

The Queer Case of Section 377

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In August 2004, the newspapers in Delhi were full of details of the double murder at Anand Lok, which involved the murder of two gay men in the posh South Delhi house of one of the victims. The media was quick to pounce upon the “unsafe lifestyle” of the victims, and instead of mourning the death of two people, began detailed reports of the “dark underbelly of Delhi’s nightlife”. Screaming headlines such as “Gay Murders Tip of Sordid Sleazeberg” (*The Hindustan Times*, 17 August) became daily fare; newspaper reports talked endlessly of the promiscuous and unsafe lifestyles of gay people in the city, and how Pushkin Chandra, one of the murder victims, was part of a “homosexual syndicate”. Even as the media attention over the double murders was dying down, the Delhi High Court, in a shocking order, dismissed the Naz Foundation¹ petition asking for the reading down of Section 377 of the Indian Penal Code (IPC), the law that criminalises “unnatural sexual offences”. To this day there has been very little media focus on the dismissal of the petition, and along with it the hopes of the queer community in the country. Section 377 of the Indian Penal Code reads:

“Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature, with any man, woman or animal, shall be punished with imprisonment for life, or for imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”.

The British had framed the Indian Penal Code (IPC) in 1860. The origin of the law can be traced back to Judeo-Christian moral standards at the time of framing, which insisted that any form of non-procreative sex was immoral or “against the order of nature”. In effect, Section 377 criminalises all penetrative sexual activity (between individuals of the opposite sex as well as between individuals of the same sex) that is not penile-vaginal.

The history of the legal challenge to Section 377 can be traced back to 1994, when a medical team inspecting conditions in Delhi’s Tihar Jail reported a high incidence of sodomy and recommended to the jail authorities that condoms be made available for the jail inmates, to prevent HIV transmission. The then-Inspector General of Prisons, Kiran Bedi, refused to do

so as she felt that it would be a tacit admission that homosexual behaviour was prevalent in Tihar; and that the availability of condoms would encourage male homosexual behaviour in the prison. Thus, according to this logic, the government's providing of condoms to prisoners would amount to a violation of Section 377 of the IPC, i.e., breaking the law. Subsequently, AIDS Bhedhav Virodh Andolan (ABVA/Anti-AIDS Discrimination Campaign), a human rights group, filed a Public Interest Litigation in the Delhi High Court challenging the constitutional validity of Section 377 and arguing for the supply of condoms to jail inmates, with a plea to the authorities to refrain from segregating or isolating prisoners with homosexual orientations or those suffering from HIV/AIDS. The petition argued that Section 377 should be repealed because it violated the right to privacy and because it discriminated against people with a particular sexual orientation. Though this petition was not followed up, in 2001 Naz Foundation filed a more comprehensive writ petition asking that Section 377 be repealed in the Delhi High Court.

The impact of Section 377 was seen clearly just before the petition was filed. On 7 July 2001, police raided a park in Lucknow that was frequented by the MSM (men who have sex with men) community. The raid was based on an FIR (First Information Report, filed at a police station in the event of a crime) filed by a person who alleged that he had been sexually assaulted. The raid led to the arrest of an outreach worker of the Bharosa Trust, a NGO working with the MSM community in the area of HIV/AIDS prevention. The police raided the offices of Bharosa and Naz Foundation and seized materials from there, arresting nine people in all. The media sensationalised the arrests, describing the police action as the busting of a sex racket. The arrested persons were remanded to judicial custody on 8 July 2001; they were allegedly beaten up and their offices sealed. They were charged under Sections 377 (unnatural offences), 292 (sale of obscene books, etc.), 120b (criminal conspiracy) and 109 (abetment) of the IPC; under Section 60 of the Copyright Act; and Section 3 and 4 of the Indecent Representation of Women Act. Their bail applications were rejected twice, first by the chief judicial magistrate (CJM) and then by the district judge, Lucknow.

The CJM denied bail, stating that "the work of the accused is like a curse on society". The sessions judge upheld the arguments of the prosecution, which alleged that the accused are "a group of persons indulging in these activities and are polluting the entire society by encouraging young persons and abetting them for committing the offence of sodomy; that the investigation is still under progress; that the offences are being committed in an organised manner". The appeal for bail was moved again on 8 August in the Lucknow High Court by Indira Jaising and Anand Grover of the group Lawyers Collective. It was only on 16-17 August that all four accused were granted bail, and that too only after the public prosecutor had stated that no link between the NGOs and the incident of 7 July could be established. A medical examination was done on all the four accused but no evidence to charge them under Section 377 was found.

This incident alarmed and disturbed the queer community in India, and made it clear that the threat of Section 377 being used as a means of discrimination was a concern that needed to be urgently addressed. The petition filed in the Delhi High Court by the Naz Foundation in 2001 asked, therefore, for the *reading down* of this law. It asked that private consensual sex between adults be decriminalised. The thrust of the petition is to challenge the law as a violation of the right to privacy; to question the legislative intent as being arbitrary and outdated; to challenge the effect of the law as being discriminatory on the grounds of sexual orientation; and

as having a damaging impact on the lives of the queer community in the country. The petition posits the main impact on the queer community as the violation of the right to life as a result of HIV/AIDS prevention work being impeded, and the MSM community going underground, i.e., refusing to publicly avail of HIV-prevention options such as condoms, out of fear of being arrested. The second reason given is that this law's proscription of "non-procreative sexual activity" violates the right to life because a person's sexual preferences are an inalienable component of this right. The third reason given is the social stigma and police abuse that Section 377 enables and perpetuates.

In its response to the petition, the Indian government has argued that "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 does".² The government claims an act that is technically unlawful cannot be rendered legitimate simply because it took place on a consensual basis. It goes on to say, "Section 377 has been applied to cases of assault where bodily harm is intended and deletion of the said section can well open the floodgates of delinquent behaviour and be misconstrued as providing unbridled license for the same".³

In response to the argument that this law can be used against both homosexual and heterosexual couples, the government states that studies of criminal jurisprudence of Section 377 reveal that it has been basically used in India to punish sexual abuse of children and to complement lacunae in the rape laws, and that it has rarely been used to punish homosexual behaviour. Referring to the argument that Section 377 is outdated because many countries have repealed similar existent laws, the government said, "Law does not run separately from society. It only reflects the perception of society. Public tolerance of different activities changes and legal categories get influenced by those changes".⁴ According to the government, "Objectively speaking, there is no such tolerance to practice of homosexuality/lesbianism in Indian society".⁵

The government goes on to say, "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 affection would at the most attract charges of indecent exposure which carries a lesser jail sentence...while the government cannot police morality, in a civil society it has to express and reflect public morality and concerns about harm to society at large. If this is not observed, whatever little respect for law is left would disappear, as law would have lost its legitimacy".⁶

Surprisingly, on 4 September 2004, nearly a year after the government's response, a two-judge bench of the Delhi High Court consisting of Chief Justice B. C. Patel and Justice Badar Durrez Ahmed dismissed the petition. The judges said that there was no cause of action in the petition as there was no prosecution pending against the petitioner. The petitioners then filed a review petition saying that queer community in India, especially MSM, on account of criminalisation by Section 377 of the IPC, are a socially disadvantaged group, who are unable to approach the court directly for fear of being identified and being subject to discrimination, harassment and violence by the police and society. The petitioners pointed out that the Supreme Court, in a number of decisions, has held that when a person, or a class of persons to whom legal injury is caused due to a violation of a fundamental right is unable to approach

the court for legal redress, the matter can be brought before the court through a Public Interest Litigation (PIL). But the High Court rejected the review petition.

The petition and the government's response have highlighted the dichotomy in the state's position. While on the one hand the government, through the National AIDS Control Organisation (NACO) and the various state AIDS Control Organisations encourages diverse sexual practices within a safe-sex, HIV/AIDS prevention framework, it still believes that Section 377 is necessary. Though NACO was party to the petition, it had not yet responded to the petition before it was dismissed.

After much debate within the queer movement, a Special Leave Petition has been filed before the Supreme Court on the limited question of whether the court could dismiss the petition on the grounds that there was no cause of action. The setback in the legal battle is an opportunity to redirect the focus of queer activism from litigation to other arenas. The strategy of using the law as a tool for changing society is limited in the context of the ingrained fears and prejudices against queer people in India. Though legal reform can be a rallying point for queer activism, it is limited in terms of functioning as an effective strategy to address homophobia. The case being no longer *sub judice* makes it easier for activists to be directly critical of the state's response. It is an opportunity to focus on building public opinion and alliances with progressive movements before resuming the legal battle. It is a chance to debate whether a fresh petition should foreground violations on human rights of the queer community in the form of police harassment and extortion, rather than the traditional approach of focusing on the threat that Section 377 poses to public health by obstructing work that is meant to prevent the spread of HIV/AIDS.

In addition, an important question is whether the petition should ask for the law to be read down to include private consensual sex only. Most homosexuals against whom Section 377 is used are subject to harassment by the police in public spaces such as parks. If the repeal did not cover public spaces, it could lead to a situation where a heterosexual couple caught by the police in a park are charged merely with "nuisance" while any two people of the same sex would be booked under Section 377, a much more serious charge, for an identical "offence".

The campaign against Section 377 is now bringing on board child rights groups who are arguing that child sexual abuse cannot be an excuse for the government to retain this law, and that a separate comprehensive law for child sexual abuse must be drafted. Though used against homosexuals, the scope of the law brings anyone who has oral or anal sex under its purview. There has been a gradual expansion of those involved in the campaign against Section 377 from primarily queer rights activists to a broader coalition of progressive groups.

NOTES

1. "Naz Foundation is committed to raising awareness to prevent the spread of HIV/AIDS and providing support to those affected by it, with sensitivity and confidentiality".
From http://www.giveworld.org/naz/naz_profile.htm (accessed 17 February 2005).
2. Union of India's response to the Naz petition, 6 September 2003.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*