# On criminalisation and pathology: a commentary on the Supreme Court judgment on Section 377

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The judgment delivered last week by the Supreme Court of India (1), upholding the constitutionality of Section 377 of the Indian Penal Code (IPC), overturns a judgment by the Delhi High Court in 2009 that decriminalised sexual activity between two consenting adults. This judgment has unleashed a veritable firestorm of protest in the public space. There has been a heated and vitriolic debate on this issue in the print and social media, as well as television, with public opinion, in the main, being critical of the judgment.

The Delhi High Court judgment (2) had led to a similar, yet diametrically opposite outpouring of commentary, with most people welcoming it. However, religious and conservative sections of the population had voiced the concern that it heralded the legitimisation of perversion of sexual mores and would damage the structure of society. At the heart of this debate is the question as to whether homosexual activity with mutual consent is a normal variation - a difference in sexual orientation - or a pathological entity.

The discourse of the legal system, which criminalises homosexuality, and that of scientific thought, which pathologises it, have gone hand in hand in many ways. It is also true that in many ways, the two have informed each other and that both are, in a sense, a reflection of how society views homosexuality.

Psychiatry, the branch of medicine that has dealt most closely with sexual desires and orientation, has also probably contributed to the negative views on homosexuality. It earlier considered homosexuality a sexual perversion and attempted, rather famously, to "treat" it with various bio-medical and psychological means. It was only in the second half of the twentieth century, which saw developments in psychiatric classification, that the main diagnostic systems in psychiatry, ie, the Diagnostic and Statistical Manual of Mental Disorders (DSM) and the International Classification of Disease (ICD), declassified homosexuality as a clinical disorder, seeing it instead as an alternative sexual orientation that is intrinsic to the individual. An observation made with the tongue firmly in the cheek actually described this as one of the most spectacular successes of psychiatry, because almost overnight, millions of people were "cured", as their "disorder" simply disappeared. The declassification of homosexuality as a clinical disorder has also highlighted the fact that with the evolution of scientific knowledge and social change, what is seen as scientific "truth" in a particular period can change over time. It is also true that this shift in the psychiatric stance, though buttressed by scientific research, has largely been driven by a growing awareness of the rights of the individual. The acceptance of the existence of alternative sexual orientations is also reflective of a larger awareness of variations not only in neurochemistry, but in individual psychology as well.

This development has been paralleled by changes in legal views in many parts of the world. It is interesting that internationally, legal opinion on homosexuality, and even the acceptance of sexual orientation differ widely. Some countries, such as India, many of its neighbours, and several countries in Africa and the Middle East, continue to view homosexuality as a crime, for which punishments ranging from a few months' imprisonment to death have been prescribed. Some countries have, over the years, decriminalised homosexuality, but with riders. These may include not allowing same-sex marriage (Australia being a recent case in point). Other countries have legalised homosexuality and allow same-sex marriage. What is interesting, however, is that the two narratives – that of pathologising and that of criminalising – have not continued apace.

The Delhi High Court judgment of July 2009 states:

*We declare that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile–non-vaginal sex and penile–non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion.*

This judgment, which deserves to be read in its entirety, raises some rather fundamental issues. It raises the point of a "constitutional morality" rather than public morality that should be the touchstone of good law. It also goes beyond the Section to turn its gaze on the groups of people that the Section affects. Thus, it clearly recognises the reality of a group of people with a different sexual orientation, it recognises the problems involved in the criminalisation of non-procreative sexual activity, and it acknowledges the discrimination that people with an alternative sexual orientation have to face due to criminalisation.

This judgment introduced into the arena of public debate the legal concept of "reading down" or "reading into" a provision of law. Thus, while Section 377 of the IPC was not dismantled, its significance and implementability were clearly diluted. The judgment effectively whittled down the significance of the Section, suggesting that it violated certain constitutional human rights, namely, those to life and liberty, equality before the law, and rights protecting individuals from discrimination. Effectively, what the judgment said was that since Section 377 violates basic rights, its validity is questionable. Interestingly, the 172nd Law Commission's report in 2000 (3) had been quite emphatic in its recommendation for the deletion of Section 377, ending with the rather wry comment that the "...only content left in Section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts."

In response to the High Court judgment, a two-member bench of the Supreme Court opined in a detailed 98-page judgment delivered on December 11, 2013:

*In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable.*

It goes on to say:

*While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said Section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.*

What this boils down to is that in the opinion of the Supreme Court, human rights are not being violated by Section 377. The Court marshals a number of arguments in support of its view. For example, it argues that there is insufficient evidence of discrimination, that the fact that there have been violations of privacy and liberty has not been established, and that therefore, the reading down of the Section is invalid.

At the heart of the matter, however, there are two basic questions. These are as follows.

1. Is an alternative sexual orientation acceptable to society, or is it viewed as either deviance or pathology?

2. If it is accepted, are the rights of that minority as valid as the rights of others?

Effectively, this judgment shifts the legal gaze back to the carnal act rather than acknowledging the possibility that there is a minority group of people with an alternative sexual orientation. By failing to recognise the identity of this group, it negates both their identity and importance. Also, by denying their identity, it dismisses the existence of the discrimination and violation of human rights faced by this group of people. The judgment also effectively criminalises all non-procreative sexual activity, even when it is consensual and between adults. Essentially, the difference between development in medical discourse and legal discourse lies, here, on the bedrock of the acknowledgement of the rights of both the minority and the individual. This is where I think the judgement falters on the criteria of both reasonableness and inclusiveness.

The Court also takes the position that it does not have the mandate to repeal Section 377 and that this falls within the scope of the legislature rather than the judiciary. While it is for constitutional or legal experts to opine on this matter, in my opinion, if we accept the primary premise that there are alternative sexual orientations, it seems clear that Section 377 represents an infringement of rights in a myriad ways. In the face of such infringement, the "reading down" by the Delhi High Court seems entirely appropriate to me. The Supreme Court also does not suggest that the legislature should change the law, but that if the law has to be changed, it must be changed by the legislature.

Not surprisingly, the Supreme Court's judgment has given rise to a veritable barrage of criticism, with Pratap Bhanu Mehta saying in the December 12, 2013 issue of the *Indian Express* (4), "The court has, in one fell swoop, extinguished the flame of humanity and reason from our Constitution. It has given free rein to prejudice, hollowed out the meaning of constitutional protections. And in doing so, it has undermined its own authority."

Rajeev Dhavan, writing in the *Times of India* on December 13, 2013 (5), says "This judgment is hurriedly written, deeply flawed, contradictory and contrary to constitutional understandings."

These are both rather strong criticisms of the judgment, and difficult to disagree with.

It is interesting to note that the medical opinion offered by the respondents, which included depositions by mental health professionals, of whom the author was one, seems to have been summarily brushed aside. This, to my mind, is rather troubling. It is necessary for conversations to take place between science, society and the law. While these three entities are not necessarily dependent on one another, the fact is that the thinking in one can and will influence the others.

It is my opinion that Section 377 criminalises a facet of human behaviour that is integral to the personal and sexual identity of some people. This facet can in no way be seen as deviance or psychopathology. It seems clear to me that the latest judgment needs to and will be challenged, whether in judicial review or on the floor of Parliament, and it also seems clear that this challenge will be driven by societal pressure. Based on the indications so far, it appears that the judgment is being viewed as both regressive and unmindful of the rights of a minority. It is my belief that for the change to be facilitated science, society and the law-making process need to engage with one another and that if any of these ignores the others, it will be to the detriment of all three.

### *Conflict of interest*

*The author is one of the mental health professionals cited as Interveners IA No 9/2010, who offered medical opinion to the Supreme Court.*

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# Medical journals – in the news and for the wrong reasons


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2013 has been a landmark year, in fact, a bad year for biomedical journals. Medical journals and their editors have been respected for long, as they are the harbingers of change and of progress in scientific thought. Science expects transparency from the agents through which scientists publish their latest research findings and this expectation is usually fulfilled. Recent developments have, however, thrown into doubt the integrity of some science journals, their editors, and by extension, the entire field of biomedical and science publishing. These developments involve wide-ranging issues – the impact factor, the International Committee of Medical Journal Editors (ICMJE), and the birth, existence and rise of predatory journals.

The impact factor is that much loved and much reviled magic number that authors (and the editors of high-impact journals) like to quote with aplomb. Enough has been said about the appropriate use of this index and its more common abuse. Despite its shortcomings, even the editors of journals with a low-impact factor, who mostly scoff at it, often secretly wish that their journals had higher impact factors. However, most of them accept their journal's low impact factor. Most editors do not indulge in unethical practices to unfairly raise the impact factor, but some do stoop to borderline or even outright wrong measures to do so. Some of these journals have, in fact, been found out and have been removed from the Science Citation Index. In December 2012, journal editors, publishers and scientific associations made a serious effort to deal with this situation. At a meeting of the American Society of Cell Biology at San Francisco, a group of about 150 editors decided that while determining the importance of a research paper, cognisance should be taken of the misuse of the impact factor by officials and journals. In May 2013, they released the Declaration on Research Assessment (DORA), which states that the impact factor must not be used as "a surrogate measure of the quality of individual research articles, to assess an individual scientist's contributions, or in hiring, promotion, or funding decisions" (1). The group has suggested alternative, more correct means of evaluating science. Will this make a difference? Only time will tell.

It has been pointed out by Chalmers that the failure to publish negative results is unethical (2). This is because in the absence of those particular data, someone else may repeat the same study and thereby, waste time and money. In 2004, the ICMJE, led by a venerable group of editors, made a move to fulfil an ethical responsibility towards the participants of clinical trials and the public, and to prevent selective reporting. The ICMJE committed to publishing clinical trials from 2005 onwards, provided that these were properly registered (3). However, there is a surprising revelation in *Bad Pharma* by Ben Goldacre (reviewed in *Indian J Med Ethics*, July–September, 2013, p. 207) (4). Goldacre writes that a study by Mathieu et al in 2009 showed that of 323 trials published in 2008 in the top 10 medical journals, all of which were members of the ICMJE, only half were adequately registered and trial registration was completely lacking in over a quarter (5). Clearly, the policing method was faulty. Subsequently, in 2013, Bhaumik and Biswas also studied the practice followed by 30 Indian medical journals and found that only nine required the clinical trial registration number (6).