

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION No. 7455 OF 2001

NAZ FOUNDATION

..... Petitioner

Vs

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

..... Respondents

Note on the Criminal Tribes Act and the Constitution on behalf of Respondent No. 8.

1. In 1871, the Governor-General of India in Council passed the Criminal Tribes Act, 1871. This Act authorized the Government to declare by notification any tribe or class of persons which 'is addicted to the systematic commission of non-bailable offences' as a Criminal tribe. The law therefore deemed persons criminal merely on the basis of membership of a particular community. Once declared a 'criminal' tribe the Government was empowered with vast powers to ensure registration of all members of that tribe, forcibly settle, remove from a particular place, detain and transfer members of the criminal tribe. Furthermore the government was empowered to separate children of a criminal tribe from their parents.
2. The 1897 amendment to the Criminal Tribes Act, 1871, was titled 'An Act for the Registration of Criminal Tribes and Eunuchs'. Under the provisions of this statute, a eunuch was '*deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impotent*'.
3. Under section 24 of the Act, the local government was required to keep a register of the names and residences of all eunuchs who are 'reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code'.
4. Under section 26 of the Act, any eunuch so registered who appeared 'dressed or ornamented like a woman in a public street...or who dances or plays music or takes part in any public exhibition, in a public street...may be arrested without warrant and punished with imprisonment of up to two years or with a fine or both'.

5. Under section 27, If the eunuch so registered had in his charge a boy under the age of 16 years within his control or residing in his house, he could be punished with imprisonment of up to two years or fine or both. According to section 29, a eunuch was considered incapable of acting as guardian, making a gift, drawing up a will or adopting a son. The Criminal Tribes Act, 1871 as amended in 1897 is annexed here as **Annexure R1**.
6. It has been stated that *'Being a eunuch was itself a criminal enterprise, with surveillance being the everyday reality. The surveillance mechanism criminalised the quotidian reality of a eunuch's existence by making its manifest sign, i.e. cross-dressing a criminal offence. Further, the ways in which eunuchs earned their livelihood, i.e. singing and dancing, was criminalised. Thus, every aspect of the eunuch's existence was subject to surveillance, premised on the threat of criminal action. The police thus became an overt and overwhelming presence in the lives of eunuchs. Further, the very concept of personhood of eunuchs was done away with through disempowering them from basic rights such as making a gift or adopting a son.'*¹
7. Commenting on the Criminal Tribes Act in a speech made in 1936, Nehru stated
*" I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty...an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such and the whole principle is out of consonance with civilized principles of criminal justice and treatment of offenders...."*² A copy of the excerpt is annexed hereto as **Annexure R2**.
8. Yet this is precisely the effect of section 377 of the IPC. It renders the entire of class of LGBT persons as criminal and reduces them to the status of 'unapprehended felons'. What Nehru said about the Criminal Tribes in 1936, is equally true of all LGBT persons today. While the Criminal Tribes were denotified in 1952, the eunuch community and the rest of the LGBT community continue to be rendered criminal as a class because of section 377.
9. The promises of the constitutional guarantees of dignity, equality and diversity have not yet been extended to LGBT persons. While in the Constitution, the inherent indignity inequality of the caste system and practices of untouchability were explicitly recognized, no comment was made on a social and legal system that allows for the persecution of individuals of a non-conforming sexual orientation or

¹ PUCL-K, *Human Rights Violations Against the Transgender Community*, (Bangalore, PUCL-K: 2003) at p.45.

² Dilip D'Souza, *Branded by law: Looking At India's Denotified Tribes*, Penguin, New Delhi, 2001 at p. 57.

gender identity, condemning them to live as modern day outcastes. This case involves those principles that animated the framing of the Constitution: a recognition of the inherent, equal value and dignity of all individuals, irrespective of their differences, be they based on religion, race, caste, sex, place of birth, sexual orientation or gender identity.

New Delhi

25 September, 2008

Counsel for Respondent No. 8