

The reversal on Gay Rights in India

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India's Supreme Court recently issued a ruling against human rights by reinstating a law that bans gay sex.^[1] The Court restored Section 377 of the Indian Penal Code, a 19th century law, barring "carnal intercourse against the order of nature". The judgment has caused great dismay among liberal and progressive people and amongst activists and advocacy groups, which use judicial intervention to redress grievances against minorities of all shades in India. It has also been criticized from legal and human rights perspectives.^[2-4]

The police use the law in question to threaten and blackmail gays, lesbians and transgender people. Violation of the law is punishable by a fine and imprisonment. Following the recent ruling, India's crimes bureau has stated that it will compile crime statistics under Section 377.

The British colonial Government enacted Section 377 of the Indian Penal Code, based on Victorian morality, to criminalize non-procreative sex. The Naz Foundation, a non-Governmental Organization working in the field of human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) and sexual health, challenged the constitutional validity of Section 377 because it violated the rights to privacy, to dignity and health, to equality and non-discrimination and to freedom of expression. It also argued that the law prevented public health efforts at reducing the risk of transmission of HIV/AIDS as the fear of prosecution prevented people from discussing their sexuality and life style. The Delhi High Court on 2nd July 2009, in a landmark judgment, held Section 377 to be violative of Articles 21, 14 and 15 of the Constitution, as it criminalized consensual sexual acts of adults in private.^[5]

Individuals and faith-based group appealed the High Court verdict. The Supreme Court of India, on 11th December 2013, upheld Section 377 and overturned the judgment of the Delhi High Court that had decriminalized adult consensual

same-sex conduct.^[1] National and International Human rights groups condemned the Supreme Court decision.

The Naz Foundation and the Government of India have since filed a petition seeking review of the judgment.^[6,7] They argue that there are a number of grave errors of law that need to be corrected.

The judgment goes against the grain of the Supreme Court's own jurisprudence on advancement of fundamental rights and freedoms of all people, especially those who face marginalization in society. The Court's reliance on the principle of judicial restraint and Parliament's prerogative to change laws is misplaced, particularly when the law has been challenged for violation of fundamental rights of citizens.^[3] The judgment raises significant constitutional issues with far reaching public importance. There is a need to seek an interim stay on the operation of the judgment, as the judgment has caused immense prejudice to all adult persons who engage in consensual sex. This is particularly true for those from the Lesbian, Gay, Bisexual and Transgender (LGBT) community who had become open about their sexual identity since the High Court judgment and are now at risk of prosecution under criminal law.^[7]

Historical records document the presence of homosexuality from time immemorial, even in our culture. The universality of same-sex expression coexists with variations in its meaning and practice across culture. Medicine and psychiatry, since the 1970's, abandoned pathologizing same-sex orientation, behavior and LGBT life-style choices.^[8] The new understanding was based on studies that documented a high prevalence of same-sex feelings and behavior in men and women, its prevalence across cultures and among almost all non-human primate species.^[9] Investigations using psychological tests could not differentiate heterosexual from homosexual orientation. Research also demonstrated

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that people with homosexual orientation did not have any objective psychological dysfunction or impairments in judgment, stability and vocational capabilities. Psychiatric, psychoanalytic, medical and mental health professionals now consider homosexuality as a normal variation of human sexuality. It suggested that much of the distress faced by people with same-sex orientation is due to difficulties they face living in our predominantly heterosexual world.^[8]

Many countries have decriminalized same-sex orientation and behavior. Several liberal and progressive nations recognize LGBT rights to include human, civil and political rights. Many countries have also legally recognized same-sex civil partnerships, whereas some have even legalized same-sex marriages (e.g., Brazil, Canada, England, France, South Africa, Spain, Sweden and in some states in USA). LGBT rights laws include government recognition of same-sex relationships, civil unions and marriage, adoption and parenting. They also include anti-bullying legislation, anti-discrimination student, employment and housing laws, immigration equality, equal age of consent law and hate crime laws providing enhanced criminal penalties for prejudice-motivated violence against LGBT people. The United Nations Human Rights Council recognizes LGBT rights.^[10]

The Supreme Court judgment dismissed jurisprudence from around the globe related to LGBT rights, which have struck down such discriminatory laws on grounds of violation of privacy, dignity and autonomy of individuals. It also rejected international human rights law on sexual orientation and gender identity.

The distinction between justice and law is crucial,^[11] particularly when a 19th century law is interpreted in the 21st century context. The demand for justice brings a case before the law; this demand puts the law at issue. The law requires an extension or a reinterpretation when the demand for justice exceeds the law or brings new issues before it. Justice, then, renews the law – makes it new; extends its hold. The law can never escape from this demand for justice since it is a demand that can never be finally met. The law-justice couple gives us a sense of how the demands of a context, the call of justice, demands a creative citing of the law in relation to the questions that present before it. Judges may opt to close off the call of justice and renew the rule of the law in relation to the new question that is presented. Alternatively, they may take up the challenge and rethink/remake/cite the law as best as they can in ways that measure up to the call of justice.

The Supreme Court judgment, which upheld Section 377, is value-laden and seemingly allowed personal ideological views to determine the interpretation of statutory law. The

ruling has disregarded the constitutional vision of an equal and inclusive society and has violated the fundamental tenets of India's Constitution. The suggestion that that Parliament is "free to consider the desirability and propriety of deleting Section 377 I.P.C. from the statute book or amend the same" is disingenuous, given the fractious nature of India's current Parliament, the conservative views of many of its members and the political stakes in the run-up to 2014 general elections.^[3]

Humanity in general needs to become more tolerant of diversity. Majorities within democracies need to view minority groups and those who differ from them with respect. We need to focus on other people's humanity rather than on their sexuality. We should voice our concerns against the Supreme Court verdict. It is also time for social groups and professional associations to clearly state their positions and demand a review of the flawed verdict. The Indian government and its Parliament now have an opportunity to leave a lasting legacy of progress and should act immediately to seek a repeal of Section 377. The 19th century law has no place in a 21st century democracy.

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