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Whose law is it anyway

BINA AGARWAL

Those making a cultural case for Section 377 need lessons in South Asian history

DOES Section 377 of the Indian Penal Code, criminalising gay sex, represent a part of "Indian culture", as some major political parties have argued to justify the upholding of an archaic, unconstitutional and blatantly unjust law? These political parties need lessons in South Asian history.

The law, which was upheld by the Supreme Court, was passed in 1860 by the British who were then steeped in Victorian mores. In fact, as historians and human rights authors such as Douglas Sanders note, its antecedents lie in the 1534 law on "buggery", which though supposedly enacted to deal with the sexual indiscretions of the clergy, was in fact intended to undermine the hold of the Catholic Church in England, take over monastic properties and help Henry VIII establish his control over the Church of England. This law was later expanded, "secularised" and changed to include "sexology" terms such as "against the order of nature". The British enacted Section 377 or its equivalent in many of its Asian and African colonies, not just in India. European colonisers also introduced anti-gay laws in parts of the Middle East where none existed before.

The IPC, drawing heavily on English law, was drafted by Thomas Macaulay. Today, while the former colonisers have ensured equality through legislation, irrespective of sexual preference, for their citizens, many Indian politicians — in this winter of our discontent — are clinging to the cloak of colonialism and representing it as "Indian culture". Really?

India is not one culture. It is and always has been a mosaic of cultures. Mid-18th century South Asia was teeming with communities that allowed sexual freedoms which left the colonisers very uneasy — Kerala's Nayars, Meghalaya's Garos and Khasis, Sri Lanka's Kandyan Sinhalese, South Asia's matrilineal Muslims, numerous tribal groups and many others. The British imposed their Victorian notions of morality and family on most of these communities, condemning and legislating against practices to the contrary, as I have elaborated in *A Field of One's Own*.

The matrilineal Nayars of central Kerala, for instance, in a pre-puberty *tali*-tying ceremony ritually married the girl to a suitable man who then had no necessary role in her life. She could enter into sexual unions or *sambandhams* with one or more men belonging to her own or higher caste, who would visit her at night and leave at dawn. The visiting "husband" left his arms outside the door to signal his presence to the others. All children were part of their mother's *taravad* (matrilineal joint family) and considered to be legitimate heirs.

This social freedom led to a barrage of European criticism of Nayar sexual morality. To bring it in line with their own ideas, the British set up the Malabar Marriage Commission, which severely indicted traditional *sambandham* relationships as being "based on a doctrine that there is no merit in female virtue, and no sin in unchastity". The commission suggested drastic changes to marriage and property laws despite recognising that the majority did not favour them, although, some elite Nayar men, who were influenced by Tamil-Brahmanical and western ideas and embarrassed by their customs, did. Women's opinions were not even solicited. The ensuing legislation made men responsible for maintaining their wives and minor children, in keeping with the British notion of a man's "natural" instincts.

Similarly in Sri Lanka, traditional Sinhalese customs, which allowed easy divorce and remarriage, were in conflict with the British idea of marriage as a monogamous, lifelong union sanctioned by church and state. In the Kandyan highlands, where wedding ceremonies were rare except among the rich, all children were legitimate except those born of some specified cross-caste unions. In 1859, the British made unregistered marriages illegal, restricted divorce, and recognised only children born from registered marriages as legitimate. As a result, 10 years after the law was passed, some 66 per cent of all marriages were considered illegal and 80 per cent of all children born were illegitimate.

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Basically, across its colonies, most laws passed by the British from the mid-19th century onwards, including Section 377, emerged from *their* cultural views, not ours. Why, one may ask, would political parties who swear by ancient Sanskrit scriptures hold up a law drafted by a man who considered those scriptures to be of "small intrinsic value", containing "monstrous superstitions", to teach which would be "hardly reconcilable with reason [and] morality". We don't even need to cite the ancient *Kama Sutra*, which recognised homosexuality as part of acceptable sexual practice. Liberal sexual mores existed in India even after Section 377 was enacted. The law went contrary to our culture then, and is certainly unacceptable in independent India.

The recriminalisation of gay sex will also have high economic costs. Travel agencies that cater to LGBT travellers have already faced a large number of cancellations. This will escalate as news spreads during high tourist season. Non-Indians will be harassed, as happened recently when a gay diplomat's spouse was refused a visa. The law can also be misused against political opponents. The criminal conviction of Malaysia's former deputy prime minister, Anwar Ibrahim, of sodomy, under its version of section 377 is a case in point.

We need to find the quickest and most effective way — judicial or legislative — to overturn the Supreme Court judgment, before we can make claims to being a humane, tolerant and modern society guided by a far-sighted Constitution.

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