 US 833 (1992). It then went on to consider the development of this right in India including the case of *Kharak Singh v. The State of U.P.* (1964) 1 SCR 332, which traced the right to privacy in India to the right to 'life' in Article 21 of the Constitution.

In addition, the Court referred to specific rights of persons of different sexual orientation in this respect by reference to the *Yogyakarta Principles on the Application of Human Rights Law in*

*Relation to Sexual Orientation and Gender Identity*, which the Court noted asserts the rights to equal enjoyment of rights of all persons regardless of their sexual orientation.

Taking stock of these provisions, the Court concluded that Section 377 denies the dignity of such individuals, criminalises their identity and violates their right to privacy which is protected within the ambit of Article 21 of the Constitution.

In making this finding the Court dismissed the arguments of the MHA that the decriminalisation of sodomy will lead to the increase of HIV/AIDS on the basis that there was no medical evidence to support this contention. The Court also noted that this claim contradicted the arguments made by NACO and the Ministry of Health and Family Welfare.

With respect to the public morality arguments put forward by the respondents the Court, citing the European Court of Human Rights jurisprudence of *Dudgeon v. The United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), and *Norris v. Republic of Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), stated that mere public disapproval or popular morality is not a sufficient basis for placing such restrictions on the enjoyment of fundamental rights. The Court asserted that the only morality which matters is Constitutional morality.

The Court determined that the Constitution of India protects and promotes diversity and ensures an egalitarian society where freedom is no longer a privilege. The Court determined that criminalisation of homosexuality runs counter to that Constitutional morality.

#### *Article 14 and Equality*

The Court reiterated the test set by Article 14 that any distinction or classification be based on an intelligible differentia which has a rational relation to the objective sought and is not unfair or unjust. Section 377, the Court said, does not distinguish between public and private acts, or between consensual and non-consensual acts thus does not take into account relevant factors such as age, consent and the nature of the act or absence of harm. The Court stated that 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 *Declaration of Principles of Equality* "as current international understanding of Principles on Equality". Drawing on Principles 1 (right to equality), 2 (equal treatment) and 5 (definition of discrimination) the Court emphasised the 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 Court stated that although the provision on its face is neutral and targets acts rather than persons, in its operation it unfairly targets a particular community, having the result that all gay men are considered criminal. **This led the Court to conclude that Section 377 discriminated against a particular community in violation of Article 14 of the Constitution.**

#### *Article 15 – Sex or Gender?*

Article 15 was described by the Court as a particular application of the general right to equality under Article 14. The Court considered the petitioner's argument that the reference to 'sex' in Article 15 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. The Court itself 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 Tasmanian Criminal Code which

criminalised 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 that basis the Court stated:

"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."

**The Court consequently found that Section 377 was unconstitutional on the basis of Article 15 of the Constitution.**

In its conclusion, the Court referred to the belief in inclusiveness which is ingrained in the Indian Constitution and explained that discrimination was:

*"[T]he antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual".*

In the light of its findings on the infringement of Articles 21, 14 and 15, the Court found it unnecessary to deal with the issue of violation of Article 19 of the Constitution.

**In sum, the Court declared that Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private, violates Articles 21, 14 and 15 of the Constitution.**