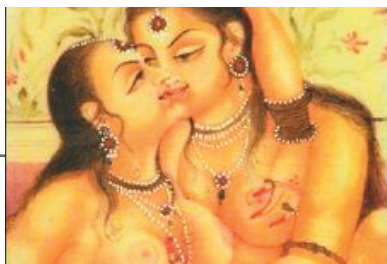


# India

## Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India<sup>1</sup>

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### Introduction

This paper investigates the political context of recent debates on sexuality in India, with a special focus on the sexual and citizenship rights of people of alternative sexualities. The historical moment in focus is the expanding HIV/AIDS epidemic in the country. The paper argues that HIV/AIDS has been one of the most significant factors in breaching Indian society's powerful taboo on public discussion about sexuality, in the process creating an unprecedented opportunity for multiple sexuality discourses. This new dialogue challenges narrow constructions of patriarchal gender relations and heteronormativity. A striking illustration of

<sup>1</sup> This paper has been constructed using a mix of primary and secondary documentary sources and in-depth interviews. Foremost thanks go to Vivek Diwan, formerly of the Lawyers Collective, for giving his valuable time and sharing his extensive knowledge and experience on the subject. Thanks also to Anjali Gopalan and Anand Grover for enriching my insights into the subject in the course of my earlier work; to Pramada Menon, Shaleen Rakesh and Ashok Row Kavi for useful discussions, sharing resources and leading me to literature; to the Lawyers Collective HIV/AIDS Unit, CREA, Naz Foundation (India) Trust, Humsafar Trust, Sangini (India) Trust and India Center for Human Rights and Law for generously making available their publications and unpublished internal documents and other resources; to Richard Parker for inviting me into the International Sexuality Monitoring Project; to Rosalind Petchesky, Bhanwar Rishyasringa, Gita Sen, and, above all, Robert Sember for comments on earlier drafts; to Sonia Correa, Connie Nathanson and other participants of the project for the discussions that have informed the overall framework; and to Mayra Pabon and others at the Department of Sociomedical Studies, Columbia University for many forms of practical help. The usual disclaimers apply.

this opportunity is the new visibility of formerly marginalized sexual and transgender communities, and the current debate over Section 377 of the Indian Penal Code – inherited from British rule in 1860 – that criminalizes them. However, this very opportunity is being complicated by the tendency to sanitize the new openings through a public health discourse, that is, “men who have sex with men” (MSM) as a “risk group” for HIV transmission,<sup>2</sup> and, the persistence of cultural nationalism that essentializes both sexuality and gender.

Using the lens of the most visible symbol of the struggle for sexuality rights in India today — the movement for legal reform focusing on Section 377 of the Indian Penal Code — the paper charts the construction of sexual rights, the key players in these debates and struggles, the positions and strategies of these players, and the strategic dilemmas confronting the sexual rights movement today. The analysis takes place within a framework of various interwoven strands: historical precedents and contradictions; convergences and disjunctions within the rights struggles; the impact of the globalization process, which constitutes a key element in the overarching economic, cultural, and political environment within which the rights struggle is taking place; and the comparative efficacy of the mechanisms available to the struggling actors.

### **Section 377 IPC: Historical origins**

Entitled, *Of Unnatural Offences*, the anti-sodomy law, Section 377 of the Indian Penal Code, states, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of either description for a term that may extend to 10 years and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.” The British enactment of Section 377 was in deference to the existence of similar laws in Britain at the time that criminalized all non-creative sexual behavior, whether homosexual or heterosexual, in keeping with Victorian

<sup>2</sup> For more on policy effects on MSM and other marginalized groups, including PLWHA and sex workers, see also in this publication: Bahgat, H. & Afifi, W. Sexuality politics in Egypt, pp. 65-66; Cáceres, C., Cueto, M. & Palomino, N. Sexual and reproductive-rights policies in Peru: unveiling false promises, pp. 151, 154-155; de Camargo, K. & Mattos, R. Looking for sex in all the wrong places: the silencing of sexuality in the World Bank’s public discourse, pp. 368-369; Le Minh, G. & Nguyen, T. M.H. From family planning to HIV/AIDS in Vietnam: shifting priorities, remaining gaps, pp. 299-300.

values relating to family and sexuality. Additionally, colonial jurists justified Section 377 as a protective measure against what they described as “the Oriental disease.” In their unflattering descriptions of Indian society – “culturally degenerate” social institutions like matriliney, polyandry and polygamy, child marriage, female infanticide and widow immolation; weak, effeminate, lascivious Hindu men; oppressed women; a barbaric religion consisting of hundreds of licentious gods – English social reformers also made direct and indirect references to Indian men’s proclivity for seeking out the company of young boys, and deplored the corrupting effects of such tendencies (Vanita & Kidwai, 2001).

The combined impact of nineteenth-century Western homophobia, and the sense of cultural inferiority evoked by colonial servitude, resulted in a complex historical process of modernization. Along with laws that abolished practices such as child marriage and widow immolation, systems of marriage like matriliney and polygamy, and sexual sub-cultures such as temple prostitution and “third sex” communities also underwent legal and social change (Vanita & Kidwai, 2001).<sup>3</sup> (See also Chakravarty, 1993; Roy, 1995; Sarkar, 1996; Menon, 1999 for discussions of the women’s question under colonialism). The cultural landscape, particularly relating to sexuality, was steadily divested of some of its diverse “little traditions” that had risen and ebbed through history (for example, the country’s ancient and medieval mythic, artistic and social traditions that had accorded spaces – albeit marginal, but not criminalized nor labeled deviant – for explicit representations of various forms of non-procreative heterosexual and non-heterosexual sexuality and erotic pleasure).<sup>4</sup> Indian culture came to be reconstructed as unilinear and co-terminus with Hinduism, and Hinduism, in turn, as narrowly “pure” and norm driven.

<sup>3</sup> While the Immoral Traffic (Prevention) Act of 1956 brought prostitution under independent India’s criminal laws, the Criminal Tribes Act of 1871 enacted during colonial rule (and still surviving today) had already criminalized *hijras* (traditionally referred to in India as the “third sex”) and their cultural representation as cross-dressers and street singers and dancers.

<sup>4</sup> The ancient myths that date back a few thousand years and are today a part of the everyday lives of ordinary people, are replete with stories of love, lust, and desire among gods and humans - both male and female – and portray diverse forms of sexual unions, marriage and family structures (see Doniger, 2000, for a discussion of some of these myths). Fringe religious cults that worship female sexuality as divine energy (*tantric* practices) survive even today. Diverse expressions of sexuality are also to be found portrayed, variously, in temple sculpture, religious and secular poetry, and epic literature, spanning both ancient and medieval periods. Non-heterosexual expressions include references in the Mahabharata to heroic figures who undergo transformation into transgendered individuals, Shiva as *ardhanariswara* (half man-half woman/formless-sexless) which may be interpreted as epitomizing the fluidity between male and female, the Kama Sutra treatise on love-making (that includes references to the pleasures and techniques of oral sex, and to same-sex attraction), and erotic temple sculptures that portray various forms of sexual unions including same-sex acts. Vanita and Kidwai (2001) cite ancient Indian legal texts that identified non-consensual heterosexual behavior as worthy of more stringent punishment than consensual sex between same sex persons.

Section 377 remained unchallenged in independent India until the advent of HIV/AIDS towards the close of the twentieth-century, nearly 50 years after the British left the country. It remains on the statute books nearly 40 years after the anti-sodomy law was abolished in Britain itself. The paradox is that an archaic and outmoded law of colonial origin embedded in nineteenth-century Victorian norms of morality, and what some sexual rights activists describe as culturally alien Judaeo-Christian values (Narrain, 2001), is being defended by the independent, modern Indian state, not to mention large sections of civil society that perceive such sexual practices as violating Indian culture. Widespread “norms” of universal marriage, monogamy, and procreative heterosexuality involving chaste women and masculine men and enforced by the triumvirate institutions of patriarchal family, caste and community, contribute to a consensual societal framework of silence about sexuality.

Admittedly, the direct reach of Section 377 is limited; an individual is only eligible for conviction if he is found committing said sexual act, while those who merely profess same-sex attraction are not. Only 46 cases were brought before the courts in the 150 years between 1860 and 2000, resulting in 29 convictions. Of these, only six prosecuted male-to-male adult anal intercourse and only one involved consensual anal sex, thus exposing the redundancy of the law. Section 377 has been useful in convicting cases of child sexual abuse; 30 cases and 19 convictions (Gupta, 2002, p. 70), a fact used by the courts and the government to argue that Section 377 ought to remain on the statute books as a benign provision. As if in confirmation of this, 1990 to 2000 – the decade of growing visibility of the AIDS epidemic and of people of alternative sexualities – saw the largest number of convictions under Section 377 (24 cases out of the total 46) in 150 years.

### **Section 377 IPC: Issues of sexual rights**

Evidence has been mounting in recent decades showing that the real “strength” of Section 377 lies in the manner in which it attracts police corruption and abuse of power. Being a cognizable (or high intensity) offence, Section 377 does not require a court order or warrant for making an arrest. This gives the police the power to threaten arrests and extort money, or to keep victims in jail indefinitely before letting them go in exchange for bribes. Often victims, particularly those who are unable to pay up, are also subjected to physical, verbal,

and sexual abuse while in police custody, the latter being the very crime for which they were arrested. Thus, most arrests are not pursued in the courts (Counsel Club, 2002; Testimonies in Human Rights Watch, 2002).

Section 377 opens opportunities for the abuse of other criminal laws. There are cases of 377 being read in conjunction with other penal code provisions such as Section 116 (abetment, defined as intention to commit the crime), or Section 109 (interpreted as instigating or encouraging “unnatural sex”), in order to make arrests.<sup>5</sup> Police also make arrests under a variety of criminal laws relating to loitering, soliciting, or indecency, all of which are open to ambiguous interpretations. Examples include various Public Nuisance Acts: Section 268 (any conduct in a public place that causes injury/danger/annoyance to the public);<sup>6</sup> sections 292, 93, and 94 (the obscenity act and its provisions, which proscribes “obscene” literature, paintings, and other objects, and “obscene” acts); Section 375 (sexual assault); the Dramatic Performances Act of 1876 (whereby any play may be banned as “depraved”); the Indecent Representation of Women (Prohibition) Act of 1986 (empowering the state to define any representation of women as “corrupting of public morality”); the Juvenile Justice Act of 1980 (empowering the State to take away a child from parents deemed “immoral or unfit”); the National Security Act No. 65 of 1980 (acting in any manner prejudicial to the maintenance of public order); and even the Customs Act of 1962 (empowering the state to ban the import of any goods which affect the “standards of decency or morality”).<sup>7</sup>

In addition to these national laws, several state and city/municipal acts contain provisions that could give police inordinate powers. Among the most notorious are sections under the Bombay Police Act — 110 (indecent behavior in public), 111 (annoying passengers in the street), and 112 (misbehaving with intent to breach the peace) — and sections 92 and 93 (public nuisance) under the Delhi Police Act (Voices Against 377, 2004, pp. 4-5; Desai, 2002, pp. 94; International Tribunal on Human Rights Violations Against Sexual Minori-

<sup>5</sup> This was one of the provisions used in the Lucknow arrests, which will be referred to later in the paper (see Gupta, 2002, pp. 68-73).

<sup>6</sup> The police use these acts in their urban park-cleansing terror campaigns.

<sup>7</sup> In October 1997, the Customs Department of Calcutta confiscated a consignment of copies of *Trikone* (a magazine for gays, lesbians and bisexuals from South Asia, published in the U.S. and distributed in India by two NGOs, Humsafar and Counsel Club in Mumbai and Calcutta, respectively) under the provisions of this Act on grounds that the magazine was “derogatory to the morality and social system of our nation” (Desai, 2002, p. 94).

ties, 1995, pp. 15-17). All these laws become excuses for harassment and blackmail by both police and members of the public, and for making arrests. This harassment is all the more effective because most victims have little knowledge of the law and fear the social repercussions of public knowledge about their sexual identity.

While the law may not in itself generate homophobia, its very existence moulds beliefs and attitudes, and drives the demeaning and abusive treatment meted out to people of alternative sexualities and those who work with them. NGOs conducting research or outreach work that involves counseling and distribution of health/rights literature and condoms risk becoming victims of human-rights abuses by police who use penal code provisions of “abetting unnatural sex,” “obscenity,” and even “threats to national security,” to get them to stop their work. The state also sanctions and promotes medical educational literature supporting the myth that homosexuality is a mental health problem. Mental health professionals thus maintain the outmoded position that same-sex attraction is an unnatural phenomenon, and resort to potent drugs and/or electric shock therapy when counseling fails to change the preferences of young people brought in by parents.<sup>8</sup> The absence of a rational discourse within the medical profession on sexuality and alternative sexualities – even after the advent of the HIV/AIDS epidemic – makes for doctors who are insensitive or hostile to the medical needs and health rights of people of alternative sexualities and HIV-positive people in general. Shunned by the medical system these people stay away and early signs of (anal) infections and other sexual transmitted diseases (STDs) go untreated.<sup>9</sup>

The greatest mental abuse takes place in the private sphere of the family. Families seek out mental health professionals, threaten children who refuse compulsory marriage, or en-

<sup>8</sup> This is an under-researched area and no statistics exist of numbers of persons subjected to such abuse; what we have is mainly anecdotal evidence. However, there is one landmark case of psychiatric abuse of a homosexual patient, who had been subjected to aversion therapy without consent at one of the nation’s leading hospitals in Delhi. The case was filed with the National Human Rights Commission (NHRC) in 2001 by the Naz India Trust’s Milan Project, and followed up with a mobilization drive by alternative sexualities groups. The NHRC rejected the case, giving no explanation for its decision. When interviewed on the subject, one of the judges, when asked what considerations influenced the decision, said that under Section 377 the patient in question was a criminal anyway (Narrain & Khaitan, 2002).

<sup>9</sup> Many health professionals tend not to ask about the sexual orientation of their patients due to the cultural assumption of universal heterosexuality. In any case, infection of the sexual organs makes patients morally suspect in the eyes of health providers. Many private doctors do not hesitate to dismiss homosexual patients from their clinics, or, alternatively, to demand exorbitant fees. Even patients who pay rarely receive quality care because of stigmatization. It was this consistent observation that led the Naz India Trust, which works with ‘MSM’ groups in Delhi, to set up its own clinic (Gopalan, 2005).

force mental “cures” through temporary confinement in religious institutions. There is also physical battering, formal or informal imprisonment, or citing “family honor” to induce guilt, shame, anxiety and depression. Those whose physical appearance does not conform to gender prescriptions and who do not have the economic and social support to undergo sex change treatments have little choice but to leave home. Suicidal impulses, public stigma, loss of primary relationships of family and friends, and loss of economic support through the inability to hold down jobs or dismissal from employment, are all real dangers for those who do not reconcile themselves to marriage and parenthood or who are unable to conform to prescribed gender roles (CALERI, 1999; Fernandez, 2002, pp. 111-117; Voices Against 377, 2004; Chauhan, 2004; Narrain & Bhan, 2005).

Community and family honor still constitute the most important anchors of individual identity in Indian society. And that community, caste, and family relentlessly enforce cultural norms prescribing early and universal marriage and the birth of sons as an individual’s primary duty, leading many people of alternative sexualities to submit to heterosexual marriage and to raise families. Many men lead double lives plagued by secrecy and insecurity. The lack of safe private spaces forces them to seek out furtive unprotected sex in public places, a behavior that militates against long-term relationships. If they contract HIV they may pass it on to their wives and unborn children. Vulnerable in public spaces, they become victims of persecution and blackmail by the unscrupulous and police who use the penal code provisions to mete out violence, including sexual violence, further adding to the risk of HIV transmission.

The first salvo against Section 377 of the Indian penal Code was fired in 1992, six years after the first HIV case was identified in the country. It came from a Delhi-based group, *AIDS Bhedbhav Virodhi Andolan* (ABVA) – translated as Movement Against AIDS Discrimination – and followed the first-ever demonstration outside the police headquarters in New Delhi. The protest was against police harassment and arrests of suspected homosexuals in public parks under the nuisance clauses of the Delhi Police Act. The ABVA petitioned the national parliament for repeal of Section 377 on grounds that the law violated several articles of the Indian Constitution: 14 and 15 (protection against discrimination); 19 (right to freedom of speech and expression); and 21 (right to life and liberty, encom-

passing the right to privacy) (Fernandez, 2002, p.165). The attempt was unsuccessful as the organization was unable to enlist the support of even one Member of Parliament to argue the petition (Aggarwal, 2002).

In 1994, ABVA again mounted a challenge to Section 377, this time in the form of a public interest litigation (PIL) filed in the Delhi High Court. The action was prompted by a survey finding that several male prisoners in Tihar Jail in New Delhi, reputedly the largest jail in the country, had tested HIV-positive. When ABVA raised the issue of condom distribution with the jail's superintendent, she refused permission claiming it would be tantamount to legalizing homosexuality. The ABVA turned to the law demanding that Section 377 be repealed on the basis that it is unconstitutional, illegal and void. ABVA also asked that steps be taken to prevent the segregation, isolation, and stigmatization of prisoners identified as homosexual and/or suffering from HIV or suspected to have participated in consensual intercourse; that condoms be freely distributed to prisoners and disposable syringes be used in the jail dispensary; and that jail officials regularly consult with the government's National AIDS Control Organization (NACO). The legal case went the way of the parliamentary petition; it languished in the Delhi High Court and was eventually lost for lack of follow-up by the ABVA. It would be another few years before a fresh petition was filed.

The silence surrounding homosexuality at the time was also the silence surrounding sexuality in general and HIV/AIDS in particular. For nearly a decade following the identification of the first HIV-positive case in the country in 1986, both the Indian state and civil society were in denial apparently convinced that a sexually transmitted disease like AIDS could not possibly spread in a country that had the protective effect of Indian culture.<sup>10</sup> The initial evidence that the virus was carried by sex workers – and in Western countries, by homosexual men – was seized upon as confirmation of HIV's links with all that was criminal and socially deviant (and of “non-Indian” origin). Such “depravity” therefore deserved marginalization. NACO, set up in the late 1980s but hamstrung by this tunnel vision, was unable to give the enlightened and effective policy leadership that the epidemic required. Not only were sexuality issues invisible within the HIV/AIDS sector, including the special vulnerability of people of alternative sexualities, HIV/AIDS itself remained isolated from the mainstream

<sup>10</sup> This was a public statement by Dr. A.S. Paintal, then Director General of the Indian Council of Medical Research (see Ramasubban, 1992).



health sector and its family planning program (within which condom use had only a marginal legitimacy), and from any other related areas of development planning. The new human rights issues that HIV/AIDS raised did not yet figure in the concerns of women's or human rights organizations, and mainstream media coverage of HIV/AIDS-related issues tended to be scanty, disjointed and sensationalized (Ramasubban, 1998).

### **The struggle for sexual rights: First phase, the Naz petition**

The successor to the ABVA legal petition came six years later in 2001. In 1994 a newly-registered NGO in New Delhi, Naz Foundation India Trust, explicitly adopted the objective of addressing the health problems of gay men and “men who have sex with men” in the context of the HIV/AIDS epidemic. The Naz strategy was to nurture the emergence of distinct class and sexual orientation self-help groups – English-speaking and Hindi-speaking gays, lesbians, *hijras*, and *kothis* – by allowing them to find their feet as discrete entities under its organizational umbrella until they felt confident enough to network across class and linguistic barriers and, perhaps, become registered organizations in their own right (Gopalan, 2005). When Naz outreach workers graduated from identifying major cruising areas and building rapport, to disseminating educational materials and condoms, they attracted regular police harassment. In the general climate of police persecution against people of alternative sexualities, carrying condoms and sexuality-related literature was itself becoming “evidence” of culpability under Section 377. Added to this were repeated attacks by local hoodlums on visitors to the Naz drop-in center and clinic. The fact that the visibility of its HIV/AIDS work was acting as a roadblock to its attempts at building a stable community for self-care, led Naz to approach the HIV/AIDS unit of the Lawyers Collective, a legal aid NGO committed to fighting for the civil rights of HIV/AIDS-affected persons,<sup>11</sup> to challenge the constitutional validity of Section 377.

The Delhi High Court admitted the resulting petition in December 2001. The petition challenged the constitutional validity of 377 on the following grounds: that the prohibition of pri-

<sup>11</sup> Beginning in the late 1970s (following repeal of the 1977 state of emergency) a general disillusionment with the state went hand in hand with a surge of NGO activism. The mission of these new non-political civil society formations engaged in developmental activism, was to redistribute the benefits of development in favor of the most disadvantaged. In this general climate, legal aid NGOs like the Lawyers Collective also started coming into their own.

vate, consensual relations violated the right to privacy guaranteed in the constitution “within the ambit of the right to liberty;” that a distinction between procreative and non-procreative sex was unreasonable and arbitrary and undermined the equal protection provision of the constitution; that the punishments prescribed in the section were grossly disproportionate to the prohibited activity; that 377 violated the prohibition of discrimination on the grounds of sex because it criminalized predominantly homosexual activity; and, that the right to life guaranteed in the constitution was violated by the jeopardizing of HIV/AIDS prevention, by the denial that sexual preferences were an inalienable component of the right to life, and by the social stigma and police abuse that was being perpetuated.

The petition emphasized the larger context of HIV/AIDS and the threat that 377 posed to individuals and NGOs attempting outreach to “men who have sex with men.” It cited evidence from the report of the first National Consultation on Human Rights and HIV/AIDS, held in November 2000 in New Delhi and organized by the National Human Rights Commission, that MSM continued to be driven underground by Section 377 despite NACO’s professed policy of including them in its intervention programs. The petition also named the government of Delhi, the Delhi Commissioner of Police, Delhi State AIDS Control Society, and NACO, as well as the ministries of Home, Health, and Social Welfare. It did not ask for the repeal of 377, but rather the exemption of private consensual adult sex from its purview (Lawyers Collective, 2001). In doing so, both Naz and the Lawyers Collective were deferring to the concerns of child rights groups who were against the repeal of the law given the absence of sound laws that protected child rights.

The prospects looked hopeful. The Lawyers Collective felt it had done its homework well. It had studied judgments from around the world and it had framed the petition within a description of the Indian cultural tradition of tolerance and inclusion of sexual diversity drawn from recent re-interpretations of Indian myths and ancient texts.<sup>12</sup> It was also relying on synergy with the report of the 172nd Law Commission, which was prompted by a public interest litigation asking for a review of rape laws. Filed by Sakshi, a women’s rights organization in Delhi, the report recommended a redefinition of sexual assault to make it gender-neutral and inclusive of oral, anal, vaginal, and other forms of penetrative intercourse, including

<sup>12</sup> A significant source cited in the petition was Vanita and Kidwai’s book, *Same Sex Love in India: Readings from Literature and History* (2000).

insertion of objects without consent. The report also recommended more effective laws governing sexual abuse of children, thus rendering Section 377 redundant (Law Commission of India, 2000).

### **The struggle for sexual rights: Constructions of sexual citizenship and mobilization strategies in the alternative sexualities spectrum**

Close to the time the petition was to be filed, however, Naz came in for severe criticism from a new generation of alternative sexualities activist groups, who were beginning to develop their positions on the question of sexual rights. These groups – located mainly in metropolitan cities across the country – had been formed in the 1990s. Several were self-support gay/MSM/*hijra/kothi*<sup>13</sup> groups dedicated to HIV/AIDS work. There were also lesbian groups that had organized in the wake of the violence and controversy surrounding the release in 1999 of the Hindi film, *Fire*, which portrayed a lesbian relationship between two middle-class women (discussed later in the paper).

In 2000 the groups held their first National Conference of Sexual Minorities, which resulted in the formation of the Coalition for Sexual Minorities Rights. The groups accused Naz of failing to engage with them in a countrywide consultative process on the petition. They also felt that public spaces ought to have been specified in the petition, and that by privileging private consensual sex Naz had left out in the cold the lower social classes for whom public spaces were the only recourse (poor gay men, and most acutely transgendered persons/*hijras/kothis* whose appearance, violative of gender-normativity itself, attracted the most violent abuse). Transgender/*hijra/kothi* and lesbian groups did not feel adequately represented given the emphasis on MSM in the petition, since many transgendered persons/*hijras/kothis* have complex gender identities and do not necessarily see themselves as MSM. Lesbian groups felt further marginalized by the preoccupation with sexual minorities within the context of AIDS infection. For them the absence of a clearer focus on sexual rights within the framework of patriarchy was a serious gap.

<sup>13</sup> *Hijras* are transgender people and people with inter-sex conditions, many of whom undergo castration, hormonal treatment, or sex change operations. *Kothis* are biological males who adopt a strategic feminine identity for the purpose of sexual relationships with men. Nanda (1990, 1994) and Jaffrey (1996) contain ethnographic accounts of the lives of *hijras*.

Naz countered these criticisms by arguing that the identification of private consensual sex was the first strategic step in what was, essentially, a long battle on the issue of homosexuality and rights. Both Naz and the Lawyers Collective reminded their critics that they had made consistent attempts to keep interested groups informed about progress on the petition. Regular updates on the petition had appeared in the Lawyers Collective newsletter, *The Lawyers*. The lawyers concerned had also held discussions with individual groups of stakeholders who had taken the initiative to voice their concerns, such as child-rights groups, and they had even discussed the petition at a special session of the National Sexual Minorities Conference in 2000. Finally, Naz had found in the course of its work that gay men and MSM were almost universally married. The importance of reaching out to them as a first priority lay in the fact that their considerable numbers and invisible alternative sexual behaviors made for the violation of women's sexual rights and their right to safety from infection, and fuelled the spread of HIV/AIDS. The fact that MSM had been identified as a target group for AIDS intervention by NACO and its international donors accorded them a certain measure of legitimacy for purposes of the petition.

Some of the polarization described above came about because there was as yet no community of people of alternative sexualities. Many of the activist groups were still at an embryonic stage of development having arrived on the scene after Naz initiated its work on the petition. Localized, small, still engaged in self-exploration, such groups were attempting to expand through networking activities including: organizing conferences and cultural programs on sexuality; building links with international groups working on broader platforms, notably forums on alternative sexualities in Asia (the NGO Naz International based in London, and *Trikone* magazine published in the U.S., both catering to South Asian gays, and the Asian Lesbian Network,<sup>14</sup> were among the earliest contacts) and the International Gay and Lesbian Human Rights Commission;<sup>15</sup> and participating in international AIDS and lesbian, gay, bisexual, transgender/transsexual (LGBT) conferences. At this stage enthusiasm for legal reform was generally weak – or, at least, not a priority – particularly among gay and *hijra/ko-*

<sup>14</sup> Seven women from Mumbai and Delhi attended the first Conference of the Asian Lesbian Network held in Bangkok in 1990, in their personal capacity. At Bangkok, the Mumbai delegates met their Delhi counterparts for the first time. This first contact, encouraged by the new links to other Asian lesbian women, marked the beginning in their evolution into organized groups (Rege, 2002).

<sup>15</sup> For the first time an activist from India testified before the International Tribunal on Human Rights Violations Against Sexual Minorities, in New York in 1995 (Fernandez, 2002, p. 186).

*thi* groups. Some gay groups with more pronounced left-wing leanings had little faith in the capacity of the legal process to bring about social change. Several groups, particularly *kothis* and *hijras*, were severely economically disadvantaged and had yet to develop the ideological and organizational capability to participate actively in the largely English language debates around law, social change, and human rights.

The lesbian activist groups – middle class, small in scale and mainly located in metropolitan cities – had a somewhat different character, and, besides, were still in the process of working out their level of equality with other groups in the alternative sexualities spectrum. Several had first found their political feet within the autonomous feminist groups that had burgeoned in the 1980s, when the women’s movement had undergone a growth spurt following the debates around rape and the campaign for reform of rape laws. Catapulted into political visibility by the turbulence following the release of the film, *Fire*, they continued to identify with feminist agendas and were struggling to gain legitimacy for their identity within the women’s movement even while they worked to build their own local lesbian groups, rights agendas and networks. Locating themselves within a critique of patriarchy and viewing lesbian sexual rights within the larger framework of women’s sexual rights, they saw legal reform as a positive force for social change. For them, the repeal of Section 377 was as vital for women’s empowerment, as was the reform of rape laws to include both men and women and homosexual and heterosexual rape. They framed their political agenda for sexuality rights as one of working for the sanction of alternative sexuality as a private and inalienable right, but demanding state intervention on issues that under patriarchy were considered private, namely domestic violence, incest and marital rape (Rege, 2002; Stree, 2002). To this end they had taken the independent initiative, under the aegis of the Campaign for Lesbian Rights (CALERI) launched in 1999, to demand the repeal of Section 377 in a memorandum submitted to the Committee on Empowerment of Women: Appraisal of laws Relating to Women (CALERI, 1999).

### **The struggle for sexual rights: Impact of global<sup>16</sup> and local processes**

Despite the incipient constructions of sexual citizenship, differing positions, fledgling organizational character, and absence of a cohesive strategy, the voices of Indian activists had been

<sup>16</sup> For a detailed overview of two significant United Nations processes, see also in this publication: Girard, F., Negotiating sexual rights and sexual orientation at the UN.

raised, due in large part to the growing momentum through the 1990s of major and complex changes in the national and international political and economic climate. One of the most important changes was undoubtedly the international movement of ideas stimulated by the interrelated actions of the global women's health movement and the global HIV/AIDS epidemic, and aided by a host of bilateral and multilateral donors.<sup>17</sup> Another was the accelerated liberalization of the Indian economy and the sexual revolution that it was inspiring.

The global women's health movement brought to the table a new set of discourses around the interrelated issues of population, gender, reproductive health, and sexuality. The discourse critiqued states-led demographic agendas that focused on controlling women's fertility to the exclusion of their health and it articulated the rights of women (and men) to reproductive health and a safe and enjoyable sexuality. In so doing it de-linked sexual and reproductive health from procreation, highlighting the sexual and reproductive health concerns of unmarried youth, widows and post-menopausal women, women in sex work and non-heterosexual men and women. By challenging the structures of patriarchy the discourse also provided an overarching framework for critically reviewing prevailing sexual behaviors and all forms of sexual violence. It drew its strength from the unfolding global HIV/AIDS epidemic, which necessitated an unprecedented re-examination of ideologies and practices relating to sexuality and gender in individual societies and cultures. Through advocacy and networking at both local and global levels, this global movement of ideas played a critical role in building consensus for national policies that reflected these concerns, as seen in the outcome of the 1994 International Conference on Population and Development (ICPD). International funding agencies that had previously supported states-led demographic agendas now made funds available to NGOs and grassroots pressure groups for research and interventions in women's reproductive health, sexuality, and HIV/AIDS.

Population control had been a major theme in Indian developmental planning since the late 1950s and the Indian family-planning program, initiated in the early 1960s and the largest of its kind in the world, had, from the start, focused exclusively on targeting women's bodies for

<sup>17</sup> This entire discussion is based on Ramasubban and Rishyasinga (2002).

fertility control.<sup>18</sup> The policy never looked at men's responsibilities for sex and procreation, and generally left unquestioned the social arrangement of the patriarchal family with its gender-sexuality equations. The only brief threat to men's sexual hegemony came between 1975 and 1977 in the form of compulsory vasectomy drives during a state of emergency imposed by the then Prime Minister, Indira Gandhi. The political repercussions proved too severe, and the drives were hastily withdrawn; thereafter, any reference, however oblique, to male contraception of any kind, including condoms, receded into obscurity.

The combined manipulation of women's bodies by the patriarchal family (the duty to produce sons rather than daughters) and by the interventionist state (the duty to terminate fertility after two or three children) has left a history of severe abuse to women's bodily integrity, including the use of sex-selection tests to abort female fetuses, unsafe (albeit legal) abortion services, and sub-standard maternal health services. The result has been widespread reproductive ill health for women arising out of pregnancy, childbirth, and fertility control methods such as abortion, IUDs and sterilization. The debates and struggles led by Indian women's groups and health NGOs around these policies also fed into the global movement of ideas leading to the ICPD accord.

The country's mainstream HIV/AIDS discourse began its slow emergence from the stranglehold of the conservative medical community in the latter half of the 1990s under persistent pressure from global debates. Evidence from exploratory field-based social science research – often conducted by, or in collaboration with, community-based health NGOs – suggested that widespread poverty and silence around sexuality stimulated the rapid spread of the virus. The research also highlighted, for the first time, the fact that a very wide range of sexual behaviors existed in the country that did not all conform to the idealized set of norms labeled “Indian culture.” Further, the combination of poverty, men's tacit freedom from sexual controls, and women's duty to unquestioningly submit to the sexual demands of their husbands, seemed a potent factor in women's enhanced vulnerability to STDs and HIV (Ramasubban, 1995). There were pressures on NACO from foreign funding agencies to include MSM in

<sup>18</sup> See related analysis, also in this publication: Girard, F., *Negotiating sexual rights and sexual orientation at the UN*, p. 319. For other local examples, see also in this publication: Vianna, A. R. B., & Carrara, S., *Sexual politics and sexual rights in Brazil: A case study*, pp. 31-33; Cáceres, C., Cueto, M., & Palomino, N., *Sexual and reproductive-rights policies in Peru: Unveiling false paradoxes*, pp. 137-140; Le Minh, G., & Nguyen, T. M. H., *From family planning to HIV/AIDS in Vietnam: Shifting priorities, remaining gaps*, pp. 285-289.

policy-making bodies as critical stakeholders, both in their own interests and in their role as a “bridge population” in infecting women. LGBT activism in Western Europe and the U.S., with its new language of rights, was another crucial influence. Finally, patient activism in those countries pushing for access to generic antiretroviral drugs threw into sharp relief the contradictions in India’s new identity as a major global producer of generic antiretroviral drugs; the country’s increasing engagement with the world economy, and the concomitant pressures to adhere to the World Trade Organization (WTO) and other trade agreements, compromised the ability of its own citizens to access those very drugs.

The Indian state, as a signatory to the ICPD consensus, renamed the national family-planning program the Reproductive and Child Health Program in 1998; the old demographic agenda was uneasily linked with some elements of the new discourse, notably the reproductive health of married women. But issues of reproductive and sexual health of unmarried and non-heterosexual groups, and of sexuality rights in general and the rights of sexual minorities in particular – raised by the ICPD and predicated by the HIV/AIDS epidemic – remained invisible, both in state policies and in the women’s and human rights movements. For both the state and women’s groups, the hierarchy of concerns in relation to women had always been weighted in favor of economic equity issues within the developmental agenda of the state. Both sides viewed female sexual minorities, like women in sex work, as victims requiring paternalistic state intervention for their rehabilitation rather than as groups deserving of citizenship rights.

For women’s groups, sexual rights outside of heterosexual rape remained a silent issue; lesbian crises were merely “lesbian issues” rather than “women’s issues,” and discourses on sex worker’s rights were seen as aiding women’s exploitation. In an environment where women’s issues and struggles were just beginning to gain societal acceptability, women’s groups feared jeopardizing their own hard-won legitimacy by permitting open discussions about sexuality, sexual rights, or lesbianism (Forum Against Oppression of Women, 2002; CREA, Sangama, & Tarshi, 2004, pp. 15-16, 31). For human rights organizations in the country homosexuality, if not seen as explicitly criminal, was still perceived as deviant. And, for all these progressive groups, as indeed for the established left-wing parties, sexuality was of little concern and homosexuality was a “capitalist aberration,” an elitist and imperialist import (Human



Rights Law Network, 2002, p. 152). Post-ICPD, AIDS intervention projects for the two criminalized groups of MSM and sex workers did begin to proliferate under NACO aegis. But, without changes in the criminal law the new visibility of these groups only increased their victimization by the police, and this repression went unchallenged by NACO. Moreover they were without social movement allies, since there was no political support from civil society.

Even while alternative sexuality groups were undergoing birthing pangs, their rights to sexual citizenship still mere cries in the political wilderness, the sexuality landscape of the country had begun to change under the impact of an unexpected source — the globalization of markets and lifestyles. India has been witnessing an unprecedented increase in employment opportunities and disposable income (and with it, economic autonomy) among educated youth due to the rapid pace of urbanization, with its attendant loosening of social controls, opportunities for exposure to multiple cultural influences, revolutionary changes in communications technologies, and a burgeoning domestic market for global material and cultural consumption. One feature of the country's new global capitalist culture is a growing tendency to commodify sexuality. Print and electronic mass media, films and theatre, fashion, advertising, and the Internet bristle with globalized images of heterosexual desire with a price tag. Couched as a public discourse on personal freedom and the right to sexual pleasure, these media messages entitle the country's youth to this pleasure, and nurture the emergence of a new, young adult sexual culture.<sup>19</sup> (Young people constitute more than a quarter of the country's population, are increasingly mobile in the search for material opportunities, and tend to delay the age at marriage.)

Repressive reactions from patriarchal forces have not been slow in coming. The new market-led openings are setting off a crescendo of anxieties among a wide spectrum of political and civil society groups. These groups talk about preserving the “purity” of Indian culture and/or specific regional culture(s), as reflected in the virtue of women, and seek to reinforce orthodox moral codes relating to women's sexuality. The general concern of the entire spectrum is to control the sexuality of mainstream, unmarried heterosexual youth in the face of

<sup>19</sup> Articles running into several pages and agony columns, all devoted to sexual issues (describing pleasures and techniques of lovemaking and discussing sexual aspects of marital and non-marital relationships) have become a regular feature of the metropolitan English press. Extramarital affairs and live-in relationships have become a staple of T.V. soaps and Bollywood cinema, directed primarily at urban audiences.

unprecedented change.<sup>20</sup> Actions include: discouraging “Western” symbols like Valentine’s Day; laying down strictures, like dress codes for college students that are disproportionately directed at young women; harassment of young couples in public parks; and public interest litigations demanding censorship of television program content.<sup>21</sup> The most vocal and often violent protests have come from religious fundamentalists of all hues – notably right-wing Hindu fundamentalist political parties and their allies – whose actions are often in concert with instruments of the state, such as the police, and with lumpen elements.

Nevertheless, these social controls are quite unlike the plethora of criminal laws or the cries that “the Indian nation is at stake” when AIDS activists call for public debate on serious issues.<sup>22</sup> It is important to note that the market-driven sexuality of the increasingly affluent urban middle classes runs parallel to the AIDS crisis and the multiple discourses on sexuality that it has generated. It reinforces heteronormativity and has little in common with the aspirations for citizenship, freedom and pleasure of those from the margins who question the prevailing constrictive constructions of patriarchal gender relations. In so doing, its trajectory actually runs counter to the larger and vital political import of the social justice issues raised by the nascent sexual rights movement.

It must be conceded, however, that the globalization of lifestyles opened possibilities, at least in the large metropolises, for persons who were simply part of gay groups seeking a space for social interaction. Whereas railway stations and parks had been the main areas for sexual activity — even for relatively well-off, English-speaking, middle-class gay men in big cities like Mumbai — now smart city clubs and discotheques, spotting an excellent business op-

<sup>20</sup> In December 2004, a male high-school student filmed an oral sex session with a female student using a camera phone. This informally circulated clip using multimedia-messaging service found its way into an Internet auction site (“Delhi schoolboy held in phone sleaze case”, *The Hindu*, December 20, 2004).

<sup>21</sup> Two cases made national headlines in 2005. In the state of Tamil Nadu in south India, Khushboo, a film actress who made an innocuous statement on young women’s sexual rights, became the target of a spectrum of political parties, the media, and the public, who attacked her for “insulting the virtue of Tamil women” and “promoting” premarital sex. Twenty cases of defamation were filed against her, and there were calls for her exile from the state and for a public apology to Tamil women (“Caught in an urban witch-hunt?” *Times of India*, New Delhi, December 7, 2005). And in Meerut city near Delhi, young lovers in a park were mercilessly assaulted in full view of T.V. cameras, taken to the police station and warned not to return (Debate on moral policing rages on, *Times of India*, New Delhi, December 26, 2005).

<sup>22</sup> In 2000, Sahyog, an NGO working in Almora district of Uttar Pradesh, published a pamphlet, “AIDS and Us,” which described local sexual practices in sexually explicit language. In a region and language unused to discourses on sexuality, this was like a spark to a tinderbox. The findings in the report were seen as unsubstantiated and derogatory to the local culture and the organizers were labeled “outsiders” bent on fielding subversive ideas. Leading members of the organization were arrested for 40 days under obscenity statutes and the 1986 National Security Act (Human Rights Watch, 2002).

portunity, were becoming available for partying, discussion, viewing films, and other recreational activities. Electronic mailing lists opened up communication within groups like Gay Bombay. Gay magazines such as the Mumbai-based *Bombay Dost* – begun in 1990 as India’s first English language gay and lesbian magazine, with both gays and lesbians on its Board – offered a platform for sharing ideas.<sup>23</sup> A 1993 festival of films with gay and lesbian themes became an annual event. Members of this relatively affluent group are usually married and in the closet but their activities have fostered a certain level of comfort regarding gay sexuality in large urban centers and greater openness from the mainstream English-language press. However, social interactions within groups like Gay Bombay don’t extend to economically disadvantaged gay men, *hijras*, and *kothis* who don’t speak English. For them, public spaces such as parks – with the lurking danger of police brutality – are still the only recourse.<sup>24</sup>

A dramatic change occurred in December 1999 that introduced a new and contentious political visibility into sexuality issues. *Fire*, the first-ever Hindi film about a lesbian relationship, was released in cinema houses in metropolitan cities. Set in India and made by Deepa Mehta, a woman of Indian origin based in Canada, *Fire*’s central characters are two middle-class women. The film, which had been passed by India’s National Film Censor Board, was well received by the public and theatres were even offering women-only shows. But within a few days of the film’s release the *Shiv Sena*, a right-wing Hindu fundamentalist party, and its political allies, set off a chain of riots and protests that included the vandalizing of cinemas in Mumbai and Delhi and demands that the film be banned. The protests were led by the women’s wing of *Shiv Sena*. The protesters questioned the right of a foreign-resident filmmaker to violate the norms of “Indian culture” – that is, importing alien ideas about women and their sexual desires into a culture that looked upon women as chaste, self-abnegating wives and devoted mothers, and worshipped them as goddesses. They denounced the film on grounds of obscenity insisting that the Hindu community had been hurt by the portrayal of “immoral”

<sup>23</sup> In 1991 *Pravartak*, a Bengali-language gay magazine, made its debut in Calcutta under the aegis of the Counsel Club, but to sustain itself after its debut was not as easy as it was for the English language *Bombay Dost*. It languished for a couple of years then resumed publication as *Naya Pravartak* (Fernandez, 2002, pp. 195-209).

<sup>24</sup> The forces of globalization have, admittedly, opened up a few fringe spaces for public representations by sexually marginalized and criminalized individuals and groups. But these remain minimal. Examples include cultural shows at academic and allied events such as the Rainbow Coalition at the World Social Forum (Mumbai, January 2004); the annual Festival of Pleasure organized by sex-worker coalitions, which also showcase cultural products on the theme of alternative sexualities; and the recent runaway market success of the autobiographical novel by Nalini Jameela, a sex worker in Kerala.

behavior “demeaning” of women, and the use of the name of a goddess symbolizing chastity for one of the two lesbian protagonists (CALERI, 1999, pp. 11-14).

The ensuing debate over women’s sexuality took on national proportions, engaging the national and regional media and both houses of parliament. The government-appointed National Commission for Women condemned the violence. Some liberal political parties and groups would only go so far as to declare that they were not against the film. Large sections of the metropolitan intelligentsia and the film community ranged themselves against the conservative forces, predominantly on grounds of freedom of artistic expression as guaranteed by the country’s constitution. Progressive groups (including women’s and human rights groups, as well as lesbian groups who now found themselves suddenly exposed) volunteered for counter-protests such as picketing cinemas in Mumbai and Delhi where the film was being shown. But they too limited their demands to freedom of expression and opposition to the forces of communalism, sidelining the lesbians’ primary plea for freedom of sexual choice.

Lesbian activists who were already part of women’s groups mustered a coalition of 31 women-oriented civil society organizations. It was from this group that the most cogent critique was mounted: the constitutional right to freedom of artistic expression and public debate, particularly on the “hypocrisy and tyranny of the patriarchal family ... women’s sexuality and ... the silence around alternative emotional/sexual relationships.” A separate statement by lesbian groups highlighted issues of forced marriages, forced heterosexuality, women’s exploitation through domestic violence, and mainstream cinema’s celebration of physical and sexual violence against women (CALERI, 1999, pp. 21-23).

Very early in the struggle the lesbian groups realized that they were on their own. The film community simply wanted the film back in theatres. The filmmaker quickly distanced herself from her lesbian supporters, declaring that *Fire* was not about lesbians at all but about women’s “loneliness and lack of choice” — despite the fact that she had marketed the film in the West through lesbian/gay and university networks (CALERI, 1999, pp. 26-27). For most women’s groups, the *Fire* controversy was simply an issue of democratic rights; in the hierarchy of legitimate women’s concerns, economic and social rights stood high, and sexual-

ity tended to be seen as a lower-order issue, a matter of “personal choice.” Some solidarity came from gay individuals and MSM support groups/help-lines/social-action organizations that were now active in urban centers. But they were unable to empathize entirely with the lesbians; the fledgling gay men’s liberation movement lacked a gender perspective, so what analysis it did conduct remained firmly patriarchal. The film itself was sent back to the Censor Board and soon returned to the cinema halls after a few minor cuts. Future screenings took place uneventfully.

*Fire* marked a political watershed of sorts. It was the first significant moral panic by right-wing political forces that targeted alternative sexualities. It was the turning point for the emergence of lesbians as a political group with its own manifesto, though they remained committed to participation in forums like the annual National Conference on Women’s Movements, and to using sexuality issues to push the women’s movement to expand its critiques of patriarchy.<sup>25</sup> Eventually, the experience of confronting the diverse political constructions of sexual citizenships moved the lesbians in the direction of making common cause with other alternative sexualities groups, and working towards a consensus on opposition to Section 377.

### **The struggle for sexual rights: Strategic convergence phase**

There was one more flashpoint that was decisive in changing the state of fragmentation on the Naz petition within the alternative sexualities spectrum, and that acted as a tool for mobilizing consensus. It came in July 2001, just a few months before the Naz petition was filed in the Delhi High Court, in the form of state repression of gay activist organizations in Lucknow, the capital city of Uttar Pradesh, one of the largest states in the country and a culturally conservative region in terms of the status of women.

Four activists from two organizations working on HIV/AIDS prevention in Lucknow, Bharosa Trust and Naz Foundation International, were arrested and imprisoned for 47 days following

<sup>25</sup> There is evidence that women around the country are attempting to defy the weight of patriarchy by entering into relationships with other women, only to be crushed by family repression or public humiliation and even suicide. Interestingly, most press reports about such relationships have, to date, come from small towns and involve lower middle-class women (Fernandez, 2002, pp. 111-116; Rege, 2002, pp. 143-46; Stree, 2002, pp. 147-50).

a police raid on their offices. They were accused of running a gay “sex racket” and the educational materials seized from their offices were declared legally “obscene.” They were charged under several sections of the Indian Penal Code: 377 (unnatural offences); 120B (criminal conspiracy to commit a serious offence); 107 and 109 (aiding and abetting a crime); 292 (sale of obscene materials); and the Indecent Representation of Women Act of 1986 (Bandhopadhyay, 2002). Although both organizations were accredited NGOs, recognized by the Uttar Pradesh State AIDS Control Society (UPSACS) and working within NACO guidelines, the judicial magistrate declared they were “polluting the entire society by encouraging young persons and abating [sic] them to committing the offence of sodomy.” The prosecution pronounced that by abetting homosexuality, the accused were going “against Indian culture,” a remark that was repeated by the senior superintendent of police in Lucknow (Human Rights Watch, 2002; Narrain, 2004).

The arrests sparked protests across the country by alternative sexualities groups. In the months that followed, it became clear that the work of Bharosa Trust and Naz Foundation had been severely compromised; indeed the Bharosa Trust never recovered from the assault. The sense of foreboding among sexuality activist groups was palpable. It was a group of lawyers that played the most constructive role in the incident; members of the Lawyers Collective, so severely criticized by the sexual minority groups over the Naz petition, represented the accused and eventually got them released. The fact that Naz’s involvement had been immediate and direct through open, active support and advocacy now generated a minimal willingness among the groups to come together to support its legal petition.

The incident highlighted the vulnerability of people in centers of social and political conservatism outside the big metropolises.<sup>26</sup> It also provided further evidence that major infringements on civil rights followed close on the heels of new visibility, in this case AIDS interventionists with declared group identities, office premises, and funding, all enviable symbols of material progress in a status-ridden society. The police, accustomed to viewing people of alternative sexualities as criminals, were unable to come to terms with this new social legitimacy, which, in their eyes, had no legal sanction, and they looked for opportunities to provoke individuals and groups. The incident also confirmed that the government’s

<sup>26</sup> See note 21 above.

AIDS policy leadership – whether at national or state levels – was in silent collusion with the police and the law; UPSACS had not responded to calls for help, and NACO had responded all too feebly and ineffectively.

In terms of the media, the Lucknow case marked a watershed in coverage of sexuality issues. Even in big metropolises, such as Delhi, media attention was mostly prurient and derogatory, prompting even greater police surveillance of cruising areas. Following every media expose, levels of extortion and blackmail of gay men, *kothis* and *hijras*, on pain of arrest under Section 377, rose dramatically, as observed by a gay rights lawyer from the Lawyers Collective who worked on the Lucknow case:

*“Policemen take advantage of this fear of the judicial process to threaten sexual minorities with Section 377. They employ such threats to blackmail, extort, rape and physically abuse their victims. And because obtaining rapid redress is a virtual impossibility, members of sexual minorities usually pay up or accede to the abuse. This also means that the police records never reflect the fact that the threat of 377 was used, for no case is ever registered. The lack of a paper trail – of records of the prosecution of consensual sexual acts between adult males – is in turn used by the police to claim that Section 377 is a benign provision chiefly enforced, as they falsely claim, to deal with cases of male rape ... Today the issue of Section 377 ... is a question of corruption, simply because it is one of the lucrative and easy sources of supplemental income for a venal police. Their real objection to its repeal is the fear of losing this easy money,”* (testimony of Aditya Bandhopadhyay, Human Rights Watch, 2002, p. 26).

In the ensuing period *hijras* and *kothis* were subjected to increased brutalization. In 2002 Sangama, a two-year-old NGO working for the rights of *hijras* and *kothis*, faced police repression in its office in Bangalore. Claiming to act on complaints of other residents in the neighborhood who were objecting to the presence of *hijras* and *kothis* accessing Sangama’s drop-in center and other resources, the police prohibited these groups from coming to the office, and ordered that their meetings be held outside the city limits (Human Rights Watch, 2002). The fact that this level of discrimination occurred in metropolitan Bangalore – a global information technology hub and cultural icon of India’s rapid economic growth – highlights the

coexistence of multiple dualisms; not only a hiatus between metropolitan cities and smaller towns/more conservative areas of the country, but also within metropolitan cities between the cultures of metropolitan enclaves and the rest.

Intensified police repression of sexually marginalized groups was becoming evident across the country. In 2002, VAMP, a sex workers collective in Nipani, Maharashtra, had bought a piece of land and built an office where it held its meetings and conducted its condom-distribution activities under the National AIDS Control Program. Local elites, abetted by the police, ordered the collective to desist from using these premises on the grounds that it was an affront to the “decent” people who lived in the area. The women were ordered to conduct their meetings outside the town, and to refrain from “provoking” the townspeople with their new-found identity and legitimacy as AIDS workers. When the women refused, their premises were attacked and they themselves were threatened with violence, including rape (Human Rights Watch, 2002; Seshu, 2005). In 2004 a subsequent attack on VAMP and its parent organization SANGRAM, under the guise of implementing the “prostitution pledge” (in which NGOs applying for U.S. government AIDS-control funds must promise not to support prostitution) was sanctioned by PEPFAR, the U.S. government’s program for foreign assistance against HIV/AIDS, illustrating how externally imposed neocolonial “laws” could be used to echo the hangover of colonial forms of repression in the name of cultural/political “security.”

The parallels between the women sex workers of Nipani and the *hijras* and *kothis* of Karnataka, also sex workers, are striking. Both groups are seen as defying the invisibility imposed on them by the institutions of patriarchy, marriage, family and the law, and by lower-class status. In the case of *hijras* and *kothis*, gender non-conformity puts them at additional risk of entrapment by the police in public spaces, and abuse and rape in police stations and jails. While sex workers are criminalized under the Immoral Trafficking Prevention Act (1986), *hijras* and *kothis* are triply criminalized; they can be arrested without warrants under the Immoral Trafficking Prevention Act (1986), Section 377, and the still-surviving vestiges of the colonial Criminal Tribes Act (1871). The sexual violence faced by *hijras* and *kothis* at the hands of police and civilians alike – so effectively documented by Karnataka People’s Union for Civil Liberties (PUCL-K, 2003) – illustrates what makes them the most exploited group within the LGBT spectrum.



In September 2003, the government of India filed its affidavit in response to the Naz petition. In stating its position rejecting the plea for the repeal of 377, the government as one of the respondents in the petition argued that, “The purpose of Section 377 is to provide a healthy environment in society by criminalizing unnatural sexual activities ... By and large Indian society disapproves of homosexuality ... This disapproval is strong enough to justify it being treated as a criminal offence.” Most of the judges involved were of the opinion that the matter required detailed consideration and accordingly issued a Rule – a step that courts take when they consider a matter serious enough to be decided in a full hearing. They also issued notice to the Attorney General of India since the constitutional validity of a law was being challenged. However when the petition came up before the Division Bench, headed by the then chief justice, it was dismissed on a minor technicality; that the petition could not be maintained since Naz was not personally aggrieved in that no case under Section 377 had been filed against the group (Grover, 2005).

Legally, Naz now had two options before it, to file a review or to file an appeal in the Supreme Court. The alternative sexualities groups, hitherto on the fringes of the Naz/Lawyers Collective efforts around the petition and maintaining a critical stance even while grudgingly agreeing to a consensus, were alarmed by the government’s response and what they saw as the prospect of the law remaining effective in perpetuity. They now approached the Lawyers Collective with a request to be educated on the meaning of the government’s position and the options ahead. What resulted was a national meeting, in September 2003, of a spectrum of NGOs representing alternative sexualities (including the lesbian groups referred to earlier), intravenous drug users, sex workers and child rights advocates. The meeting, led by the Lawyers Collective, discussed the Naz petition and resolved to bury differences and form a coalition called *Voices Against 377* to carry the campaign forward. The consensus was that a review petition be filed, and that public awareness activities be conducted around the country on the issue of Section 377 to mobilize social support for the petition and to culminate in a million signatures voicing protest.

During this period, another crisis occurred that cast a pall but also pushed *Voices Against 377* into taking its case to the Supreme Court of India. On August 14, 2004, Pushkin Chandra, an affluent gay man, resident of New Delhi and employee of USAID, was brutally

murdered in his home along with a friend who was with him at the time. The criminal investigations, widely covered in the national media, revealed his homosexual background, and highlighted his habit of picking up young men, generally poor and unknown to him, for sex. The media's prurient coverage of the homosexual aspects of the case, evoking the "dark underbelly" of Delhi and the "economic and sexual exploitation" of poor young men by the gay community, were accorded an inordinate amount of column inches. Articles deplored the "new gay evangelism," the "growing climate of moral laxity," "gay criminality," and "assault on family values," as well as the "fear" of "ordinary, decent people about speaking out against the perversions in the gay community lest it be construed as intolerance" (Dasgupta, 2004).

Articles in alternative forums pointed out the bias of the mainstream press in equating gay issues with criminality, especially when compared to its silence on the high incidence of rape and rampant trafficking in girl children in the country (Dutta, 2004). The state's position on homosexuality was described as a case of double standards since it did not question the legality of heterosexuality in the face of rape of women and girl children by men (Gopalan, 2005), a criticism that could well have been applied to the civil society response to Pushkin Chandra's murder. The very public debate, however, was evidence that the visibility of people of alternative sexualities, and their determination to carve out their own niche, was coming of age, at least in the metropolitan cities and among the better off, English-speaking classes.

On October 15, 2004, the Lawyers Collective and Naz, with the weight of the alternative sexualities community behind them, filed the review petition. It cited 14 reasons that justified Naz's legal intervention on behalf of a section of the population, whose criminalization made it dangerous for them to access the courts. The review petition was dismissed by the Delhi High Court just 19 days later. The question now was whether Naz should pursue an appeal in the Delhi High Court or, alternatively, file a petition in the High Court of another state of the country. Another round of consultations within the coalition elicited a range of different opinions. There was concern about going before the Supreme Court because once it decided the case there could be no further appeal. After a third round of consultations, despite many lingering differences, the coalition was able to take an informed and collective decision to file an appeal to the Supreme Court on a single issue; whether the Delhi High

Court was correct in finding that Naz Foundation India did not have the *locus standi* to file and maintain a public interest litigation, and thereby dismissing the petition (Lawyers Collective, 2004, 2005).

Between December 2003 when the Voices Coalition was formed and January 2005 when the final consensus was reached, the Lawyers Collective continued to take the lead in consolidating the opposition to Section 377, organizing meetings in Delhi, Mumbai, Calcutta and Bangalore in association with local groups. Soon there were some 70 groups across the country — predictably concentrated in the metropolitan cities of Mumbai (11), New Delhi (10), Bangalore (11) and Calcutta (8) — discussing the petition and building consensus on the next steps (Sangini, 2005).

In January 2005 the Voices Coalition stepped up its public outreach efforts, staging peaceful demonstrations and holding press conferences in major cities to keep alive the opposition to 377, and collecting signatures in support of the petition as proof that civil society in the broadest sense, with Naz as the tip of the iceberg, had the *locus standi* to protest against a socially unjust law. The evolving consensus among the alternative sexualities groups had come to rest on a composite construction of sexual citizenship: “We state that our struggle against control of sexuality is a matter of social justice and linked to our struggle for women’s rights, our fight against fundamentalism, and our vision of a just world where people have the freedom to be different and yet be treated as equals” (Gay Bombay, 2005).

The Million Voices Campaign, as the petition drive was called, is the apex of a broader set of decentralized actions, with each group negotiating challenges at the local level and working, to the extent possible, with police, media, politicians, academia, bureaucrats, and medical institutions and professionals. Individual streams in the coalition are seeking to grow according to their own imperatives and to build their own coalitions with allies (such as lesbians who are out) for whom public sanction of their sexuality is critical, and transgender groups, which are examining their commonalities with sex workers.

On September 26, 2005, the Ministry of Home Affairs submitted its response to the Naz petition. The state’s position remained unchanged. The Ministry held that the Naz petition

was merely “academic” in nature and did not call for any “substantial question of law of public importance;” that there was no evidence HIV-prevention work was being hampered due to Section 377; that “public opinion and the current societal context in India does not favor the deletion of the said offence from the statute book;” that “the right to privacy cannot be extended to defeat public morality;” and that it was for the legislature to decide whether homosexuality should remain an offence (Lawyers Collective, 2005).

Nevertheless, the years of advocacy had begun to yield some returns, made easier, perhaps, after the 2004 general elections when the government changed from a right-wing coalition to a centrist/left-of-center coalition. In October 2005, the federal government’s Planning Commission appointed a task force to re-examine the laws criminalizing homosexuality and sex work in the light of the spreading HIV/AIDS epidemic. An HIV/AIDS Bill (2005) now before the parliament addresses the civil rights of persons of alternative sexualities among other significant rights relating to HIV-positive people. A government-appointed group is already deliberating on the recommendations of the 172nd Law Commission. On World AIDS Day in December 2005, the Prime Minister appealed to the country for a freer social climate for public discussion of sexuality related issues in the interests of the safety of youth who are falling prey to HIV/AIDS. It was the first significant position on HIV/AIDS taken by an Indian prime minister and, certainly, the most liberal public statement on sexuality by a political leader. Most recently, in October 2006, NACO, under new leadership and in a major position shift, filed its response to the Naz petition – its first publicly stated position on the matter – in which it supported the decriminalizing of alternative sexualities. The other responses are awaited.

In the midst of these hopeful initiatives, again in Lucknow, on January 3, 2006, police entrapped four closeted and married homosexual men in their homes and in restaurants, apparently as an outcome of monitoring gay website chat rooms. Falsely charged under Section 377 on grounds of having been caught having sex in a public park, the men were effectively tried by the media and publicly stripped of all dignity, in violation of all journalistic ethics. Thirteen others were publicly named and their personal and professional profiles broadcast.<sup>27</sup> Around the same time, two young women in Meerut, a town in the vicinity of Delhi, de-

<sup>27</sup> Preliminary report of the fact-finding team on the arrest of four men in Lucknow under the IPC (January 2006).

clared themselves married to each other in a local temple. They were separated and thrashed by their respective families, resulting in one of them attempting suicide.

As the time nears for the Supreme Court judgment, the Voices Coalition has made its final thrust in building public opinion in favor of the petition. In September 2006, English language metropolitan newspapers published an open letter on their front pages titled, Same Sex Love in India: Open Letter Against Section 377. The letter was addressed to the Government of India, members of the judiciary, and all citizens of India, and signed by several prominent Indian citizens, metropolitan and overseas-based professionals from the arts, media and academia headed by Amartya Sen, the Nobel laureate, and Vikram Seth, the internationally acclaimed author. Sen also issued another statement explaining the reasons for his support (AIDS-INDIA, 2006). The letter and the issues that it raised received wide media coverage.

### **Conclusion: Strategic dilemmas and the way forward**

The politics of Section 377 of the Indian Penal Code, with its multiple actors, positions and contradictions, affords a glimpse of the layered and discontinuous nature of the politics of sexuality in India. The foregoing analysis has examined the process of bringing disparate alternative sexualities groups across the country into a national-level community.<sup>28</sup> The various actions taken by these groups in response to repression, in concert with civil society organizations engaged in HIV/AIDS prevention and legal aid, proved instrumental in diminishing conflict around the comparative efficacy of available mechanisms. Their objective was to mount a social movement for countering state instruments of control. For most groups in the Voices Against 377 movement, the significance of the decision to support the Naz petition all the way to the highest court in the land is in its usefulness as a mobilizing tool. Opposition to a law that was itself acting as an instrument of illegality brought them together as no other single principle could, and the legal reform campaign, while serving to develop a common ideology and strategy, relied on this organized movement for strength and legitimacy as it engaged with the state.

<sup>28</sup> For other local examples of alliance building for sexual rights, see also in this publication: Vianna, A. R. B. & Carrara, S. Sexual politics and sexual rights in Brazil: a case study, pp. 41-51; Cáceres, C., Cueto, M. & Palomino, N. Sexual and reproductive-rights policies in Peru: unveiling false promises, p. 152; Ilikaracan, P. How adultery almost derailed Turkey's aspiration to join the European Union, pp. 266-270. For global-level alliance building, see: Girard, F. Negotiating sexual rights and sexual orientation at the UN.

The movement offers significant lessons on the strategic dilemmas that social activists face when determining how to act instrumentally and effectively; in this case, taking advantage of the spaces created by members of the middle class and the public health discourse prompted by the AIDS epidemic, even as they run the risk of becoming distracted by these discourses.

The inevitable tension between calibrating arguments according to the narrow assumptions of the law and the ideal trajectory of the movement toward broadening rights is one source of ambivalence activist groups experienced in using legal mechanisms. At the broadest level, working through the legal system may result in laws becoming further entrenched, and a change in the law does not necessarily translate into social change. At a more practical level, many activist groups lack the knowledge and literacy necessary to participate in complex legal processes, particularly those who are economically and socially disadvantaged. Paradoxically, criminalization makes it dangerous for affected groups to access the courts on their own behalf, but working through intermediaries may bring with it a sense of opacity and alienation. One of the fallouts in the struggle against Section 377 is that the campaign leadership has remained in the hands of metropolitan-based, educated activists, and the movement itself is still limited to functioning in the relatively more liberal, English-speaking environment of the metropolises.

The “legalization” of the struggle for LGBT rights also throws into sharp relief other problematic implications of class, such as the exclusion of the majority of transgendered persons, *hijras*, and *kothis*, who, on account of their poverty, engage in sex in public spaces. Backed neither by legal reform nor by benefits arising from the globalizing economy, the continuing plight of these groups – further accentuated by their non-normative gender behavior – highlights the perpetuation of the pre-existing dualisms of private and public, metropolitan and non-metropolitan, upwardly mobile and poor, and gendered and transgendered, with little end in sight. Although they are strategic constituents of the current legal reform movement, these grassroots groups are seeking to build their own independent bridges with other potential and real allies for long-term change in social attitudes towards their demand for citizenship rights. These groups, which feel the greatest urgency to publicly advocate their cause, also seek cultural legitimacy by their claim to a historically sanctioned place in pre-colonial,

quintessentially “Indian” regimes of sexuality that celebrated diversity. This claim, already infused with new life from recent and ongoing scholarly work, exposes the instability of essentialist assumptions about the meaning of the past, and how that past justifies the present. But it also runs the risk of a backlash (the reassertion of hyper-masculinity) from dominant fundamentalist political groups, and by accentuating an Indian/non-Indian dualism might further distance these vulnerable groups from the modernist vision of their more affluent and educated metropolitan allies in the alternative sexualities spectrum.

The public health formulation of “men who have sex with men” has its own contradictions. The acceptance of the sanitized identity of MSM may have gained for the movement a shift to the center from the margins. But it highlights the problematic role of gender, self-identities, and multiple sexualities in influencing political balances within the incipient LGBT community, the relative legitimacy of different groups in relation to the state, and the movement forward of a broad-based rights agenda. Here again, it is the gender-ambivalent transgendered persons, *hijras*, and *kothis* who are at a distinct disadvantage. The MSM approach also carries with it the potential loss of some aspects of women’s sexual rights, most notably lesbian rights. By virtue of the fact that the MSM concept does not engage with the patriarchal organization of gender, which is at the root of the current crises around sexuality, it precludes LGBT alliances with other significant social movements such as feminist groups, whose own emancipation is contingent on overturning this same gender organization.

One of the strengths of the consensus that built up around the Naz petition was that it did not allow the strategic use of the MSM concept to get in the way of collective mobilization for the limited objective of legal reform. The recently changed stance of NACO, the deliberations of the 172nd Planning Commission, the open letter of social support signed by metropolitan citizens, and the progress of globalization with its concomitant opening up of spaces for freer sexual expression (albeit commodified and confined to metropolitan cities) may, together, make for a supportive external environment for the final push for the reading down of Section 377. But the reassertion of normative sexuality and stigma is always a possibility as are changes in the external environment, both national and international, such as the “routinization” of national AIDS policies, conservative shifts in international AIDS funding, the political resurgence of fundamentalist forces, or a widening chasm between

those regions of the country witnessing a faster pace of globalization and those undergoing a much slower process of social change. The only bulwark against these possibilities is the development of a theoretical and political agenda for sexual rights that includes the entire spectrum of people of alternative sexualities, that draws its strength from the debates and struggles generated by the HIV/AIDS epidemic, and that goes beyond the freedoms held out by the market. In other words, a willingness to critique patriarchy, dominant masculinity, and sexual violence, which govern both the subordination of women and repression of marginalized sexual and transgender communities, and recast sexual rights in terms that go beyond market definitions of heterosexual pleasure, to social justice for all sexualities.

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