

The Section 377 Hearings in the Supreme Court : Brief notes

The first appeal against Delhi High Court's landmark judgment decriminalizing homosexuality in India was filed by Suresh Koushal, an astrologer on July 9, 2009– a mere one week after the Delhi High Court's order. His appeal was joined by 14 similar petitions filed by a diverse range of organisations and individuals – including the Apostolic Churches Alliance, the All India Muslim Personal Law Board, the Raza Academy, BP Singhal (a former BJP Rajya Sabha MP), S.K. Tizarawala (Baba Ramdev's spokesperson). If nothing else, one of the achievements of the Delhi High Court's judgment was to unite conservative religious groups!

The oral arguments in the case finally commenced on February 13th, 2012 and ended on March 27th 2012 before Justices Singhvi and Mukhopadhyay of the Supreme Court. The proceedings began with the appellants making out their case as to why they believed the High Court's order was bad. The substance of the arguments was that the words of S. 377 - '*carnal intercourse against the order of nature*' – included anal and oral sex and that as the mouth and anus were not meant for sexual intercourse, a criminalisation of these sexual practices was permissible. Consequently, according to them there was no fundamental right to have anal or oral sex. They also argued that as the majority of Indians looked down upon homosexuality, the state was justified in criminalising homosexual conduct. The counsel also argued that the right to privacy did not include the right to commit illegal acts. Essentially, they argued that the Delhi High Court had entered a slippery slope, and as a result of its judgment, incest, dowry, pornography would all have to be legalised.

Being the senior most lawyer, **Mr. Fali Nariman** - one of India's foremost constitutional lawyers and scholars - commenced arguments for the respondent's (our) side. Arguing for the parents of LGBT persons across the country, he raised the pitch of the argument from what was hitherto an expression of disgust of "what homosexuals do" and placed on a constitutional pedestal. According to Mr. Nariman, asking whether there is a fundamental right to commit homosexual sodomy, as the appellants were asking, was the wrong question to ask. The correct question to ask was whether there was a right to privacy, or the right to be left alone. Just because people may be offended by homosexuality, Mr Nariman argued, was not a reason to criminalise homosexual acts. In one of the more memorable exchanges in Court, in a response to a comment that someone may be offended by looking at homosexual conduct, Nariman countered, "Who is asking them to look through the peephole?"

Mr Nariman was followed by **Mr. Anand Grover**, Senior Advocate and long time friend of the LGBT movement in India. Mr. Grover represented the original petitioners, Naz Foundation. The Judges seemed concerned at the fact that while Section 377 was phrased in neutral terms, i.e. began with the word "Whoever..." and did not apparently target homosexuals, this case was being argued on the premise that LGBT people were the main target of the provision. Mr Grover's response to this was that the basic act the law targetted was anal sex which was integral to the sexual expression of gay men, since as Mr. Grover plainly put it, gay men could not have peno-vaginal sex. By prohibiting anal sex which was the only form of sex available to gay men, the law hurt the dignity of gay men. Mr Grover argued that section 377 impeded efforts related to HIV/AIDS prevention since it drove MSM populations underground and made it more dangerous for them to access HIV/AIDS prevention services.

Mr Shyam Divan representing Voices against 377 was next. Voices Against 377 is a coalition of 12 human rights, women's rights, child rights and LGBT rights groups. Mr Divan argued that this case was centrally about two issues – firstly, the status and moral citizenship of a section of the community namely LGBT persons and secondly, about the identity of the Supreme Court – Is it an institution that protects the rights of citizens or one that shuts its door on those who knock on it seeking justice. “Will the ringing words of the Preamble of the Constitution –which promises Equality, Dignity and Fraternity – be extended to LGBT persons or will they be returned to state of criminality?” he asked. Mr. Divan began by saying that the Court has asked the government counsel whether they knew anybody who was gay or lesbian and that he would like to answer the question and that LGBT people were part of his immediate family, friends as well as colleagues at work. The reason many people don't know LGBT people is because LGBT are afraid to come out. Not knowing any LGBT persons itself breeds fear and contempt.

Mr. Divan was followed by **Mr Ashok Desai** who represented Shyam Benegal. Mr. Desai's key point was that the police should stop at the bedroom door. Mr. Desai also made the point that fifty years ago he would not have argued this case. However times had changed and both the bar and bench were in a process of constant learning. Mr Desai argued that section 377 violated the idea of fraternity enshrined in our Constitution. Mr Desai also read out an affidavit of one of the parents of LGBT persons to make the point that the law not only affects individuals but also families.

Mr Lutra representing the Teachers for Democracy, made a strong submission on the colonial origins of the law tracing it back to the notion of sin in the Bible which finds a place in English law and finally becomes Section 377. He traced the history of the British law that spread across the Commonwealth. He argued that to retain 377 could only be understood in the context of its religious underpinnings and would be to violate the idea of secularism enshrined in our Constitution.

Mr Dayan Krishan representing a group of mental health professionals was hardly given any time to address the Court. The Bench observing that it was not necessary to hear any factual submissions and that mental health professionals had no role to play in this hearing, as the law was only about acts which applied to everyone and nothing to do with people with same sex desires. Mr Krishnan did give in written submissions that made the point that homosexuality was natural, normal and could not be changed through conversion therapy.

Ms. Meenakshi Arora representing a group of legal academics was questioned on whether the law teachers had done any research in the rural areas and she made submissions on the interpretation of Section 377.

The Union of India which initially through the Additional Solicitor General, **Mr Malhotra**, argued for the retention of 377, changed its position dramatically and made a forceful plea for upholding the Delhi HC judgment. The Union of India argued that criminalisation was a part of the colonial baggage and pre colonial India was tolerant and accepting of homosexuality, group sex and sexual diversity! When pressed as to why the Union of India was taking different positions in different Courts, the **Attorney General** replied “We have been enlightened by the High Court judgment.” The Attorney General, Mr Vahanvati, clearly said that the government wanted the court to decide the matter and supported the findings of the

Delhi High Court.

Based on the hearings a couple of points which can be tentatively made:

The tenor of judicial questioning, seemed to indicate that there were doubts as to whether Section 377 did at all impact LGBT persons as a class. Since the language used in the statute is '*whoever voluntarily has carnal intercourse.....*' the law applies equally to all persons be they homosexual or heterosexual. Section 377 in this reading is a facially neutral statute and does not target a group of persons called LGBT. This interpretation would mean that the right to equality and dignity of LGBT persons is also not affected.

The viewpoint that Section 377 was a colonial law which used quaint and archaic language such as carnal intercourse and was really the 'least lovely of the British colonial exports' seemed to have some purchase. Further the fact that India prior to colonization was tolerant to a range of sexual practices which were condemned in Victorian Britain was again a viewpoint which seemed to be favourably viewed. (Ruth Vanita and Saleem Kidwai's, Same Sex Love in India was filed before the Court)

Sadly, there is no crystal ball and we do not know which way the Judges will swing or how long they will take. At present our hope is that a process of reflection about the submissions made as well as the voluminous material submitted will enable the judges to come to a proper conclusion on whether there is a place for the criminalisation of homosexuality in a democratic republic.