

Campaign against Section 377 of the Indian Penal Code

By Vir Sanghvi

Section 377 of the Indian Penal Code

Anyone who voluntarily has carnal intercourse against the order of nature with man, women or animal, shall be punished with imprisonment of either description which may extend to life, or to ten years and shall also be liable to a fine.

Explanation: Penetration is sufficient to constitute the offence as described in this section.

This particular law has been used to target gay men and other MSM across India in terms of violence, abuse, rape and blackmail. Very few cases have actually gone to court.

In the late Seventies, Tom Robinson, the gay rock singer, would introduce his bitter-sweet *Glad to be Gay* with the words, "This is a medical song. It is about a disease. Or at least it is about something that the World Health Organisation regards as a disease..."

That was then. In 1981, the WHO realised how foolish it was to regard homosexuality as a disease and most Western countries stopped persecuting gay people. Homosexual acts between consenting adults were legalised in Britain early as the Sixties and by the end of the Eighties, it was entirely acceptable for leading politicians to come out and declare that they were gay. Even film stars no longer found it necessary to pretend to be heterosexual and open declarations of homosexuality did no damage to the careers of such actors as Ian McKellan and Rupert Everett. Nor did it hurt such romantic leading men as Tom Hanks and Antonio Banderas to pay gay characters in their movies.

How strange then to find homosexuality remains a crime in India. Consenting adults caught engaging in homosexual acts can be sent to jail. Politicians routinely denounce gay behaviour as a hideous aberration. And the focus on our anti-AIDS campaigns is heterosexual sex even though there is a considerable body of evidence to suggest that homosexuals are among the most at risk. (By the way, even though the WHO no longer lists homosexuality as a disease, the India Psychiatric Association continues to do so. Think of that and consider it a measure of the sophistication of the profession of psychiatry in India if you ever need to consult a shrink.)

Much is being made of the origin of the law against homosexuality. It dates back to 1861 and incorporates Victorian prejudices against gay people. Given that even Britain has abandoned Queen Victoria's prejudices, why should we in India remain slaves to a colonial mindset? Why should we preserve this unpleasant legacy of the Raj a century and half after the law was originally passed.

But my objections to the law go beyond its Empire origins. One of the founding principles of the Indian state has been that we ensure justice and fairness to all minorities. Thus, scheduled castes will find jobs and university places reserved for them. Seats in panchayats will be reserved on a gender basis so that women get a fairer deal. Political parties will make some attempt to reassure religious minorities that their personal laws will be preserved by the Indian State. And now, there is an increasing emphasis on measures that will benefit senior citizens: cheap fares, tax breaks, higher interest rates, etc.

But homosexuals are exempt from all special consideration. As far as the law is concerned, they are not a minority. They are criminals.

And why are they criminals? What justification can there possibly be for a law that criminalises homosexual acts? No legal scholar I have spoken to has been able to provide any kind of justification for this provision.

The basis of all law is that it punishes acts that harm other people. So, if I rob you or assault you or cheat you, then I am clearly in breach of the law and should be punished. But there is no evidence that homosexual acts between consenting adults will harm *anybody*. Both

parties have provided consent, and both are adult enough to decide what behaviour is appropriate to their lifestyles.

So how can you justify legislating against such acts? How can you possibly justify turning otherwise law-abiding citizens into criminals purely on the basis of their personal choices – choices that hurt nobody?

Because there is no effective rebuttal to this argument, supporters of Section 377 of the Indian Penal Code which criminalises homosexuality, fall back on a variety of bogus justifications. Most popular is the paedophilia argument: if homosexuality is legalised, then dirty old men will rape children. This is nonsense. There are several laws already in existence to protect children and to guard against all kinds of rape. And in any case, most instances of paedophilia in India involve heterosexual sex. If this is an argument for anything, it is an argument for banning heterosexuality.

Then there is the society-is-not ready argument. This states that India is a deeply conservative country and harmless law-abiding heterosexuals will be deeply offended by the knowledge that somewhere, two consenting adults are performing homosexual acts in private. I don't think that this even needs a rebuttal. The truth is that homosexuals exist anyway and regardless of what Indian Penal Code (IPC) says, they do have sex. As far as I can see, this has done no damage to Indian society. And the overturning of Section 377 does not affect the usual laws about public indecency; it does not mean that homosexuals will make love in the centre of Connaught Place or Kala Ghoda.

And finally, there is the what-does-it-matter argument. The law against homosexuality is not rigorously enforced. We all know homosexuals who are clearly not celibate. And yet, nobody puts them in jail. So, even if there is a Raj-era law on the statute books, why make such a fuss about it?

The problem with this argument is that it actually works *against* Section 377. If there is no justification for a law and it is not enforced anyway, then what reason is there for keeping it as a part of the Indian Penal Code? Surely it is much easier to simply abolish it.

But, of course, it does matter. If I were a homosexual, I would find it deeply offensive and an affront to my human rights that my romantic and sexual choices were considered illegal by the Indian State and that each time I had sex with my partner, I was breaking the law. Under Section 377, I would turn into a criminal every night. It would be no consolation for me to know that even though the police had a perfect right to lock me up, they had decided not to bother.

And, as Amartya Sen points out in his statement, "Whenever any behaviour is identified as a penalizable crime it gives the police and other law enforcement officers huge power to harass and victimise some people. The harm done by an unjust law like this can, therefore, be far larger than would be indicated by cases of actual prosecution."

I am one of the signatories to the open letter sent by Vikram Seth and many other concerned citizens addressed to the government, the judiciary and to Indians everywhere demanding the overturn of Section 377.

I know there will be a tendency to treat us as bleeding-heart liberals and to argue that India has many greater priorities. But I do not believe that a law that turns at least 50 million otherwise law-abiding Indians into criminals can be a low priority. As long as Section 377 exists, as long as we fall back on the colonial law book to discriminate against our own citizens and as long as we deny a fundamental human right to a large section of our people, we lower ourselves as a nation. And we lose the right to be considered a liberal society where all men and women are equal.

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