

Is it time to review Section 377?

LEFT | Anand Grover

Section 377, titled “unnatural offences”, was enacted by the British after we lost our First War of Independence in 1857. They imposed their religio-cultural values upon us. Prior to that, sexual activities, including amongst homosexuals, were not penalised in India.

Section 377 penalises non-procreative sexual acts and any act of sexual perversity, as has been interpreted by different courts. Though it textually applies to all persons, homosexual and heterosexual, it has been targeted at gay men.

The Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (2009) rightly held that criminalising sexual activities with consent in private not only impairs the dignity of those persons targeted by the law, but it is also discriminatory and impacts the health of those people. Gay men are seen as criminals by the law because of Section 377, and thus by other members of society. This judgment lifted the criminal restrictions on gay men. However, it was short-lived as the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* (2013) set aside the Delhi High Court judgment. The *Koushal* judgment did not notice that the rape law itself had changed whereby instead of mere restriction on penile-vaginal non-consensual sex, it now includes a range of sexual activities, including digital and object penetration.

Discriminatory in nature

Section 377 is now restricted only to gay men and perhaps transgender people. The contradictions in the law are glaring. Consent is considered to be irrelevant. In the case of children, law presumes no consent. Therefore all sexual acts between an adult and a child are penalised.

The latest judgment on privacy by the Supreme Court has observed that *Koushal* has not appreciated the fundamental right to privacy in its application to Section 377. The *Koushal* verdict is dead; only its burial remains.

After the *Koushal* verdict, there have been a large number of cases where gay men are being blackmailed by their acquaintances and the police in connivance with each other. These cases have sharply risen in the last three years. Though there is recourse in law, no gay man can take recourse to it because Section 377 itself makes gay men’s sexual practices illegal and would put them in danger of being arrested. I have come across cases where people have undergone terrible humiliation and psychological stress, apart from being blackmailed either by their acquaintances or the police. No human being ought to be subject to such acts on account of a natural sexual affection for another human being.

Not in great company

The worst aspect of Section 377 is at the individual level. It makes gay men feel like lesser human beings because they are seen as criminals by law. That impairs not only their dignity, but forces them to go into the closet.

The British, who enacted the law, got rid of it in the 1960s in England. Many countries have got rid

of such laws, either by amendment of legislation or vide decisions of the court. India now remains with countries which India would not like to be associated with otherwise.

While most people gained independence from the British, the LGBT community, and gay men in particular, in India have remained chained to Section 377. It is high time that the chains are broken and we get rid of Section 377 so that gay men and the LGBT community can live their lives with dignity.

(Anand Grover is a senior advocate in the Supreme Court and the petitioner's lawyer in the Naz Foundation case)

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RIGHT | Navneet Rajan

Section 377 has been the subject of intense criticism in academic and other circles for being a colonial legacy, an outdated provision of law which is misused by the police and often against innocent individuals, and one that militates against the individual liberty and freedom of choice, etc. Naz Foundation challenged the constitutional validity of this section before the Delhi High Court and received a favourable verdict when the court held that the essence of Section 377 goes against the fundamental rights of citizens. The court declared that the Section, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. It further ruled that the provisions of Section 377 would continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

However, the judgment was successfully challenged in the apex court, which reversed it on several grounds, mainly that Section 377 does not violate the Constitution, there was little evidence that the provision was being misused, misuse of law does not make it invalid, and most importantly, it was only for the legislature to repeal or amend the law.

Regaining fervour

The debate has regained fervour after the privacy judgment. Specifically referring to the rights of the LGBT community, the court said these are not "so-called" rights but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. It further added that sexual orientation is an essential component of identity, and equal protection demands protection of the identity of every individual without discrimination. It goes on to state that privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation.

All religions consider homosexuality a sin, a conduct against the order of nature, and hold that an individual falling in this category be considered a criminal. However, by the end of the 19th century, a strong opinion emerged that it was a pathological condition and that the person should not be blamed for such conduct. Later, a dominant view emerged that homosexuality was inborn

and therefore not immoral, and it was not a disease. However, there is still no unanimity on the issue and individuals continue to hold diverse opinions.

While the progressive and timely judgement of the apex court needs to be celebrated, one should not be oblivious of the dangerous path we may tread on if the right to privacy is not tempered with reasonable restrictions. Any right, and more so a fundamental right, survives only if it is not exercised in a manner that it tramples upon the similar rights of another person.

Protecting the 'vulnerable'

The question that arises is, whether by repealing Section 377 we will achieve the objective of privacy and giving equal rights to individuals of any sexual orientation?

The rights of individuals belonging to the LGBT community need to be recognised, and these persons must be treated with dignity. Nevertheless, the law must ensure that the rights of others, especially those who may be vulnerable and may be easily tricked into unacceptable behaviour or physical intimacy by another individual with a different sexual orientation, must also be protected. To ensure that helpless children and women are not victims of such behaviour, we may have a modified provision in the law to punish such conduct against innocent children and non-consenting females who may not have the courage to resist such demands from their husbands.

(Navneet Rajan retired as Director General of Bureau of Police Research and Development, and earlier served in the CBI and the National Investigation Agency)

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CENTRE | Kamal Faruqui

As far as the private affair of an individual is concerned, within the four corners of the house, nobody has the right to interfere or peep into it. Everybody has the right to lead the life they want. But such choices should not spill over onto the streets by way of an endorsement of this style of life so as to attract other people.

Religion and rights

Why is this such an issue? Because we are a religious society. Be it a Hindu, Muslim, Christian, or Sikh, a couple, by which I mean husband and wife, does not have sex outside wedlock. Islam is very particular about the way couples should conduct their lives. Sex is allowed only in married life. Sex within the same gender, or sex out of wedlock, is prohibited in Islam. It is a crime.

But we are living in a democratic society governed by our Constitution. And the Constitution gives certain fundamental rights to citizens and one of the rights is the choice to lead the life one wants. Nobody has the right to disturb and intrude into someone's private life. We are not discussing the philosophical complexities of Section 377, but we are talking in the context of rights enshrined in the Constitution. In that context nobody should be harassed. At the same time, they should be aware that such activities are private, to be conducted within their homes.

Would you say homosexuality should be decriminalised? I speak in the context of the Constitution and in the context of religion and morality. As far as the Constitution is concerned, nobody has the

right to say how an individual should conduct his life, what to eat and what not to eat, what to wear, or comment about people's sexual activities. The Supreme Court was right in making this observation in the right to privacy judgment, delivered by a nine-judge Bench, and in another judgment in another case of instant triple talaq delivered in the same week as the privacy judgment wherein personal laws have been reaffirmed as being protected under the Constitution. The court has also observed that this right cannot be abrogated by a community in the name of majoritarian view.

So far as religious morality is concerned, homosexuality is prohibited by Islam. But the Constitution provides fundamental rights — we are not an Islamic country but a democratic country. But this does not mean a licence to do anything. I am a non-vegetarian, but I should not be oblivious to the concerns of vegetarians. Anything banned in the country, I should not do it.

The order on privacy has to be seen in the context of freedom to religion and the private lives of individual citizens. To protest the criminality of Section 377 is the right of every citizen.

Respect the Constitution

You are asking Kamal Faruqui who is a practising Muslim, who is saying that we should submit ourselves to the Constitution. But it is against my religion. The Koran very clearly states, "*Lakum dinukum waliyadeen*", which means "your religion for you and my religion for me".

We have to respect our Constitution. We are a country of many religions. Who am I to impose my view on others? That's the beauty of our Constitution. I would definitely like my children not to indulge in homosexuality. Section 377 has to be read in totality and I think the nine-judge Bench was clear that this must go.

(Kamal Faruqui is former chairman of the Delhi Minorities Commission and executive member of the All India Muslim Personal Law Board)

The views expressed are personal. As told to Anuradha Raman

The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President's plan

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