

VOICES AGAINST 377

MEMORANDUM TO THE HON'BLE MINISTER FOR LAW AND JUSTICE

1st July 2004

Handwritten: 1-1-2004
To,
Shri Hansraj Bhardwaj
Hon'ble Minister for Law and Justice
14 Tughlak Road
New Delhi

Dear Shri Bhardwaj,

Voices Against 377, is a Delhi based coalition of women's groups, child rights groups, human rights groups and groups working for sexual rights including gay and lesbian rights. As you are aware, the High Court of Delhi is presently considering a Writ Petition that challenges the Constitutional vires of Section 377 of the Indian Penal Code. The petition calls for a reading down of Article 377 – i.e. that instead of criminalizing all sexual acts deemed to be 'unnatural' (as per the wording of the Section) only non-consensual acts should be penalized and private consensual sexual acts between adults be decriminalized. The next hearing of the case is on 7th July 2004. In this regard we had shared our concerns with you through a letter dated 22nd June 2004, in which we had also requested an opportunity to meet you in person. Today, our day of public action, we take the opportunity to emphasise our concerns and demand immediate action on the part of the Government of India.

Section 377 is a provision that was enacted by the British colonisers in order to regulate us and to impose their 'morality' upon us. At the time of enactment, all sex that was deemed 'non-procreative' was considered 'unnatural'. In other words, even the use of contraception would have been considered an offence! This relic of colonialism has for long been a basis for serious human rights violations of a large number of people across the country, who are not heterosexual, including those who identify as lesbian, gay, bisexual, transgender, hijra, kothi etc., and others who practice same sex behavior. The criminalization of same sex behavior has served only to legitimize violations at the hands of the police as well non-state actors, e.g. the family. As organizations committed to opposing human rights violations and strengthening the voices of the marginalized sections of society, we have come together to strongly oppose this law.

The response of the NDA Government

At the outset, we would like to express our grave concern with the manner in which the earlier NDA Government's had responded to the Writ Petition in the Delhi High Court. It had argued that 'Indian society by and large disapproves of homosexuality and disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private', and that 'decriminalizing' would amount to 'opening of floodgates of delinquent behavior.' Rather than addressing the substantive issues of fundamental rights guaranteed to all by our Constitution, the NDA Government's

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response was based on the argument that 'Indian society' disapproves of homosexuality. As is clear from many other examples that your government is well aware of, this was an attempt by the NDA government to define what it means to be 'Indian' and to define 'Indian culture' in a narrow fashion in keeping with its fundamentalist Hindutva drive. It is a violent act of exclusion of all those who do not suit the Hindutva brigade's definition of 'Indian'. It is indeed an irony that in doing so, this Government supported an act of colonial violence that the British carried out, not only in India, but in almost all its colonies. We would like to emphasise here that non-heterosexual desires, practices and identities are part of the history of our region for as long as this history has been recorded. Same-sex desire features in the literature, art, ancient texts and recorded history of the region. There is no doubt that the argument that 'homosexuality is a western import' is absolute fundamentalist propaganda that distorts our history. We state our right to reclaim our history.

Another argument that the previous Government has put forth in Court is that this piece of legislation is necessary in order to be able to prosecute perpetrators of child sexual abuse (CSA). This response was at one level incomprehensible. Surely, the government was aware that the petition does not call for a repeal of section 377, but merely a 'reading down'. This means essentially that the petition seeks to remove adult, private, consensual sexual acts from the ambit of section 377. It leaves unchanged the rest of the section that would still apply to non-consensual sexual acts, and could thereby continue to be used in case of CSA. The response of the NDA government amounted to pitting the rights of homosexuals against child rights. This is ironic in a context in which despite demands from women's groups, child rights groups, sexual rights groups and human rights organizations the government had sought to ignore the demand for a law which would specifically address CSA. These groups, including Voices Against 377, have stated categorically that the existing laws, including Section 377, are highly inadequate in dealing with CSA. Using the argument of retaining Section 377 to address CSA was an act of denial by the government of its responsibility under the Constitution and under international human rights law to address sexual abuse of children.

Section 377 and violations by State and non-State actors

Section 377 has for long been a source of harassment, extortion, sexual abuse and blackmail of men who have sex with men, by police. These wide-spread experiences have been documented in various parts of the country and the magnitude of the problem lies in just how common such harassment is. Being under a constant threat of prosecution and stigmatisation, people facing such harassment have no legal recourse. This creates an absurd situation where, on the one hand Section 377 enacts a victimless crime by criminalising even consensual sex between adults, while on the other hand, its impact is that victims of violence have no legal recourse.

The impact of this exclusion from legal protection is articulated in the disturbing phenomenon of the rape of *hijras* by people including police personnel. These cases are rarely reported (who does one complain to when the 'protector' is the perpetrator?), but their wide prevalence has been documented. The emergence of a movement against discrimination on the basis of sexual orientation and gender has provided the space for

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bringing these experiences into the public domain. The most recent case to have received public attention is that of Kokila, a *hijra* who was first raped by 10 goondas and then by a large number of police personnel in a police station in Bangalore, less than ten days ago. Activists, women's groups, child rights groups, human rights organisations and a number of people's movements are sitting in protest even as this memorandum is being written. It is heartening to hear that the State Women's Commission has taken a strong stand in this case and is supporting the protesters in demanding that severe action be taken against the offending officers. More details of this incident are attached for your reference and action.

In addition to violence by state machinery, Section 377 also forms the basis of violence carried out by non-state actors against non-heterosexual people. Cases have been documented where families use of 377 to imprison women at home, force them into marriage, drive them to suicide. Such is the impact of this violence that in some parts of the country a pattern of suicides by young women has emerged. In Kerala, for example, suicides by lesbian women are reported on an increasingly regular basis. Section 377, form an important part of this context of violence, its mere existence contributes to a culture of injustice by strengthening discriminatory social attitudes.

Section 377 and mental health

Familial and social pressures and stigma, personal struggles with one's sexuality, the threat of human rights violations inflicted upon homosexual people can and lead to an absence of full mental and emotional well being for many. Experiences on helplines and in support spaces – as well as fact finding reports on lesbian suicides, for example – show the range of mental health concerns for same-sex desiring people, to include depression, suicidal feelings, and substance abuse. Ideally, help should be sought, and received, from mental health professionals. What we have instead is the infliction of biases against homosexuality on the part of mental health professionals, on those who either voluntary seek help or are forced to do so. We also have the use of 'reparative therapies' by mental health professionals to 'treat' same-sex desiring people. Reparative therapies aim to change the sexual orientation of a patient through the administration of nausea inducing drugs and shock therapy. Section 377 is one of the main reasons that such violations against homosexual people continue to be hidden within mental health spaces. Patients have no way of protesting, and no recourse against abusive therapy for they risk exposure, social stigma and even legal action for speaking out. Moreover section 377 has meant that gross violations, such as those entailed in reparative therapies, are not even recognized as human rights violations. We therefore have the National Human Rights Commission rejecting the petition filed in the case of a patient from All India Medical Institute for Medical Sciences who reported experiencing serious emotional and psychological trauma as a result of the reparative therapy conducted on him. The response of a representative of NHRC to demands for justice was 'homosexuality is an offence under IPC, isn't it? So, do you want us to take cognizance of something that is an offence?' This is another example of how Section 377 is used to deny legal recourse to non-heterosexual people in cases of human rights violations.

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Section 377 and HIV/AIDS intervention and prevention

It is widely known that power inequalities shape, and even determine, the vulnerability to HIV/AIDS. The adverse impact of section 377 on HIV/AIDS intervention and prevention efforts with non-heterosexual individuals and communities can be felt all levels:

- Section 377 legitimizes the social stigma and biases that make people of marginalised sexualities reluctant to access counselling and health care services, critical to the reduction and prevention of HIV.
- The fear and risk of attracting criminal liability, social discrimination and stigma leads to a lack of safe, social spaces for those belonging to marginalised sexualities – often leading to unsafe sexual practices.
- Activities related to reducing the risk of HIV infection such as condom promotion/distribution among these communities have been construed as abetting and aiding a criminal act under Section 377. Information on safer sex practices for MSM is also often labelled as 'criminally obscene' materials and then confiscated by State actors. On this basis outreach workers and peer educators from NGOs have to face constant harassment and threat of violence from the police. There are also cases where outreach workers have been arrested and are presently being tried for abetment of Section 377. This makes HIV/AIDS intervention risky and difficult to carry out and sustain.
- All these violations of rights are directly opposed to the rights based approach proclaimed by the National AIDS Prevention and Control Policy which emphasizes that respecting the rights of those who are most at risk of HIV infection is the only way HIV can be prevented or controlled. While men who have sex with men (MSM) find mention in National AIDS Control Organisation (NACO) documents, and many groups working with MSM receive grants from NACO, Section 377 makes any effective AIDS policy impossible.

This inability to counter the HIV/AIDS epidemic and protect marginalised communities is in effect a violation of the right to life guaranteed by the Constitution to all persons.

In light of these issues we urge you to ensure that the response of the Government in the Writ Petition is reconsidered and takes cognisance of the human rights violations faced by all those marginalized on the basis of their sexuality. The people of India have voted in a new era of change, inherent in which is a strong rejection of the politics of hatred and narrow, fundamentalist assertions of what it means to be Indian. We hope that the new leadership will stand up to the expectations of the people and demonstrate, in no uncertain terms, its stated commitment to protecting the rights of marginalized sections of society, not least those whose very existence has been criminalized by the law.

Voices Against 377:

Amnesty International India, Talking about Reproductive and Sexual Health Issues (TARSHI), Creating Resources for Empowerment and Action (CREA), PRISM – A Sexuality Rights Advocacy Group, Nirantar -- Resource Centre for Gender and Education, Sama – Resource Centre for Women and Health, Jagori – Women's Training and Documentation Resource Centre,

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Partners for Law in Development (PLD), Saheli Women's Resource Centre, Anjuman JNU Queer Students Collective, Nigah Media Collective, Haq Centre for Child Rights, Breakthrough – Media and Human Rights organization