

**IN THE HIGH COURT OF DELHI AT NEW DELHI****CIVIL WRIT PETITION NO. 7455 OF 2001****IN THE MATTER OF :**

NAZ FOUNDATION

PETITIONER

VERSUS

GOVT. OF N.C.T. OF DELHI &amp; ORS.

RESPONDENTS

**I N D E X**

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NEW DELHI  
DATED :**(AMAN LEKHI)**  
CENTRAL GOVERNMENT  
STANDING COUNSEL  
159, LAWYERS CHAMBER  
DELHI HIGH COURT  
NEW DELHI-110 003.

**IN THE HIGH COURT OF DELHI AT NEW DELHI**  
**CIVIL WRIT PETITION NO. 7155 OF 2001**

**IN THE MATTER OF :**

NAZ FOUNDATION

PETITIONER

VERSUS

GOVT. OF N.C.T. OF DELHI & ORS.

RESPONDENTS

**COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO. 5**

I, Venu Gopal V. working as Director (Judicial in the Ministry of Home Affairs, Government of India, do hereby solemnly state and affirm as under :-

1. That I am familiar with the facts and circumstances of the case having dealt with it in my official capacity and am competent and authorized to swear this affidavit.
2. That I have read and understood the contents of writ petition and my reply to it is set as below :

**Preliminary Objections :**

1. No one except those whose rights are directly affected by the law can raise the question of its constitutionality. Declaration of unconstitutionality being an extraordinary relief, the petitioner cannot succeed merely because someone else may be hurt.
2. Public Interest Litigation is intended to use the judicial process to enforce administrative accountability and is generally resorted to in cases of administrative mis-feasance where public power is abused and public property is

dissipated. It cannot be extended to issues concerning vires of a statute.

3. The objections raised in the captioned writ petition go more to the policy of law than to its legality.
4. The Petitioner may well lobby with the Parliament and involve doctors, psychiatrists, criminologists, sociologists and legal experts so as to mobilize public opinion about the necessity of the provisions like Section 377 I.P.C. but the vires of the provision has to be judged by a Court only in judicial capacity which must necessarily involve its application to facts of a particular case. No such case exists to form a basis for the captioned writ petition.
5. Even where literal reading of prohibitory words produces an unintelligible result, if the statute in question gives out its meaning clearly, effect will be given to that meaning by curing the defect in phraseology and rejecting words as surplusage. Section 377, therefore, would be interpreted and understood in the context of the facts of a case in which it is invoked, and not in the abstract as the captioned writ petition does.
6. This is more so because rule of strict construction, as applicable to penal statutes, allows a court to interpret the law according to its current meaning and apply its language to cover developments taken place since the law was passed. The issues raised in the captioned writ petition, therefore, might well be applied by a court seized of an

individual prosecution to decide whether an offence alleged is, in fact, covered by Section 377 I.P.C.

7. The settled rule of construction applicable to all penal sections is if a reasonable interpretation as will avoid penalty in any particular case be available, the same should be adopted. Section 377 does not bar the application of the said rule of construction and, like any other provision, creating an offence has to be strictly construed. Preference for the liberty of a subject where a court is in doubt about the application of law would necessarily have to be resolved in favour of the subject and this rule applies to Section 377 I.P.C. as well. The pleas raised in the captioned writ petition are available to an accused being prosecuted under Section 377 I.P.C. to argue that the said section is not attracted to the facts of his case, but cannot be used to strike down the section as invalid.
8. The section applies the settled principle that if an act is unlawful it cannot be rendered legitimate because the person to whose detriment he acts consents to it. No person can license another to commit a crime. If an act has a tendency to create breach of peace or to offend public morals it is not in the power of any man to give effectual consent. And while the right to respect for private and family life is undisputed, interference by public authority in the interest of public safety and protection of health and morals is equally permissible. This is precisely what Section 377 I.P.C. does.

9. A perusal of cases decided under Section 377 I.P.C. shows that it has only been applied on the complaint of a victim and there are no instances of its being used arbitrarily or being applied to situations its terms do not naturally extend to. Section 377 has been applied to cases of assault where bodily harm is intended and/or caused and deletion of the said section can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled licence for the same. Sections like Section 377 are intended to apply to situations not covered by the other provisions of the Penal Code and there is neither occasion nor necessity for declaration of the said section unconstitutional.

**Parawise Reply :**

Para 1-13

The contents of paras 1 to 13 need no reply.

Paras 13A & 13B

The contents of these paras are wrong and denied. Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. Section 377 of IPC, does not in any way, violate article 21 of the Constitution.

13 C (1)

Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or equal protection of life within the territory of India. Section 377 IPC provides punishment for unnatural sexual offences, it does not make any distinction between procreative and non-procreative sex. It only

says whoever voluntarily has carnal intercourse against the order of the nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Thus the contention of the petitioner that section 377 IPC is violative of article 14 of the Constitution is not correct.

13C(2)

Section 377 IPC has increasingly been employed in cases of allegation of child sexual abuse and for complimenting lacunae in the rape laws. Constitution of India protects the women and children. Article 15(3) of the Constitution confers powers on the State to make special provisions for women and children. Article 39(f) provides that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. In the light of this view, the punishment prescribed by section 377 IPC is not disproportionate and is not violative of article 14 of the Constitution.

13D

Article 15 of the Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 15(3) states that nothing in this article prevents the State from making any special provision for children and women. Since section 377 IPC is primarily used for punishing child sexual abuse and to compliment the lacunae in the rape laws and not mere homosexuality, it is not violative of article 15 of the Constitution.

13 E National Aids Control Organization to reply.

13F.

Article 19 (1) (a) to (d) i.e right to freedom, provides that all the citizens shall have the right :-

(a) to freedom of speech and expression;

(b) to assemble peacefully and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India

The freedom guaranteed by the Constitution is subject to reasonable restrictions in the interest of sovereignty and integrity of India, public order, decency or morality.. eg. A person suffering from AIDS can be restricted in his movement by law as held in Lucy Vs. State of Goa AIR 1990 Bom. 355 paragraph 7-8. However, none of the freedoms guaranteed by article 19 of the Constitution is violated by section 377 IPC.

13G

Section 377 provides punishment for unnatural offences, consensual or otherwise.

Para 14

In reply to this para, it is submitted that Law does not run separately from the society. It only reflects the perception of the society. When section 377 was brought under the statute as an act of criminality, it responded to the values and mores of the time in the Indian society. In any parliamentary secular democracy, the legal conception of crime depends on political as well as moral considerations notwithstanding considerable overlap existing between legal and everyday conception of crime (i.e. moral

factors). There is no necessary equation between the two. Public tolerance of different activities changes and legal categories get influenced by those changes. The social dynamics take into account the moral aspect also.

The issue whether to retain or not to retain section 377 IPC was considered by the Law Commission of India in its 42<sup>nd</sup> Report and it observed that Indian society by and large disapproves of homosexuality and disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private. The views adopted in various reports of Law Commission of India are annexed hereto as Annexure - R-1.

Para 15-21.

The contents of these paras require no reply.

Para 22

In reply to this para, it is submitted that there are no convincing reports to indicate that homosexuality or other offences against the order of nature mentioned in section 377 IPC were acceptable in the Indian society prior to colonial rule.

Para 23-24

The contents of these paras require no reply.

Para 25

In reply to this para, it is submitted that Section 377 of the IPC does not make any distinction procreative or non-procreative sex. It only provides punishment for carnal intercourse against the order of nature.



Para 26

In reply to this para, it is stated that the studies of the criminal jurisprudence of section 377 reveal that in India it has been basically used to punish sexual abuse of children and to compliment lacunae in the rape laws. It has rarely been used to punish homosexual behavior.

Para 27

The contents of this para require no reply from answering respondent.

Para 28

The contents raised in this para are without merits and require no reply from answering respondent.

Para 29

The contents of this para require no reply

Para 30

In reply, the answering respondent craves leave to refer to averments made in para 26 above.

Para 31

In reply, it is submitted that as indicated in earlier paragraphs, the law does not run separately from society. It only reflects the perception of the society. Public tolerance of different activities changes and legal categories get influenced by those changes. The public, notably in the United Kingdom and the United States of America, have shown tolerance of a new sexual behavior or sexual preference but it is not the universally accepted behavior. In the United Kingdom, under Sexual Offences Act, 1967 buggery is no longer an offence if committed in private between two

consenting adults above the age of 18. The legislation, however, has not been free from criticism on the ground that the legislation negates the State's right to suppress what Lord Devlin has categorized as "social vices". Objectively speaking, there is no such tolerance to practice of homosexuality/lesbianism in the Indian society. Ref. 42<sup>nd</sup> & 156<sup>th</sup> Report of the Law Commission of India.

Para 32

The contentions raised in this para are wrong and denied. In fact, the purpose of this section 377 IPC is to provide a healthy environment in the society by criminalizing unnatural sexual activities against the order of nature.

Para 33

In reply, it is stated that the provision of section 377 becomes operable only when there is a report to the Police for either sodomising or buggery. If this provision is taken out of the statute book, a public display of such affection would, at the most, attract charges of indecent exposure which carry a lesser jail sentence than the existing imprisonment for life or imprisonment of 10 years and fine under section 377. While the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large. If this is not observed, whatsoever little respect of law is left would disappear, as law would have lost its legitimacy.

Para 34

The contentions raised in this para are wrong and denied. In fact section 377 has been normally used for punishing child sexual abuse and to compliment lacunae in the rape laws. As admitted in

the petition (para 30), it has been rarely been used against homosexual activities.

Para 35.

The contentions raised in this para are wrong and denied.

Para 36.

In reply, the answering respondent craves leave to refer to averments made in para 33 above.

Para 37.

In reply, it is submitted that section 377 does not make any distinction between procreative and non-procreative sex. It only penalizes sexual behaviour against the order of nature.

Para 38

The contentions raised are denied due to lack of knowledge.

Para 39-41

The contents of these paras require no reply from answering respondent.

Para 42 to 53

The averments pertain to National Aids Control Organization and require no reply from answering respondent.

**REPLY TO GROUNDS :**

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Section 377 is in no way an infringement of the protection guaranteed by article 21. Article 21 would be satisfied the moment it is established that there is a law,

which provides a procedure – fair, just and reasonable and has been followed. The arguments of the petitioner are, therefore, not relevant to article 21 of the Constitution.

When section 377 was brought under the statute as an act of criminality, it responded to the values and mores of the time in the Indian society. It is true that a number of countries have done away with the criminal content of homosexuality/lesbianism, but it is not clear even now whether bestiality is out of the criminal hook altogether even in those countries.

In any parliamentary secular democracy, the legal conception of crime depends on political as well as moral considerations notwithstanding considerable overlap existing between legal and everyday conception of crime (i.e. moral factors). There is no necessary equation between the two. Public tolerance of different activities changes and legal categories get influenced by those changes. The social dynamics take into account the moral aspect also.

In our country the criminal law, fortunately, is not based on a fundamentalist or absolutist conception of morality and it reflects shift according to changes in public attitudes. Outside the realm of Code of Criminal Procedure, 1973, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872, special laws have been enacted which deal with problems in society. The acts, which have been glorified in the past, like dowry, child marriage, domestic violence, widow re-marriage etc. have now been brought under the purview of criminal justice. Therefore, changes in public tolerance of activities lead to campaigns to either criminalize some behavior or

decriminalize others. There is no such tolerance to the practice of homosexuality/lesbianism in the Indian society.

The public, notably in the United Kingdom and the United States of America, have shown tolerance of a new sexual behavior or sexual preference, but it is not the universally accepted behaviour. In the United Kingdom, under Sexual Offences Act, 1967 buggery is no longer an offence if committed in private between two consenting adults the age of 18. The legislation, however, has not been free from criticism on the ground that the legislation negates the State's right to suppress what Lord Devlin has categorized as "social vices".

The basic thrust in the argument of pro-gay activists is the perceived violation of the fundamental liberties guaranteed in article 19 of the Constitution of India. However, there is no violation of fundamental liberty as long as any act of homosexuality/lesbianism is practiced between two consenting adults in the privacy as in the case of heterosexuality.

The provision of section 377 becomes operable when there is a report to the Police for either sodomising or buggery. If this provision is taken out of the statute book, a public display of such affection would, at the most, attract charges of indecent exposure which carry a lesser jail sentence than the existing imprisonment for life or imprisonment of 10 years and fine under section 377. While the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large. If this is not observed, whatever little

respect of law is left would disappear as law would have lost its legitimacy.

**Reply to Prayer**

In view of the above submissions, it is respectfully submitted that the writ petition lacks merit and deserves to be dismissed with costs.

**DEPONENT**

Place : New Delhi

Dated...04 Sept. 2003.

**Verification :**

I, Venu Gopal V, do hereby verify that the contents of above affidavit are true and correct to the best of my knowledge based on official records, no part of it is false and nothing material has been concealed therefrom.

**DEPONENT**

Place : New Delhi

Dated 04 Sept 2003