

A Step Forward...But

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2nd July 2009 is a significant date for anybody who follows social movements and its interface with the legal system in India. The Delhi High Court passed a judgment to the popularly known Naz Foundation petition decriminalizing homosexuality in India. It declared that insofar as S 377 criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. (Para 130 Page 105 of judgment) Certain observations may be made by reading the 105 page judgment.

- The judgment uses the public health rhetoric, arguing that because HIV/AIDS is reaching the proportions of a pandemic in India, therefore it is logical to decriminalize homosexuality. This will allow MSMs (men having sex with men) to come out of their closet without the threat of being harassed or arrested and test HIV. This is important because many MSMs have heterosexual relationships also and thus the danger of a public health disorder. This is the reason why the Health Ministry in India has been one of the chief proponents of decriminalization together with the fact that NACO (National AIDS Control Organization) is one of the petitioners to the case.

The decision to decriminalize is supported because it is argued in the case that criminalization of homosexuality violates Art 14 (equality for all), 15 (non-discrimination on the basis of sex and to read sexual orientation as a component of sex) and 21 (right to life and liberty, and including right to privacy within it) of the Indian Constitution. Thus it is significant that a number of fundamental rights are being discussed and formally guaranteed to the homosexual community with the acknowledgment that till before these they were violated.

- The judgment makes a reference to many International Human Rights documents. Art 12 of the Universal Declaration of Human Rights and Art 17 of the International Covenant on Civil and Political Rights both of which ensure right to privacy. India is a signatory to both these documents indicating that there is a contradiction between ratifying internationally right to privacy and continuing within the domestic legislative space a criminal provision that goes against the letter and spirit of that privacy. It also makes a reference to the Yogyakarta Principles of 2007, which discusses state's responsibility towards protection and respect of all persons regardless of sexual orientation and gender identity. What is significant about these principles is that it guarantees rights both within the private sphere, as well as public sphere. The latter with respect to right to take part in the conduct of public affairs, right to stand for elected office, to participate in the formulation of policies and to have equal access to all public functions and employment. The Principles of Equality and the Development of Legal Standard on Equality issued by the Equal Rights Trust in 2008 is referred which is the most recent position defining equality, equal treatment and dignity.

Besides referring to international human rights documents, the Delhi High Court also does a very good research on different international cases (of USA, UK, South Africa, Fiji, Australia, Canada) covering a wide range of issues—dignity, right to choice of a pregnant woman, right on distribution of contraceptives, liberty on most intimate and personal choices, and violations faced by inter-racial couples in apartheid South Africa. This wide range of cases on matters relating to human rights itself is laudable because that corroborates that the existence of S 377 also is a human rights violation. In a sense it is an intersectional jurisprudence where the implications of the judgment may be extended not just to the LGBT community but to members of other minority communities.

- Another reason why this judgment is considered to be landmark is because it talks about the spirit of the Constitution. The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality (Para 80, Page 65 of judgment). It looks at the judiciary as an interpreter of the Constitution protecting the fundamental rights. It suggests that the views of those groups which may dissent or deviate from majoritarian view in a democracy needs to be recognized. The constitutional tenet on which the judgment seems to be based is that of inclusiveness.

Undoubtedly, this being a giant step forward for human kind in India, yet there are certain concerns that need to be remembered and in fact highlighted :

- This judgment is a result of a collective social movement of more than a decade to establish its identity in India facing serious threats and resistances from a homophobic patriarchal society. Just the Naz foundation petition was first filed in 2000 and it took nine long years to travel just the preliminary step of decriminalizing. One would have hoped that there would have been an acknowledgment somewhere in the judgment on the role that civil society organizations, LGBT groups have been playing in this country to make this issue public and not just referred to different international cases on sexual identity.
- The 172nd Law Commission Report, 2000 and the Sexual Assault Bill had proposed for deleting S 377 having broadened the definition of rape(S 375, IPC) and also modifying S 509 of IPC. It proposed a provision on sexual assault in place of rape bringing in the concerns of child sexual abuse also within this proposed 375, thereby eliminating the argument that the country needs S 377 because there is no law on child sexual abuse. It is unfortunate that although the judgment mentions the Law Commission Report yet it does not delete S 377, it just takes away its criminal content. This is definitely not a step forward rather a few steps back.
- The decision does not go into concepts like civil partnership, gay and lesbian marriages, adoption, employment related harassment that declared gay and lesbian persons face, housing facilities being denied to people with this kind of sexual identity or problems related to insurance schemes, transfer of property, etc. Coming in 2009, after years of struggle and in an international situation which has become much more liberal and accommodative, this judgment does

not really reflect the times. It is just doing away with a part of the colonial heritage not destroying the colonial basis of law making itself. One wonders how long gay and lesbian couples in India would take to get a civil partnership status.

Finally the text can be read from a class perspective. By decriminalizing adult consensual sexual relationship in the public sphere it is appealing to the urban middle and upper middle class homosexuals. However the thousands of homosexuals who are harassed for public display of affection because there may not be the socio-economic conditions of private space may be targeted still. This is not to promote public display of gay love, but to acknowledge an economic reality in India. On the other hand, the judgment is gender neutral and gender silent, does not mention lesbian rights at all. One of the reasons obviously is because the provision of S 377 itself is extremely male-centric, the public health argument taken also targets MSMs. It is unfortunate that the judgment does not make any reference to prostitutes and they being subjected to harassment, criminalization and also being vulnerable to HIV/AIDS.

A lot of allied changes need to happen in other laws in the country. This is just a beginning, a step in the right direction, but... with some limitations. □□□