

A summary of the Supreme Court verdict on Section 377

BRIEF BACKGROUND

[Section 377](#) of the Indian Penal Code, 1860 makes certain acts illegal. It is an archaic colonial law that was brought in by the British. The section seems neutral in that it criminalizes certain sexual acts and not people and their identities. However, it has never been used against consenting heterosexual persons and has been misused against homosexual persons. The primary problem with the provision of law is that it does not take into consideration age or consent. Therefore, it criminalizes adult consensual same sex acts.

The fight against section 377 has been going on since 2001 before the courts. It started with the petition by Naz Foundation before the High Court of Delhi. Subsequently Naz Foundation was joined by other petitioners (Details of the parties and proceedings before the courts are available at www.377.orinam.net). The Delhi High court gave its judgment in *Naz Foundation v NCT of Delhi* wherein section 377 of the IPC was read down to not apply to consenting adult consensual acts in private. The Delhi High Court held that section 377 is against constitutional values embedded in Article 14 (Right to Equality), Article 15 (Non Discrimination) and Article 21 (Right to Life).

However, immediately after the verdict of the High Court, Suresh Kumar Koushal appealed before the Supreme Court against the Naz decision. He was followed by 13 other Appellants in the appeal. It is pertinent to note that the Government of India agreed with the decision of the high Court and did not appeal. Naz Foundation, Voices Against 377, Parents of LGBT persons, Teachers, Law Academics and Shyam Benegal opposed the appeal to the Supreme Court and supported the High Court decision. The Apex court gave its verdict on 11.12.13 and reversed the judgment of the Delhi High Court and upheld the constitutional validity of section 377. This means that section 377 IPC is valid law and the Delhi High court decision is no longer applicable.

DELHI HIGH COURT

The High Court of Delhi declared that “section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Article 21, 14 and 15 of the Constitution”. The High Court relied on affidavits, FIRs, Judgments and Orders to illustrate misuse of s.377; they also places reliance on academic literature, scientific and medical literature, international law, constituent assembly debates, comparative jurisdictions and judgments of superior courts in India.

The High Court held that the right to life cannot be restricted by what the majority thinks and that section 377 violates the right to dignity and privacy guaranteed under Article 21. The court further held that no one can be discriminated on the basis of their sexual orientation and that the provision is violation of right to equality.

The High Court decision was legally sound and was humane in its approach.

SUPREME COURT

The Supreme Court reversed the judgment of the Delhi High Court and held that section 377 does not violate the constitution and is therefore valid.

The Supreme Court reasoned its judgment on several grounds. First, it held that all laws enacted by Parliament are presumed to be valid under the Constitution. This means that in order to hold a law to be invalid, it must be shown, through evidence, that the law is violating the Constitution. The Supreme Court held that there is not enough evidence to show that S.377 IPC is invalid under the Constitution. The Court held that there is very little evidence to show that the provision is being misused by the police. Also, just because the police may be misusing a law, does not automatically mean that the law is invalid. There must be something in the nature of the law itself that is unconstitutional. According to the Supreme Court, the law can be implemented without misuse.

It was also argued before the Supreme Court that because S.377 applies to certain sexual conduct, it essentially means that all forms of sexual expression by LGBT people would be unnatural. This would mean that any sexual conduct by such people would be illegal. Therefore, S.377 prohibits all sexual expression of LGBT persons. The Supreme Court disagreed with this argument and held that S.377 speaks only of sexual acts and does not speak about sexual orientation or gender identity. This would mean that even heterosexuals indulging in acts covered under S.377 would be punished. Therefore, the section does not target LGBT persons as a class.

Further, the Supreme Court held that the Delhi High Court in its anxiety to uphold the so called rights of LGBT persons had relied on cases from other countries. They are of the opinion that cases from other countries cannot be directly used in the context of India. Therefore, important cases from South Africa, Fiji, Nepal, USA etc where homosexuality was decriminalized was not taken into account by the Supreme Court.

Laws are presumed to be valid therefore the responsibility of changing laws is with the parliament. In this case also parliament is free to consider deleting or changing S.377. The Supreme Court also said that despite so many years the Parliament has not changed the law in spite of having ample opportunities to do so.

In light of the above factors considered, the Supreme Court reversed the decision of the Delhi High Court and upheld section 377.

REACTION

The decision of the Supreme Court was received by a wave of protests spanning across the country. People across a spectrum of sexuality and gender identity were shocked and felt betrayed by the guardian of fundamental rights. The decision of the Supreme Court is wrong because of several reasons. These are summarized as follows:

- ≡ The Supreme Court held that the LGBT community is an extremely tiny and insignificant minority. This is wrong on the basis of data as well. However, even if the population of LGBT people is in fact tiny, it does not affect the question of

harassment or constitutional rights. The violation of the right of one person is as serious as that of millions of people.

- ≡ The Supreme Court has failed in its decision to understand the scale of misuse of S.377 by the police against people of the LGBT persons. The Supreme Court held that there have been less than 200 cases of prosecution under the Section since 1860. However, this is wrong because it does not include the number of police complaints, arrests or harassment on the basis of this Section. There are several well-known instances of abuse and harassment by the police which the Supreme Court fails to consider.
- ≡ The Supreme Court has held that the law applies to heterosexuals as well as homosexuals and therefore, there is no discrimination against members of the LGBT community. However, the truth remains that the law is used against the LGBT people and not against heterosexual couples.
- ≡ The Supreme Court is wrong in its application of laws from other countries. It does not consider the fact that same-sex acts have been decriminalized in a lot of countries, including the UK and the USA. The Supreme Court should have considered the decisions from other countries as it always has been doing. In this case, the Supreme Court ignored foreign decisions.
- ≡ The Supreme Court held that the law applies only to certain acts and not to the identities of people. However, this is wrong because it means that for members of the LGBT community, any way in which they could express themselves sexually becomes a criminal act. This is not so for heterosexual people who can have sexual intercourse without violating the law.
- ≡ The Supreme Court held that the law should be changed by Parliament and not the Court. However, the Supreme Court was never asked to change the law! It is the duty of the Court to restrict or strike down a law which is against the Constitution. The Supreme Court had to do that in this case, which it failed to do.

WAY FORWARD

Though the decision of the Supreme Court is extremely unfortunate and goes against the basic rights of the LGBT community, the struggle for equal rights and dignity does not end here. There are several ways forward for the community against the decision of the Supreme Court. These are outlined as follows:

- ≡ **Review Petition-** A review petition is filed before the same judges who have decided a case. A review petition asks the judges to have a re-look at the case because they may have made an error in the decision. This has to be done within 30 days of the decision. In the present case, a review petition will be filed. Since Justice Singhvi has retired, the review petition may be heard by another judge along with Justice Mukhopadhyay (who decided the original case with Justice Singhvi).

- ≡ **Curative Petition-** A curative petition may be filed if the review petition does not succeed. This will be filed before the Chief Justice of India and decided by a five judge bench of the Court.
- ≡ **Legislative Amendment-** The decision of the Supreme Court has been criticized by every part of civil society. Political parties, journalists, academics, activists, lawyers and citizens have criticized the decision. Ministers in the government, including Kapil Sibal, P. Chidambaram and others have stated that they would bring an amendment and consider all options to ensure that the High Court verdict is restored and the Supreme Court decision is set aside. The Supreme Court has itself stated that Parliament might consider amending S.377. Parliament might amend S.377 to ensure that same-sex consensual conduct between adults in private is no longer a crime.
- ≡ **Ordinance-** An ordinance is a temporary piece of law which can be enacted when Parliament is not in session to pass a law and because the law is urgently required, it can be done through an ordinance. In this case, the government can choose to bring an ordinance into effect which would restore the High court decision and reverse the Supreme Court. This will have to be finally converted into a regular law after Parliament comes into session.