

RIGHTS FOR ALL:

ENDING DISCRIMINATION AGAINST QUEER DESIRE

UNDER SECTION 377

*"Whoever voluntarily has carnal intercourse against the order of nature with any man,
woman, or animal, shall be punished..."*

A Compilation by
Voices Against 377

2004

"Queer": an inclusive umbrella term that designates all those who are willing to
question the norms of gender and sexuality

☆☆☆

Voices Against 377 is a Delhi-based coalition of groups working on women's rights, child rights, human rights, sexual rights, right to health, and lesbian, gay, bisexual, and transgender issues. Thus far, members of Voices Against 377 include:

Amnesty International India, Campaign for Human Rights

Anjuman, the JNU Students' Queer Collective

Breakthrough: building human rights culture

CREA (Creating Resources for Empowerment and Action)

Haq, Centre for Child Rights

Jagori, Women's Training, Documentation and Resource Centre

Nigah Media Collective, a space for discussions around gender and sexuality

Nirantar, Centre of Gender and Education

Partners for Law in Development, Legal Resource Group

PRISM, a forum for issues relating to sexual and gender identities

Saheli Women's Resource Centre, autonomous women's group

SAMA, Resource Group for Women and Health

TARSHI (Talking About Reproductive and Sexual Health Issues)

We invite other groups/individuals who would like to lend support or learn more to contact us at voicesagainst377@hotmail.com.

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INTRODUCTION

At stake is the human right to be different, the right to recognition of different pathways of sexuality, a right to immunity from the oppressive and repressive labelling of despised sexuality.

Upendra

Baxi¹

Over the last few decades, the movement for the rights of lesbian, bisexual, gay, transgendered and hijra communities has come into its own. Today, diverse voices and groups based all over India increasingly articulate the rights of these communities to lives of dignity without fear and the threat of violence, and with the same constitutional and human rights as all others. The movement has long been documenting and protesting human rights violations against such communities, and bringing the history and the real stories of struggle, resistance, and support within the communities to light. Now, along with other allied movements, it also challenges larger structures that seek to use deliberate constructions of what is “natural” and “normal” to penalise all those that do not fit into a heterosexual, binary-gender framework.

We live in a society that constantly tells us that there is only one kind of acceptable desire: heterosexual, within marriage, and male. Social structures further define and defend rigid notions of what it means to be a man or a woman, how the two should relate, and the family unit that should result. All those who dare to think outside this perfect ideal are considered threats to “morality” and to society at large. In response to this threat, the system either tries to altogether deny the existence of those deviating from the norm (as in the invisibilising of lesbian women), or dismisses them as imports from the West (“It’s only a handful of urban, westernized elite who are gay”). When their presence is difficult to ignore, they are punished in ways that deny them a life of dignity and freedom.

This report represents the effort of diverse groups – the coalition includes groups and individuals working on issues of sexual rights, child rights, and human rights – to come

¹ Foreword to PUCL-K, (2003). *Human Rights Violations Against the Transgender Community*. (Bangalore: PUCL-K).

together and acknowledge that sexuality and the rights of homosexual communities are issues that affect all of us, and that we cannot be silent when these rights are violated.

The subject of this report, Section 377 of the Indian Penal Code (IPC), criminalises “voluntary carnal intercourse against the order of nature,” and remains one of the main obstacles for the sexual rights movement today. It is ironic that a British colonial law passed in the early 1860s to criminalise all non-procreative sexual behaviour (whether homosexual or heterosexual), is purported to be reflective of our society even today! Under this law, all “unnatural” acts ranging from consensual same-sex sexual activity between adults, or even oral sex between a married heterosexual couple, are offences, though the pervasive homophobia in our society ensures that only the first is ever prosecuted.

What are our main concerns about Section 377? It seeks to impose a stifling uniformity upon what we know to be a rich and varied diversity of sexualities and genders. It legitimises notions of what is ‘natural’ and ‘normal’, with a view to upholding the institutions of heterosexuality and patriarchy such as marriage and the family in order to maintain the existing inequalities inherent in these systems. It allows for punishment to be meted out to gay, lesbian, hijra, transgender and bisexual people whose human rights are repeatedly violated by state and non-state actors as diverse as the police, the family, the media, and the medical establishment. Numerous studies and fact-finding reports document violations ranging from sexual assault and abuse in police custody, extortion, electroshock and drug-based reparative therapies in mental health institutions, and wide ranging social stigma and discrimination on a day-to-day basis. The seriousness and repeated nature of these violations has not yet been understood by society at large. Even in our personal lives, anecdotal evidence suggests that the existence of the law continues to be a major obstacle for friends, families, work colleagues, and others to be accepting of diverse sexual orientations. Those who are committed to reaching out these marginalised communities through outreach, education and advocacy work have faced the danger of being found legally culpable. Further, the existence of Section 377 and its use to prosecute cases of Child Sexual Abuse (CSA) has frustrated many child rights activists, who argue that Section 377 was never meant to be a law on CSA and is therefore woefully inadequate in understanding any of the complexities or needs of CSA cases. As long as this law remains on the books, they fear, no comprehensive law on CSA will be formulated.

The first legal petition against Section 377 was filed by the AIDS Bedhbhav Virodhi Andolan (ABVA) in 1994. Currently, a PIL filed by the Naz Foundation India is being heard in the Delhi High Court and the 2003 response of the erstwhile NDA government proved that this challenge will not be easy. In its response, the government argued that Indian society, by and large, disapproves of homosexuality, and that this is enough for it to be considered a crime. Further, it defended the need for Section 377 to prosecute cases of Child Sexual Abuse and to safeguard the society from “moral degradation.”

Such an argument implicitly places the government’s right to judge and enforce a vision of “public morality” over the rights, freedom and dignity of homosexual people. Where is the place of perceived “public morality” within criminal law? Who decides what is “moral” and “natural”? In India alone, homosexual people, widows, single women, Muslims, and Dalits can all tell a unique yet common story of being considered “unnatural” and “immoral.” If, hypothetically, the majority in this country decided to ban inter-caste marriage because it was “unnatural,” should the law be then amended to reflect this opinion? Certainly not! The Constitution of India, and the laws that follow from it, are meant to, first and foremost, guarantee and protect the fundamental rights to freedom, life, and liberty to *all*. On what grounds are these rights being denied to homosexual people? The law must be a space that enshrines and protects the ideals that we stand for. It cannot follow society, but instead must lead it. Had the law simply to reflect what it perceived to be public opinion, then anti-Sati and anti-dowry laws would never have been passed.

The aim of this report is two-fold: to counter the assertion that the Indian public does not approve of homosexuality by bringing together diverse voices that support sexuality rights, and to show, in particular, how Section 377 adversely impacts the lives of homosexual people, child rights, women’s rights, mental health praxis, and human rights. Articles in this report show how the law affects HIV/AIDS outreach and prevention efforts, how the law limits any effective addressing of Child Sexual Abuse, while also explicitly countering the false belief that gay rights adversely impact child rights. Another article documents violations against homosexual people at the hands of mental health practitioners and shows how Section 377 perpetuates homophobia within mental health spaces. The final sections document the intersections of sexuality with both women’s rights and human rights

discourses, and firmly places sexuality rights within our understanding of basic human rights.

Sexual rights have been on the periphery of law, movements, and society for far too long, and it is imperative that the pervasive discrimination against large numbers of peoples and communities be stopped. The decriminalisation of consensual, adult same-sex activities will act as the first step towards a larger campaign against Section 377 that would lead to its ultimate repeal and also to the simultaneous drafting of a substantive new law on Child Sexual Abuse. It is only then that a country so proud of its democracy and freedom will be safe for so many that live in fear on its soil. Sexuality has been on the wrong end of the law and on the margins of society and movements for too long.

FACTS ABOUT SECTION 377

Section 377 (Unnatural Offences) reads: *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 which may extend to ten years, and shall also be liable to fine.*

- Section 377, Indian Penal Code 1870, the British-introduced anti-sodomy law, criminalises all voluntary ‘carnal intercourse against the order of nature’.
- Does not specify what constitutes “unnatural” sex, nor does it distinguish between consensual and coercive sex.
- Because of the explanation to the section, “penetration is sufficient to constitute... carnal intercourse”, it has been interpreted to include anal and oral sex.
- Anal or oral sex in a heterosexual context – even within marriage – is ‘against the order of nature’!
- The punishment for Section 377 – life imprisonment: cognisable, non-bailable.
- **Section 377 criminalises sexual activity, but does not even acknowledge sexual identity, nor is there any such recognition of non-heterosexual identity in Indian law.**
- Used in tandem with Section 375 (sexual assault) and other laws in child abuse cases.
- In some cases used in tandem with Section 375 (sexual assault) and other laws by women filing rape charges against husbands for which there is no provision in the rape laws.

- Most often used by police to harass same sex desiring people: to extort money from men who have sex with men in cruising areas, to verbally and sexually abuse them. Also used to break up same-sex couples including women.
- Section 377 leads to the abuse of other laws to harass same-sex desiring people, including:
 - Section 268 IPC – any conduct in a public place that causes injury/danger/annoyance to the public: *ambiguous therefore often used.*
 - Section 292/3 IPC – Sale of obscene books/objects: *impedes publication and distribution of material on safe sex practices for sexual minorities.*
 - Section 294 IPC – Obscene acts – punishes public acts including songs: *extremely ambiguous and also impedes HIV interventions.*
 - Section 109 IPC – Abetment; 120 B – Conspiracy; 511– Attempt.

In addition to sections under the Indian Penal Code, various local laws are also used to harass and discriminate against same sex desiring people, in particular men who have sex with men. The **Bombay Police Act**, for instance, contains sections particularly favoured by the police when attempting to extort from gay men in “cruising areas”:

- Sec 110 – Indecent behaviour in public.
- Sec 111 – Annoying passengers in the street.
- Sec 112 – Misbehaving with intent to breach peace.

TESTIMONIAL: MY STORY

Tip toeing out of a dark, cool room that occasionally sparkled with drops of sunlight sieved through the *chik*, were the three of us – my older brother, my younger sister and me the middle one – neither amongst the old or the young – like the drops of sunlight indefinable as either light or dark. I did not fit anywhere. Fleeing in the summer afternoons, through the burning courtyard of the house, past the *neem* tree and up the incline on the railway tracks behind our house, the competition amongst us siblings used to be about who could walk straight on the tracks the longest. When we were caught I was chided the most. I was a girl, older than my younger sister. Not so small after all, to indulge in games that did not become a grown up girl like me and to make matters worse I used to be slapping and kicking! Didn't I know that girls did not raise their hands to hit boys? Growing good girls did not venture into lonely places on lonely afternoons.

And when there were outings like going out to the movies or school excursions I was rarely old enough to understand what was good for me, so, like my younger sister I had to stay back.

No matter what I did, I ended up breaking some rule. Like the railway track that ran ahead of me there was an unquantifiable ideal I always seemed to miss. I thought marriage would help me attain it. Perhaps it would give me the maturity and the respect that almost always deluded me. I settled down. I had a son. I hoped that the ignominy my mother went through for bearing five daughters would be countered and the story of our births would be compensated or replaced with other stories of our achievements. Each of our births had been announced by striking an earthen vessel so that its dull clang did not spread far and wide. My brother's birth instead, had been heralded by beating a steel plate so that the good news could be carried all around.

As I deftly smoothed the creases out of bedcovers and linen and put in place pieces of my household, I began to get unsettled. No matter what and how much I did to keep the house going, it was never enough, never entirely well done. Also, it was always my responsibility alone. Yet I was given no part in the decision-making. When my anger surged up, guilt at being angry soon arose in equal measure and haunted me. Nothing I knew or had learnt thus far in my life eased this ongoing conflict.

In the midst of the daily tasks of child-raising and cloistered domesticity, I happened to see women's groups on the television screen, demonstrating on the streets and demanding a stop to violence against women and demanding greater rights for women. The boldness of these groups, bringing private issues into the public arena, initially shocked me and ought to have alienated me. Instead, I was drawn to them. Saheli, one of Delhi's earliest autonomous women's groups, was based in a locality adjoining the one I lived in. I joined them as a volunteer in 1983. It was here that I got the opportunity to work with women survivors of the anti-Sikh riots in 1984. As a result, a long and deep process of internal questioning began. In my search for answers, in 1991 I joined the women's group Jagori as a full-time paid employee.

One of my first assignments involved working at a resettlement colony (slum) in Delhi. The work included local organizing and also documentation of the lives of single women. Women, who were technically considered illiterate, and lived in poverty and at subsistence level, re-educated me in immeasurable ways, on a daily basis. It was one of the most empowering periods of my life. The regular practice of sitting as equals on the ground in a circle as we discussed problems, evolved strategy and planned interventions, challenged me to scrutinize my class privilege as well as other privileges.

The first woman I wrote about was Bhavari, in her sixties. As I sat next to her, she held my chin in her hands and ran her work worn fingers on my arms and face, "My husband did not ever ask me how I am, what I drink, eat and wear, he never loved me like this..." Even as her sharing echoed a

similar yearning in me, I became aware of a pleasurable sensation when she touched me. I recognized with a shock that the sensuousness evoked in me came from the hands of a woman. It brought back the memory of a dark staircase in a convent school. A memory that I thought had died with a phase I had 'outgrown'. That day when I came back home conflicted and dazed nothing else had changed.

Later in my meetings with more women, traces of what I absorbed would come back to me like that weathered touch. Listening to them I dimly saw how structural power impacts our most intimate relationships. I began to see a larger pattern in our individual and varied lives reflected in the identical words we used in the telling of our stories - 'caged,' 'good woman,' 'bad woman.' The daily presence of women who put at stake their precarious survival means to change their lives inspired me to change mine. I gathered the courage to speak to my son and step out of the 16 year old marriage.

But when the turning point came, it was almost invisible. It came when I first heard Bhavari talk about a relationship between two women. Simply and without a moral judgement she said that these two women met one another in the fields away from their homes and families. "They loved one another dearly. They could not live without seeing one another..."

Women's nurturing space healed me. But even then it was not simple for me to write the story I had just heard. I had just begun to know myself. I was afraid. It was only towards the end of the project that I was able to incorporate the story. Looking back I see several issues here.

Even though I acknowledged my love for women I was afraid. I had only Bhavari to go to. Besides her there was no one I knew even in the women's groups with whom I could talk. It was only later in private asides I learnt there were many women like us in the movement. I also began to see how when dealing with issues in the movement factors like class, caste, marital status were taken into account there was rarely any mention of sexual preference. The belief that heterosexuality is an all-pervasive norm is

not only sustained by our silence, but it also thwarts a full visionary analysis of situations.

Finally my involvement with another woman strengthened me. I was no longer alone. As we negotiated our heartbreaks and differences, the support we got from women like us was also from those who had not come out. What we often missed was an outer, larger affirming space into which we could simply slip and be ourselves without pretensions.

SECTION 377 AND CHILD SEXUAL ABUSE

In its response to the petition pending in the Delhi High court against Section 377, the government asserted that this piece of legislation is necessary in order to be able to prosecute perpetrators of child sexual abuse (CSA). The response is at one level incomprehensible. Surely, the government must be aware that the petition does not call for a repeal of Section 377, but merely a “reading down”. This means essentially that the petition seeks to remove adult, private, consensual same-sex acts from the ambit of Section 377. It leaves unchanged the rest of the section that would still apply to non-consensual sexual acts, and could thereby continue to be used in cases of CSA.

One could easily argue that we have here not a mere oversight on the part of the government but a deliberate attempt to confuse issues. Part of this attempt is to pit child rights against gay and lesbian rights. What better way to counter the demands for decriminalizing adult consensual sex, including homosexual acts, than to raise the bogey of the vulnerability of the child. There is little evidence however to suggest that the government is in fact concerned about the child’s search for justice. The government has itself acknowledged the need for a separate law to deal with CSA in its First Periodic Report to the UN Committee on the Rights of the Child. The government’s actions however, fail to match the stated intention. Despite demands by groups from all over the country, working on child rights, women’s rights and sexual rights, and even the National Commission for Women, the government has sought to ignore the demand for a law which would specifically address CSA. These groups have stated categorically that the existing laws, including Section 377, are highly inadequate in dealing with CSA. These actors, including the media, have also, in the course of their work, contributed to breaking the silence around CSA. The government, on the other hand, yet again, instead of proactively legislating in a manner that would enshrine principles of justice, is creating hurdles in the way of civil society in its pursuits of the goal of justice.

The current scenario with regards CSA and the law is such that in order to undertake criminal prosecution for sexual abuse of girls, it is Section 375 (the section of the IPC which relates to rape), Section 354 (outraging the modesty of the woman) or Section 377 which is used. In the case of abuse of boys, only Section 377 can be used. As has been repeatedly pointed out by groups that have been demanding a law to address CSA, the rape law is

highly inadequate. Section 375 only criminalises vaginal penetration by the penis. It is well known that most often CSA does not take this form. CSA ranges from exhibitionism, touching, to all forms of penetration (including penile-anal, penile-oral, object-vaginal and finger-vaginal).¹ Section 354 (outraging the modesty of the woman) does not even begin to capture the gravity of the crime that CSA is. As in the case of Section 375, this section can only be used in the case of abuse of girls. Section 377 too is inadequate for a number of reasons, stemming from the fact that it is also not a law designed with CSA in mind, and fails to cover the majority of forms that the abuse might take.

None of the above sections define in legal terms what constitutes CSA. The procedures during investigation and trial are highly detrimental to the interests of the child, being neither effective, nor in any way sensitive to the needs of a survivor of CSA. Even if a child were to give repeated testimonies, most likely in the presence of the abuser, the chances of conviction are virtually nil. The experience of, and power dynamics around sexual violations is different for children, women and sexuality minorities. Laws dealing with them should therefore also be different. The specificities should inform the understanding and perspective underlying the laws as well as the procedures needed for investigation and trial. By the government's necessitating the use of the same section under the Indian law which it uses for criminalising adult sexual acts, including homosexual acts, in the prosecution of CSA, it reinforces the false notion that homosexuality is linked with child sexual abuse. There is clearly a need for the government to learn the distinction between male-male sexual abuse and adult homosexuality. The prevalence of rape of women by men, does not, for example, lead the State to question the institution of heterosexuality. CSA could be perpetrated by men who may be either heterosexual or homosexual. The impetus in either case is the desire to establish power over the victim.

Whatever might be the motivations in continuing with the use of Section 377, it is clearly not the answer to legal redress in cases of CSA. It is imperative that the section be repealed and a law specifically addressing CSA formulated, built on the perspectives and

¹ One definition of CSA offered by the Campaign against Child Trafficking includes within CSA the following: sexual intercourse through penile penetration or use of objects or other parts of body, anal sex, oral sex, bestiality, forcing two or more children to have sex with each other, making children pose for pornographic pictures or films, exposing children to pornographic literature, pictures, films or conversation, voyeurism, fondling with or directly or indirectly touching any part of the body of a child for sexual gratification, directly or indirectly touching any part of the body of a child with an object or with a part of body for sexual gratification, passing sexually coloured remarks or verbally abusing a child using vulgar and obscene language or actions, making children watch others engaged in sexual activity.

understanding on those who have engaged with the issues. The law on CSA must define appropriate punishments, engage with both substantive and procedural law, and develop specific provisions keeping in mind the gender, age and nature of sexual offence, towards creating a child friendly procedural system. The new law would also need to look into aspects of victim assistance and support, rehabilitation and diverse legal remedies.

The government has to demonstrate its stated concern for protecting the rights of children by committing to the creation of a law which will comprehensively address CSA, instead of touting Section 377 as the route to justice, while trampling on the rights of all those it is mandated to promote and protect.

There is also the need to locate CSA in the larger social and cultural contexts. If sexuality continues to be a taboo subject, with certain expressions of sexuality being virtually demonized, we are working against the possibility of a child being able to protect herself/himself from abuse. The government, in many ways, including through the laws it upholds, actively contributes towards entrapping sexuality with attitudes that are dangerously moralistic, judgmental and stigmatizing. We need to work towards building an environment in which the child has the ability to distinguish for right from wrong, the security to say when a wrong is committed and a system which creates a safer environment with effective redress when abuse is perpetrated. Section 377 is not the answer to any part of this.

TESTIMONIAL: EXPERIENCES WITH MENTAL HEALTH INSTITUTIONS¹

Geeta from Sangini answered Justice Kirby's call for a narrative about shock therapy. At the age of 13 she "knew" that there was "something wrong" with her and that she wasn't like "normal" children. Her parents also "recognized" this and sent her to a psychiatrist who subjected her to a vigorous series of shock treatment to "cure" her of her perceived abnormality. The process was harrowing at best; she lost much of her hair, her cognitive processes were slowed, and she was generally in a state of duress due to the unrelenting (and unexplained) violation of her body. She lost her parents sometime during this period. After her parents' passing, she met Kate and Louisa and things became very different for her. Now 33, she has gone from someone undergoing shock therapy to a woman who would gladly stand on a street corner and proclaim to anyone that she is a lesbian.

Justice Kirby thanked her for her "brave" story and claimed that the great irony of the story, and of stories like hers, is that shock therapy fails to lead to its ostensible goal – that is, to "normalize" one's sexual orientation. He asked Geeta if the therapy changed her orientation at all and she answered with an amused "no." A few other audience members also answered in unison with her.

¹ Source: Geeta's story from the January 9, 2002 Public Meeting with Justice Kirby.

SAME SEX DESIRE AND MENTAL HEALTH

Historically, psychology has been used to scientifically brand homosexual people as “sick”, “diseased”, or “mentally ill”, and, in the process, reinforce the “normalcy” of heterosexuality. While these attitudes are still pervasive amongst many mental health practitioners, international codes of ethics and conduct, governments, psychiatric and psychoanalytic associations, and human rights covenants alike have together sought to reverse this trend and have successfully refuted the idea that homosexuality is a mental illness.¹

Officially, the **Indian Psychiatric Society** accepts the international World Health Organisation and American Psychiatric Association mental health guidelines as laid out in the internationally recognised *Diagnostic and Statistical Manual of Mental Disorders* (DSM). Within DSM IV, homosexuality is no longer considered a mental illness. Additionally, any reparative therapy that seeks to convert or change someone’s sexual orientation through any means is prohibited under the guidelines². Speaking of these rules, Dr. Sandeep Vohra, Senior consulting Psychiatrist of the **Apollo Hospital**, President of the **Delhi Psychiatric Society**, as well as a member of the **Indian Psychiatric Society**, has said: “Our stand remains the same. Homosexuality is not a disease, and we will continue to treat it that way.”¹ In reality, however, mental health institutions and spaces in India remain sites of personal, physical, and emotional violations and abuse, playing on the prejudices of mental health practitioners, institutions, and using Section 377 as a shield to do so.

MENTAL HEALTH CONCERNS OF HOMOSEXUAL COMMUNITIES

Familial and social pressures and stigma, personal struggles with one’s sexuality, the threat of Section 377, and other human rights violations and indignities inflicted upon homosexual people can and do lead to an absence of full mental and emotional well-being for many. Experiences on helplines and in support spaces, as well as fact-finding reports on lesbian suicides, for example, show the range of mental health concerns for same sex desiring people, to include depression, suicidal feelings, and substance abuse. As several participants noted in a seminar of mental health professionals held by the lesbian and

¹ See “Same Sex Desire and Mental Health: An International Overview”, p. 32.

² Full Text of the official resolution available at <http://www.apa.org/pi/lgbpolicy/against.html>

bisexual women's group, Sahayatrika (Trivandrum, November 2002), one of the pervasive points of ignorance in professional counselling is the idea that the lack of mental well-being of same-sex desiring people is directly linked to the "sickness" of that orientation itself. But as several mental health professionals noted that day, it is homophobia that needs to be "fixed" in order to realise well-being, and not the orientations themselves.

Ideally, help would be sought, and received, from mental health professionals. Yet many times mental health practitioners are seen under duress or pressure from the family, with an intention to "cure" the patient, not treat them or make them feel comfortable with their identity. Even when the patient seeks help willingly, mental health professionals are not free from the same homophobic biases and assumptions that cause a same-sex desiring person's lack of well-being. In addition to these biases, there is a systematic and discriminatory lack of information on sexuality and sexual choice, in direct violation of a patient's rights and needs. The lack of reliable and accurate information available, and the difficulties of obtaining it, only exacerbate the obstacles to well-being. Part of that information, for example, should be to communicate the legitimacy of same-sex sexualities, as well as the existence of groups and communities who support same-sex desiring people. Many of these changes cannot be brought about, however, while Section 377 continues to criminalise adult, consensual homosexual behaviour.

Section 377 is one of the main reasons that violations against homosexual people continue to be hidden within mental health spaces. Patients have no way of protesting, and no recourse against abusive therapy that violates them on personal, physical, financial, and many other levels, for they risk exposure, social stigma, and even legal action for speaking out. A further example of the denial of rights is provided by the use of what are known as "reparative therapies" by mental health professionals to "treat" same-sex desiring people. Reparative therapies aim to change the sexual orientation of a patient through the administration of nausea inducing drugs, shock therapy and/or behavioural therapy. The following quote describes one gay man's experience with reparative therapy:

"I approached a psychiatrist, assuming he would help me. 'Help' he did. 'Its all in the mind', he said. My bouts of depression (which I never realized arose from bottling up gay orientation) he glibly informed was a disease called schizophrenia. 'Your gayness

¹ Cited by Arvind Narrain and Tarunabh Khaitan in their paper *Medicalization of homosexuality: a*

is the cause of delusions and hallucinations.’ He prescribed ‘Orap’ and ‘Serenace’ which are powerful neuroleptic medications. The nightmare began in earnest, lasting fifteen years, ravaging body and soul. I took an overdose of Orap hoping to die. I did not. I was rescued. As a reward I was given shock therapy which played havoc with my memory for over two years. My moods were always bleak, my senses dull, and my thinking blurred.”

-Hemant, quoted in Narrain and Khaitan

Arvind Narrain and Tarunabh Khaitan, in a paper entitled *Medicalization of homosexuality: a human rights approach*, discuss the glaring problems of reparative therapy, so vividly described by Hemant. The first is the fact that reparative therapy assumes homosexuality to be a pathological condition requiring medical modification, rather than an expression of sexual freedom, choice and diversity. Secondly, the use of nausea-inducing drugs and electric shock, for example, not only violate the dignity of a patient, but also, at worst, constitute forms of torture. Third, the philosophy of reparative therapy, premised as it is on the notion that homosexuality is an illness, assumes that all same-sex desiring clients are ultimately in need of “conversion.” The details, desires and concerns in a client’s life — as well as a therapist’s own biases — are rendered irrelevant. (Narrain and Khaitan)

The following testimonial aptly sums up the horror of reparative therapy and the way in which the existence of Section 377 further exacerbates the patient’s suffering, and also prevents him from seeking his constitutional right to justice and legal recourse. Until the law stays as is, no change can be brought about within the mental health profession, and cases like this will continue to destroy the lives of innocents.

REPARATIVE THERAPY, SECTION 377 AND HUMAN RIGHTS VIOLATIONS

A petition was filed in the case of a patient from the All India Institute for Medical Sciences (AIIMS), who was being treated by a doctor at AIIMS psychiatry department for the past four years so as to cure him of his homosexuality. The patient himself noted that “Men, who are confused about their sexuality, need to be given the opportunity to go back to heterosexuality. I have never been confused but was nevertheless told that I had to be ‘cured’ of my homosexuality. The doctor put me on drugs which I had been taking for four years.”

The patient went to Naz Foundation India (an organization working on MSM issues), and the coordinator of the MSM Project there filed a complaint with the National Human Rights Commission (NHRC) alleging psychiatric abuse involving a patient at the All India Institute of Medical Sciences (AIIMS). The treatment reportedly involved two components: counseling therapy and drugs. During counseling therapy sessions, the doctor explicitly told the patient that he needed to curb his homosexual fantasies, as well as start making women rather than men the objects of his desire. The doctor also administered drugs intended to change the sexual orientation of the patient, providing loose drugs from his stock rather than disclosing the identity of the drug through formal prescription. The patient reports experiencing serious emotional and psychological trauma and damage, as well as a feeling of personal violation.

The moment the petition was filed there was a wide mobilization of the sexuality minority community and a number of letters were written to the NHRC urging the NHRC to protect the rights of the sexuality minority community. The NHRC after admitting the complaint (No. 3920) finally choose to reject it. Informal conversations with the Chairman of the NHRC revealed that the Chairman believed that till Section 377, Indian Penal Code, went, nothing could be done and anyway most of these organizations were

foreign funded and there was no real grass roots support. According to another NHRC source, “homosexuality is an offence under IPC, isn’t it? So, do you want us to take cognizance of something that is an offence?”

(The Pioneer, 2nd August, 2001)

TESTIMONIAL: VIOLATIONS AGAINST HIJRAS AND KOTHIS¹

In 2002, four kothi sex workers, Seeta, Sheela, Vimla and Malathi were picked up from the streets by the police and taken to Sampangiramanagara police station in Bangalore. In the police station, they were harassed and severely beaten up, resulting in injuries on their hands, arms and feet. They were later released, without any charges, but with a warning that they should not be seen on the streets of Bangalore again.

In a state of considerable physical pain and mental anguish, and despite feeling insecure about appearing in public, they approached Sangama, a sexuality minority rights organisation, with this complaint. The police had been threatening them on a regular basis in an attempt to “cleanse” the streets of hijra and kothi sex workers even when they are not trying to solicit clients, which is a crime under Sec8(b) of the Immoral Traffic Prevention Act(1986).

Nasir, a 27 year old kothi, states: “The Sampangiramanagara police filed a false case against me under a wrong name (Saleem) and my father’s name as Abdul, and put me in the lock-up. When I protested against this confinement, they told me we cannot do anything with you, so just be here. I was made to be there until 11 p.m. and after approximately an hour, three policemen came to me and asked me whether I have a penis or not, ‘Let us see’. When I didn’t listen to them, they started hitting me in order to make me take off my clothes. One policeman put a stick into my anus saying you are a *khoja* (derogatory term used for kothi/hijra). And then one policeman forcibly inserted his penis in my mouth and the other in my anus and so did the others one by one, till they all came out and left me. In the morning at around 5 am I said ‘I want to go back home, my brother will be waiting and worried about me’. Then they said ‘let the police inspector and the police person who brought you here come back then we will let you go’. At 9 pm my fingerprints

¹ From PUCL-K Report, 2002.

and footprints were taken, I asked them why my fingerprints were being taken 'I am not a murderer'. They shouted at me saying 'do as we say'. At 1:30 pm, I was taken to the Bangalore City Police Commissioner's office where my photographs were taken after which I was taken back to the police station and told to sign some papers which I did. Around 2 pm, I was taken to the magistrate's house; there we had to wait for half an hour because he had gone to a wedding. Then the police told me to agree with whatever we ask you in front of the magistrate and not to say anything else or we will beat you. But when he arrived I told him that I had not made any mistake I was innocent. But even the magistrate did not listen to me, he told me to leave .Next I was taken to the Central Prison where the police went through my clothes and took away my belt, my house keys and whatever little money I was left with after the police in the police station had taken most of it".

Geetanjali, a 23 year old hijra states: "They took me to Cubbon Park Police station where the police did not ask me anything but just beat me up. None of the policemen tried to listen to my account of the incident when I tried to explain it to them. Eight policemen beat me up and put me in the lock up. They were so curious to know if I had a penis that they stripped me. They hung me up horizontally with ropes and beat me black and blue".

SECTION 377 AND HIV/AIDS INTERVENTION & PREVENTION EFFORTS

It is widely known that power inequalities shape, and even determine, the vulnerability of a group or an individual to HIV/AIDS. A wife or a sex-worker who is unable to even begin negotiating condom use with a male sexual partner comes to mind immediately as an example of how disempowerment breeds vulnerability. For gay, lesbian, bisexual, transgendered and hijra communities, pervasive social attitudes make it near impossible to speak of our desires and sexual choice. When it comes to those who are not meant to experience desire (read women), or not meant to experience certain forms of desire (read gay men, lesbian women, hijras, sex-workers, kothis), HIV/AIDS prevention work runs into serious trouble. The heavy presence of Section 377 which criminalises (and therefore renders unspeakable) all non-procreative acts of sex, makes effective HIV/AIDS prevention efforts even more difficult. In short, we have a battle on our hands.

Those whose sexualities have been deemed to be “deviant” from the heterosexual norm are increasingly vulnerable to HIV/AIDS because of a denial of basic human rights. This is a denial that is justified and enabled by the archaic Section 377, which persists despite the Law Commission of India’s 172nd Report (25th March 2000) which recommended that Section 377 be dropped. Gay men, lesbian women, people, hijras, sex-workers (female, male or transgendered) and kothis (biological men who have sex with men, and identify as feminine) have all been left more vulnerable to the AIDS pandemic. Anecdotal data and documented research have discussed the barriers and impediments created by Section 377 IPC for HIV/AIDS prevention and intervention efforts, especially among MSM (Men who have Sex with Men).

The adverse impact of Section 377 on HIV/AIDS intervention and prevention efforts with non-heterosexual individuals and communities can be felt at all levels:

1. Section 377 legitimizes the social stigma and biases that make people of marginalised sexualities reluctant to access counseling and health care services, critical to the reduction and prevention of HIV. Owing to this stigmatization, HIV/AIDS intervention programs often do not have the information or understanding of diverse sexualities to be able to intervene and impact risk reduction efforts effectively. Even when appropriate

interventions are planned, members of marginalised communities are often suspicious that information about their sexual practice/orientation may be made public. All of these factors, logically, make many people resist accessing health services at all.

2. The fear and risk of attracting criminal liability, social discrimination and stigma leads to a lack of safe, social spaces for those belonging to marginalised sexualities. Sexual encounters are therefore often hurried and furtive with little chance of negotiating safer sex practices, thus leading to a greater vulnerability of HIV infection.
3. Activities related to reducing the risk of HIV infection such as condom promotion/distribution among these communities have been construed as abetting and aiding a criminal act under Section 377. Information on safer sex practices for MSM is also often labeled as “criminally obscene” material and then confiscated by state actors (as illustrated by the Lucknow incident in 2001, detailed below).
4. The existence of Section 377 also discourages sexually marginalised people from forming support systems/groups within and for the community. Such support systems are essential for effective HIV/AIDS intervention and prevention efforts.
5. All these violations of rights are directly opposed to the rights based approach recognised in the National AIDS Prevention and Control Policy which emphasizes that respecting the rights of those who are most at risk of HIV infection is the only way HIV can be prevented or controlled. While MSM find mention in NACO documents, and certain groups working with MSM receive grants from NACO, none of the public awareness messages even address MSM. Curiously, even as NACO admits that outreach to MSM populations is critical, Section 377 makes any safe access to these populations impossible, thereby making it impossible to have a unified and effective AIDS control policy in the country.

NACO’s acknowledgement of the existence of MSM needs to be located in the context of the large inflows of foreign funding into the country for HIV/AIDS prevention and education. This funding has necessitated progressive posturing at international fora by the Indian government. The government was vocal in its support for the inclusion of the International Gay and Lesbian Human Rights Commission in the UN General Assembly Special Session on HIV/AIDS in June 2001. However, at the recent UN Human Rights

Committee meeting held in Geneva (May 2003), India was one of the nations that called for the postponement till 2004 discussion of a landmark resolution on 'Human Rights and Sexual Orientation' introduced by Brazil.

The hypocrisy of the State vis-à-vis HIV/AIDS was further exposed when workers of Bharosa Trust and Naz Foundation International, NGOs working on HIV/AIDS related issues with MSM in Lucknow, were arrested in 2001 (this was exactly twelve days after the posturing by the Indian government at the UNGASS as mentioned above). The charges under which the arrests were made included Section 377, criminal conspiracy, abetment and possession/sale of obscene materials. According to a lawyer's report, while under arrest, the four "were beaten, denied food, forced to drink sewer water, abused regularly, and refused treatment when they got sick." Lucknow's then Superintendent of Police, Mr. B.B. Bakshi, publicly stated that he would like to "eradicate homosexuality, which is against Indian culture." What the Lucknow incident demonstrates is the fact that the State does not only fail to live up to its claims in the international arena, but actively prevents the realization of a right to health for sexually marginalised people domestically and punishes those that seek to make an effort to do so.

TESTIMONIAL: NON-RECOGNITION OF SEX REASSIGNMENT SURGERY¹

Through a sex change operation in 1987, Tarulata (33) became a man named Tarun Kumar and married Lila Chavda (23) in December 1989. They were close friends for five years prior to this. Claiming it to be a lesbian relationship, Lila's father petitioned the Gujarat High Court praying that the marriage be annulled (*India Today*, April 15, 1990).

He contended: "Tarun Kumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children. Adoption of any unnatural mechanism does not create manhood and as such Tarun Kumar is not male."

Oddly, Section 377, IPC, was invoked for criminal action. It was argued that Tarun Kumar was not a Hindu male at the time of his birth. The High Court issued a notice to the respondents including the doctor who conducted the surgery and the registrar of marriages.

The same issue of *India Today* quoted the courageous couple: "There is nothing unusual about our relationship as we live like any other married couple. Even if the Court declares our marriage null and void we shall continue to live together because we are emotionally attached to each other".

¹ From *Less Than Gay*, 1991.

A PERSPECTIVE FROM THE WOMEN'S MOVEMENT*

“Personal is political” has long been a rallying point for the women’s movement, and never has it been as much applicable as in the realm of sexuality. From abortion rights to the use of contraception, women’s groups have campaigned for the right to control sexuality and bodily integrity. For women, the only legitimate expression of sexuality has been within heterosexual marriage, rigidly circumscribed by caste and community. Sex for pleasure has traditionally been taboo for women, who are expected to merely “submit” to the sexual act to satisfy their husbands and produce children, preferably a son. Of course, whores/ prostitutes/ sex workers are at the other end of the scale, their entire existence constructed around sex. Patriarchal control of women’s sexuality is reinforced by laws, as well as biases of the judiciary, to bolster attempts to maintain the unit of family – however oppressive or violent it may be.

Section 377 and the government’s unwillingness to repeal it sums up the historical attitude of the Anglo-Saxon legal system toward non-procreative eroticism, usually going under the broad – if inaccurate – term “sodomy”. The Indian legal system has not only taken on this perspective, but has added on its own brand of prudishness. The psychological discomfort of repressed or moralistic individuals from centuries before created a jurisprudence consigning the enjoyment of non-procreative sex to the status of criminality. While Section 377 does not refer specifically to homosexuality, the outlawed “acts” can be construed as such, and male homosexuals have borne the brunt of this archaic law, often subjected to police harassment and extortion due to their sexual preference. If “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal” can invite a maximum sentence of life imprisonment and fine, a large proportion of the adult population of the country could be behind bars and taking loans to pay fines for having “sex against the order of nature”.

“UNNATURAL” SEX

Sex itself has been little-talked about in the land of the Kama Sutra, and a stony silence has surrounded non-procreative eroticism and sex for pleasure. However, already rattling the cupboard doors when the government family planning propaganda in the mass

* There are diverse positions on how Section 377 should be handled within the women’s movement

media had every child talking about the relative merits of Mala-D vs. Nirodh (even blown up as balloons by children!), the AIDS scare over the past decade or so has dragged sex truly out of the closet.

Sexuality is increasingly seen as fluid and as a range of behaviours and situations that go beyond inflexible binary categories of “heterosexual” or “homosexual”. Surveys on sexuality, published in popular magazines, reveal that Indians are not as “straight” as the government would like to believe. A whole range of sexual behaviour is prevalent: oral sex (both fellatio and cunnilingus), masturbation, mutual masturbation, inter-femoral intercourse and tribadism. Thus, although it is amply clear that sex-for-procreation between one man and woman in the missionary position is not universal, all other “unnatural acts”, since they are not “procreative”, would by definition be unlawful!

Although myths, taboos and stigma around sex persist, there is a perceptible opening up about issues of sexuality in general and women’s sexuality in particular. Yet there is a large gap between social reality and legislation and judicial attitudes. Section 377 is untenable since the Indian government itself no longer supports the assumption of sex-for-procreation, given that it invests large amounts annually, promoting measures of birth control and contraception for population control.

Moreover, medical technology existing since 1978 with the birth of the first test-tube baby has made claims to heterosexuality’s social or biological “necessity” invalid. Sexual activity is no longer essential for reproduction, and healthy sexuality is being recognized as desirable. The very notions of “gender” and “sex” are being challenged, with increasing acceptance of gender and sex as shifting categories – an understanding brought about by the growing visibility of transgendered persons. The law, to be ready for the morrow like the traveller, must recognize that fact.

SEX AMONG WOMEN

Originally, sodomy referred only to two sexual acts: anal intercourse between two men or a man and a woman, and sexual intercourse between a human being and an infrahuman animal of the opposite sex. Due to the ignorance of biology in the medieval times, it was thought possible that bestiality could lead to conceiving a half-human, half-

itself and this is only one of them.

beast offspring. Sodomy was condemned because the devil was thought to engage in such activity with witches. Thus, with the fear of supernatural forces overwhelming God's good people, harshness was considered necessary self-defense.¹

The appellation "crime against nature" was coined by English jurist William Blackstone (1723-80). Male-male sex came to the attention of the law before sex between women because of differences in sexual behavior. In general, males are more likely to engage in sexual activity in public or semi-public places than are females. Moreover, sex between women was viewed as an oxymoron. In a case from Scotland, dating to 1811, the House of Lords decided, regarding a charge of cunnilingus between two women, "the crime here alleged has no existence." In the US, in 1913, the Missouri Supreme Court refused to permit a cunnilingus conviction to stand because the Court could not conceive of sexual activity without a penis and said that sexual intercourse could not be accomplished with the mouth.

In India, lesbians and bisexual women are organizing and demanding visibility and social recognition of their relationships, demanding an end to harassment and violence. Ironically, the current marginalisation in law is also seen by some to be advantageous, since female-female sex is not specifically criminalised. Section 377 has nevertheless been used to harass lesbian women and compel them into heterosexual marriages. More and more lesbian women's suicides coming to light are evidence of the need for social recognition and decriminalisation of non-heterosexual sexuality.

Lesbian and bisexual women have had an uphill struggle not only vis-à-vis mainstream society, but also within the women's movement itself. Their issues have been brought squarely on the agenda of the Indian women's movement in recent times by LGBT groups, and women's groups as well as democratic rights groups have been forced to confront prejudices and challenge premises earlier taken for granted. Alliances are being forged, and mutual dialogue has enabled a collective understanding to develop and the struggle to move forward.

¹ Painter, George: *The Sensibilities of Our Forefathers - The History of Sodomy Laws in the United States*. Source: <http://www.sodomylaws.org>

THE ISSUE OF CONSENT

The women's movement in India has engaged far more intensely with the violent aspects of sex. About 25 years ago began the campaign to amend laws relating to rape. We articulated the understanding that sexual violence exists because of power exercised by men over women within the patriarchal societal structures, which are further graded through caste, class and religious divisions. One of the common concerns for women's groups has been the definition of the term rape itself. We have consistently asked for a wider definition of sexual assault, which would move away from the typical penile-vaginal penetration as the ultimate crime and violation. This broadening of the notion is being attempted in all cases of sexual assault – i.e. non-consensual penetration of the vagina, anus or mouth by the penis, finger or any other object. Assault here is defined in terms of lack of consent and violation of bodily integrity rather than on grounds of morality.

It is appropriate to mention here that the government is equally reluctant to make marital rape an offence, because it would interfere with the "sacred" relationship between husband and wife. The husband is assumed to have the right to have sex with his wife by virtue of the fact of marriage, and consent is assumed for all time. This obnoxious notion has been challenged time and again, with attempts to bring marital rape into the purview of the rape law. Yet, the law has no qualms about invading the privacy of consenting adults to engage in the sexual activity of their choice. Any law that appears to threaten the institution of the family and marriage faces an uphill struggle, and the solicited repeal of Section 377, challenging notions of morality, family and heterosexual marriage, particularly so.

One of the central arguments for retaining 377 is that it protects children from sexual assault. This is not sufficient justification to uphold an oppressive law that victimizes sexual minorities. Protection for children can and must be achieved through an amendment of laws on sexual assault. Again, while it is true that Section 377 has been used (very rarely, it may be noted) in cases of forced anal or oral sex between a man and woman, this is not sufficient justification for retention of this section. Reformulating the laws on sexual assault will enable forced sexual acts (of whatever description) to come under the purview of the law. The issue here is force and lack of consent, not nature of the sexual act. Merely because the state has long interfered with sexual activity between consenting adults, there is not sufficient constitutional justification for permitting it to continue doing so.

TESTIMONIAL: POLICE HARASSMENT

On 22nd April 2000 at Bangalore, 10 men were picked up in the same area and taken to the Vidhana Soudha police station, where they were verbally abused, some were badly beaten up, all their money taken, and their addresses taken down along with threats to inform families and embarrass them.

When the Joint Commissioner of Police Dr. Ajai Kumar Singh was asked what the police view was on the subject of gay rights, he said: "Homosexuality is an offence under Section 377 of the Indian Penal Code and it is the duty of the police to prevent any kind of offence from happening. If the cop on duty questions or prevents any form of crime, he is only doing his job. Where is the question of harassment or atrocity? These are not cases of human rights violation because these groups are not legally recognised. Let them repeal the IPC Act, which bans Homosexuality".

About extortion, Mr. Hegde admitted that policemen are not all "Satya Harishchandras" and it was possible that some of them do extort money from homosexuals but the problem was that homosexuals do not come forward to lodge a complaint due to social stigma. As regards the nature of homosexuality, Mr. Hegde was quite clear that it was an animal-like behaviour.

SECTION 377 AND HUMAN RIGHTS VIOLATIONS

The Government of India, in response to the petition calling for the decriminalisation of adult, consensual sex filed in the Delhi High Court by the Naz Foundation, stated that Section 377 IPC could not be challenged because Indian society by and large does not approve of homosexuality. In this assertion, the government has failed to recognize that the laws of this land are meant to protect and promote human rights of all its citizens, irrespective of what it claims to be the popular sentiments of the majority. The majority-minority framework is clearly a dubious one, considering that sexual acts deemed to be “against the order of nature” include oral and anal sex, irrespective of whether these acts are performed between men and men, women and women or, significantly, women and men.

Even in those cases where the State does not perpetrate overt violations itself, the mere existence of a law such as 377 shows disregard for a range of Fundamental Rights as guaranteed in Part III of the Constitution. These include the right to life and liberty, as stated in Article 21 (and which includes the rights to health and privacy); the right to equality (Article 14); and, under Article 19, the freedoms of speech, movement, assembly, to carry on a profession or business and the right to reside. As the testimonies throughout this pamphlet demonstrate — through stories of forced medical “correction,” loss of employment or residence, or the inability to speak freely or assemble — Section 377 is violative of fundamental rights. And as the Constitution clearly states, such a law must therefore be deemed unconstitutional.

Section 377 also contributes to a culture of injustice. It does this by rendering “lawful” and thereby strengthening those discriminatory social attitudes that implicate all of us in insidious ways. The morality enshrined in Section 377 seeks to generate shame, secrecy and guilt around sexuality — tools that patriarchy has long found useful to ensure that women do not exercise choice. It disallows citizens from exercising rights positively defined as sexual rights. But while this law succeeds in constructing the norms for all people’s sexualities, Section 377 has specific implications for same-sex desiring individuals and communities.

In considering how the human rights of sexual minorities are violated, we must recognize that violations take place both at the hands of State as well as by non-State actors as diverse as the family, the media and medical practitioners. There is clearly a symbiotic relationship between State discrimination and societal discrimination. The principle of due diligence, upheld in word but not deed by the Government of India, demands that the State takes steps towards prevention, investigation, prosecution, and redressal of violations committed by non-State actors. But the state's complicity in violations perpetrated by private citizens is manifested through its unwillingness to protect same-sex desiring people and communities from human rights abuses, and laws such as Section 377 only formalize this unlawful and unjust arrangement.

The unenviable status of those who do not conform to the heterosexual framework is being increasingly documented. Numerous reports, including those brought out by the People's Union of Civil Liberty, Karnataka (PUCL-K), show how the human dignity of gay, lesbian, hijra, transgender and bisexual people is repeatedly violated. The violations range from the repeated rape of a hijra by a policeman, to the agony of a gay college student disowned by her parents, to the terrible trauma of a person forced to undergo painful medical therapy in order to be "cured" of his homosexuality. The routine police harassment of gay men and the large number of documented double suicides of women who tried to live their lives together further paints a depressing picture of the conditions of fear, intimidation and violence under which sexual minorities in India live their lives.

The international community of human rights advocates have increasingly recognised the need to engage with the specific violations faced by gay, lesbian, bisexual and transgendered people. This felt need has been supported by covenants and declarations. In 1991, Amnesty International drew up a policy to support the rights of people imprisoned because of their sexual orientation or because of engaging in homosexual activity in private. International concern with the rights of sexual minorities gained momentum after the decision in *Toonen v. State of Tasmania* in which the Human Rights Committee held that the anti-sodomy statute (very similar to Section 377 of the IPC) violated the rights to privacy and equal protection under international human rights conventions signed by Tasmania. In South Africa, too, the constitutional court has recently declared the anti sodomy statute unconstitutional as it violated the rights to privacy and dignity of homosexual people. Other

significant changes include an amendment to the South African constitution which prohibits discrimination on the grounds of sexual orientation, as well as the EU's requirement that all European Union members must remove any law that discriminates against gay, lesbian and bisexual people.

Turning the gaze to civil society, sexuality is often dismissed, even in self-declared liberal and radical circles, as a frivolous or bourgeois issue. In such a context, homosexuality is implicitly seen as something “abnormal” that is at best defended as an individual freedom but not as a matter of human rights. Generally, issues of poverty, gender, class and caste oppression are seen as more relevant than examining oppression based on sexual difference. But this ignores the fact that sexuality is integrally linked to all structures of social oppression such as patriarchy, capitalism, the caste system and religious fundamentalism. It is ironic, to say the least, when human rights activists, who claim to subscribe to principles of indivisibility and inter-connectedness of rights, reduce sexual rights to the rights of a discrete minority. We mustn't fail to recognize that the call for sexual rights is not distinct from — and is, in fact, integral to — the broader human rights struggle for economic, political and social justice.

APPENDICES

GAY RIGHTS ARE HUMAN RIGHTS!

A Statement by Amnesty International India against Section 377

Sexual orientation is not merely an issue of individual freedom. It is a basic human right because laws and practices aimed at coercing individuals to alter or deny their sexual orientation, or punishing them for not doing so, attack a deep-rooted aspect of human personality. They inflict huge psychological as well as physical violence, because it undermines the basic dignity and worth of the individual by forcing them to surrender or deny the core of their physical and mental integrity as a person. The criminalisation of sexual orientation and identity and adult consensual same-sex relations is therefore recognized a violation of human rights.

Sexual Orientation and International Human Rights Law

International human rights law on this question is clear and settled. In 1994 the UN Committee on Human Rights, which monitors States' compliance with the ICCPR (International Covenant on Civil and Political Rights, which India acceded to (ratified) in 1979) ruled that laws that criminalise same sex behaviour violated the human right to freedom from non-discrimination and the human right to privacy. The Committee noted that reference to "sex" in the non-discrimination clauses of the ICCPR - Articles 2(1) and 26 - should be taken as including "sexual orientation", thereby setting out that the rights set out in the ICCPR cannot be denied to any individual because of their sexual orientation. See *Toonen v. Australia*, (Views on Communication, No 488/1992, adopted 31 March 1994, UN Committee on Human Rights).

The UN Human Rights Committee (referred to above) has since urged states not only to repeal laws that criminalise homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitutions or other fundamental laws (Concluding Observations: Poland, 29 July 1999, UN Committee Human Rights).

Other UN human rights monitoring bodies have also emphasised that discrimination on the basis of sexual orientation is prohibited under international legal standards. These include the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of

Discrimination Against Women and the Committee on Economic Social and Cultural Rights (General Comment 14, para 18).

Section 377, Indian Penal Code (IPC)

Amnesty International India believes that the **Government of India's defence of Section 377 of the IPC constitutes a deliberate and wilful violation of international human rights law**, specifically India's obligations under the ICCPR.

Amnesty International India maintains that the stand of the Government of India [GoI] in their submission in the Naz case, that public opinion is not in favour of homosexual behaviour is an attempt to obfuscate the issue. The GoI's submission represents an attempt to preserve a colonial legal heritage through the creation of sociological and legal fiction.

The law cannot recognise rights only in private, while disowning them in public. The law has to be based on human rights principles and standards and cannot blindly follow public opinion. Indeed if that were to be the case the practice of untouchability, child marriage, child labour etc would all have to be legalised given their widespread prevalence and acceptability in society. Further section 377 is in no way equipped to deal with the crime of child sexual abuse and is in fact an impediment in securing prosecutions for child sexual abuse.

There have been attempts by the GoI and others to portray the issue of the right to sexual identity as a 'western' concern. This position ignores the fact that in a growing number of 'southern' countries – discrimination on the grounds of sexual orientation is prohibited. These include Philippines, South Africa, Mexico and Bulgaria. Other states including Indonesia, Kazakhstan, Chile, Romania and Azerbaijan do not criminalise adult consensual same sex relations.

The GoI's submission in the Naz case comes despite the growing consciousness towards sexual orientation in Asia by Governments in Taiwan, Japan, Thailand and Singapore.

Amnesty International India calls for the immediate repeal of Section 377, the legal recognition of the right not to discriminated against because of one's sexual orientation or identity **and the enactment of a separate legislation, in line with international human rights standards, on child sexual abuse.**

Amnesty International India fully supports the campaign launched by various civil society groups under the banner 'Voices Against Section 377'. Amnesty International India believes

that what is at stake is not individual freedoms but the basic human right to one's physical and mental integrity and the right to be free from discrimination.

This is not an issue of only the lesbian, gay, bisexual or transgender community, instead it is a human rights issue that concerns us all. If we tolerate the denial of rights to any group, we undermine the whole protective framework of human rights by taking away its central plank – the equal rights and dignity of all human beings. Amnesty International India therefore appeals to all sections of civil society to support this campaign to repeal an unjust law.

SECTION 377 VIOLATES INTERNATIONAL HUMAN RIGHTS CONVENTIONS

- ***Universal Declaration of Human Rights*** – ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ (Article 5).
- ***UN Human Rights Committee*** in one of the cases noted that reference to ‘sex’ in the non-discrimination clause of the ICCPR should include sexual orientation.
- The ***UN Human Rights Commission*** has urged states not only to repeal laws criminalising homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitution or other fundamental laws.
- ***Beijing PFA*** – ‘the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence’.

OPEN LETTER IN RESPONSE TO THE GOVERNMENT AFFIDAVIT ON SECTION 377

QUOTES FROM THE GOVERNMENT'S AFFIDAVIT FILED BEFORE THE DELHI HIGH COURT AT THE HEARING OF THE SECTION 377 PETITION ON 9TH SEPTEMBER 2003

Quoting the 42nd report of the Law Commission, the government claims that "Indian

On 9th September, 2003, the Union Government filed an affidavit in response to a petition filed by the Naz Foundation (India) Trust before the Delhi High Court, asking the court to decriminalise private, consensual adult sexual behavior. The Government's response is cause for grave concern — its position is in contravention to its role

as the upholder of the fundamental rights of all citizens.

The government affidavit supports Section 377 of the Indian Penal Code, which states that 'whosoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life or 10 years'. With respect to the arguments presented by the State, we, as concerned citizens and representatives of women's groups, child rights groups, human rights organisations, sexual minorities groups, and NGOs seek to clarify that:

(a) The State cannot deny that Section 377 violates the rights of Indian citizens. Section 377, in its present form, denies the right of sexual expression. Other than same-sex sexual acts, non-procreative heterosexual acts including oral and anal sex also fall under the purview of this law. Moreover, Section 377 violates the right to life and liberty, the right to health and the right to equality before the law and freedom from discrimination for many sections of society such as gays, lesbians, bisexuals, transgender people and hijras. These people are affected by Section 377 on a day to day basis. The stigmatisation attached to their choices is so severe that they are disowned by their families, subjected to shock therapy by doctors, are brutally harassed by the police, and are unable to avail of legal redress against discrimination. Section 377 is also used by the police to threaten NGO workers who distribute condoms and impart safe sex education amongst, for instance, men who have sex with men — communities extremely vulnerable to the transmission of the HIV virus — with charges of abetment of and attempt to commit Section 377.

(b) By speaking the language of moral panic, the State is seeking to draw attention away from these tangible human rights violations. It is a fundamentally flawed logic that the government is using when it argues that legal reform cannot take place because 'Indian society by and large disapproves of homosexuality'. The government cannot impinge upon the rights of citizens who fall outside its ideas of 'Indianness'. Indian culture is not monolithic; it cannot be used as an excuse for discrimination. Diverse sexual expression is a well-recorded part of India's history and of her culture. Moreover, our laws are meant to enshrine principles of justice that Indian society should abide by. If all laws were drafted on the basis of popular opinion, progressive legislations such as the anti-Sati and anti-dowry laws would not have been possible.

(c) The deliberate and repeated assertion by the government that this petition will prevent the court from being able to protect children from sexual abuse is patently false. The petition is not seeking a repeal of Section 377, but merely a decriminalisation of consensual, private, adult sexual behaviour. Should the petition succeed, the state's ability to use Section 377 in child sexual abuse cases remains unaffected.

As individuals and groups that support and affirm the rights of gay, lesbian, bisexual, hijra, and transgendered people, we demand that the government enable the protection by the law of all citizens, without discrimination based on gender or sexual orientation. Towards this end, there is an urgent need to decriminalise sex between consenting adults. It is not the business of government to decide what people choose to do with complete consent without infringing on the rights of any other citizen. It is the business of the government, however, to frame effective laws that prosecute heinous crimes such as child sexual abuse.

The government has stated in its affidavit each of the fundamental rights are subject to 'reasonable restrictions'. Restricting the access of millions of citizens to proper health care, failing to address rampant discrimination on the basis of their sexual preference, failing to protect them from harassment by the police and criminalising their consensual sexual acts while hiding behind the fig leaf of protecting Indian culture, are not reasonable restrictions by any standards. We urge the government to reconsider its position, bringing it in line with the requirements of the Constitution of India with regard to Fundamental Rights of every citizen and with the Universal Declaration of Human Rights.

PRISM LEAFLET ON SECTION 377

Do you know Section 377 of the Indian Penal Code?

It criminalises sexual activity between consenting adults.

Do you know we don't have a law that punishes sexual abuse of children, but we have laws that say you cannot choose to have oral sex in the privacy of your bedroom even if you are married?

Do you know that a child molestor was acquitted because the child he abused was "too young" to have a sense of modesty?

Do you know that two women were jailed and lost their jobs because they wanted to marry each other?

Do you know that Section 377 allows the state to discriminate between citizens; that it encourages the police to harass and blackmail gay men?

Violates the fundamental rights guaranteed to all
citizens by our Constitution? Leads to loss of jobs
and life?

Do you know how many people have died from HIV because they were
too scared to tell their doctor they were gay?

countless

Do you know how many gay men have been raped by policemen?

countless

Do you know how many lesbians have been forced to marry?

Countless

Open your mind. It's a matter of life. Or death.

HALLA BOL!

Release Human Rights Workers!

Stop harassing NGOs!

On 7th July, 2001, the Uttar Pradesh police raided the offices and arrested members of Bharosa Trust and Naz Foundation International (NFI) in Lucknow, both NGOs working on HIV/ AIDS intervention with the men who have sex with men (MSM) community. NFI specifically provides technical support to HIV/ AIDS intervention work. All the staffers were subsequently beaten at the police station.

The police seized literature and materials used for educating MSM on safer sex practices, on the basis of which they charged the staff members with sale, etc., of obscene materials. Even more dangerous are charges of violations of the Copyright and Indecent Representation of Women Acts. These last two expose the mindset of the UP police, which has been harassing and intimidating NGO workers across the state. It may be recalled that an NGO was recently charged under the National Security Act, and other NGO workers have also been branded naxalites. In this case too, the workers have been interrogated by the Intelligence Bureau to investigate 'possible links' with Pakistan's ISI!

The staff were also charged under the antiquated Section 377 of the Indian Penal Code which criminalises consensual sex. That too when no case of sodomy exists, according to the police's own report. Yet the Chief Judicial Magistrate and the Sessions Court have denied them bail on the grounds that they are a '*curse on society*'. These grounds are not acceptable under law.

This police action has dangerous implications for all sexual health projects in India and on the work being done by HIV/ AIDS intervention NGOs with vulnerable populations like sex workers, drug users and MSM, who become open to such abuse and victimisation by organs of the state, including the police.

Bharosa was working *within* the guidelines set by the Government of India pertaining to HIV/ AIDS intervention work. The injustice is compounded by the fact that the government has stated unequivocally in international fora like the United Nations General Assembly Special Session (UNGASS) on HIV/ AIDS that LGBT (Lesbian, Gay, Bisexual and Transsexual) people are a vulnerable section that must be included in HIV/ AIDS outreach work. The

charges against the staff and their continued incarceration in jail is a perversion of justice and a direct assault not only on the arrested but also on the rights of MSM to access health information around HIV/ AIDS.

Right to health is covered under the Fundamental Right to Life under Article 21 of the Constitution, and health information cannot be denied to MSM just because of social perception. No one can be criminalised for providing health information.

We demand that the arrested staff be released immediately and that all the charges against them be dropped.

Leaflet on contradictions in the State's actions and deeds brought out after the arrest of NGO workers at Lucknow in July 2001

THE RIGHT HAND KNOWS NOT WHAT THE LEFT HAND IS DOING



A glance at recent Government of India statements/actions with regard to sexual minorities.

On 25 March, 2000 the Law Commission of India, in its 172nd report (review of rape laws), recommends that Section 377 be dropped, clearly stating that “we are of the opinion that Section 377 deserves to be deleted”.

On 26 June, 2001 India vehemently opposes an attempt by 57 countries (the Organization of the Islamic Conference) to exclude the International Gay and Lesbian Human Rights Association from deliberations at the United Nations General Assembly Special Session on HIV/AIDS. Stating unequivocally that excluding IGLHRC would set “a very bad precedent”, that the Indian government recognised gays and lesbians as “a crucial population whose needs had to be addressed in the context of HIV/AIDS” and towards that conducts support programmes catering to the health risks of this community.

On 6 July, 2001, the Union Minister of State for Health, Mr. C.P. Thakur appears on Star News to reiterate India's commitment to including gays, lesbians, bisexuals and transgender people in the Government's HIV intervention efforts.

On 7 July 2001, the Uttar Pradesh police raided the offices and arrested the staff members of Bharosa Trust and Naz Foundation International (NFI) in Lucknow.

On 30 July, 2001, India votes with the Organisations of the Islamic Conference to deny the International Lesbian and Gay Association a place at the United Nations World Conference Against Racism to be held in September in Durban, South Africa.

Government policy on NGOs working on HIV/AIDS: The National Aids Control Policy, specifically mentions “men having sex with men” (MSM) as one of the categories with high risk behaviour and therefore in need of intervention.

SAME SEX DESIRE AND MENTAL HEALTH: AN INTERNATIONAL OVERVIEW

Across the world, medical associations and official bodies of numerous mental health disciplines have de-stigmatized homosexuality and also explicitly prohibited attempts at “reparative therapy”, or conversion therapy. The American Psychoanalytical Association’s 1994 statement perhaps best summarizes the views of the global medical establishment when they describe homosexuality as:

“... neither mental illness nor moral depravity. It is simply the way a minority of our population expresses human love and sexuality. Study after study documents the mental health of gay men and lesbians. Studies of judgment, stability, reliability, and social and vocational adaptiveness all show that gay men and lesbians function every bit as well as heterosexuals.

Contrary to what some imply, the incidence of homosexuality in a population does not appear to change with new moral codes or social mores. Research findings suggest that efforts to repair homosexuals are nothing more than social prejudice garbed in psychological accoutrements.”

Recent statements by professional health and medical organizations include¹:

International

- The **World Health Organization**² removed homosexuality from its list of mental illnesses in 1981.
- The **American Psychiatric Association**³ removed homosexuality from its list of mental illnesses in 1973, though keeping ego-dystonic homosexuality within the DSM. In 1986, even this was removed. The **American Psychological Association**⁴ similarly removed homosexuality from its list of disorders in 1975.

¹ Full texts of all declarations can be obtained from www.nglhf.org

² Full text available at www.who.org

³ The *American Psychiatric Association's* position on Gay and Lesbian Issues is available at: http://www.psych.org/public_info/homose~1.cfm

⁴ The *American Psychological Association's* Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients are available at: <http://www.apa.org/pi/lgb/guideline.html#top>, and its Policy Statements on Lesbian and Gay Issues are available at: <http://www.apa.org/pi/statemen.html>

Voices from India

- The recent guidelines issued by the **Indian Council of Medical Research**¹ include the “Code of Practice, Ethical Consideration and Legal Issues” which, when speaking of the use of Artificial Reproductive Technology (ART), states that: *There would be no bar to the use of ART techniques by single unmarried women or a lesbian couple or a gay couple who wish to have a child and no ART clinic may refuse to offer its services to the above, provided other criteria mentioned in this document are satisfied. The child thus born will have all the legal rights on the woman or the man.*
- Dr. Sandeep Vohra, Senior consulting Psychiatrist of the **Apollo Hospital** and President of the **Delhi Psychiatric Society**, as well as a member of the **Indian Psychiatric Society** has this to say: “Our stand remains the same. Homosexuality is not a disease, and we will continue to treat it that way.”²

Asia

- The **Chinese Psychoanalytical Association** adopted a resolution in 2001 which accepted the guidelines of the 1973 APA resolution and has removed all references to homosexuality in China that refer to it being a pathological disorder.
- The **Department of Mental Health** in **Thailand** has declared homosexuality not to be a mental disease, accepting WHO guidelines issued in 1993.

North America

- The **American Medical Association** (AMA) released a report in 1994-DEC which calls for "nonjudgmental recognition of sexual orientation by physicians."
- The **Academy of Pediatrics**¹ and the **Council on Child and Adolescent Health**
- have also stated that homosexuality is not a disease and that reparative therapy can be very harmful for adolescents.
- In 1999, **American Academy of Pediatrics, American Counseling Association, American Association of School Administrators, American Federation of Teachers, American Psychological Association, American School, Health Association, Interfaith Alliance Foundation, National Association of School**

¹ Guidelines available for public view at <http://icmr.nic.in/home.htm>

² Arvind Narrain and Tarunabh Khaitan, in the paper *Medicalization of homosexuality: a human rights approach*

Psychologists, National Association of Social Workers and National Education Association jointly issued a document titled: "Just the facts about Sexual orientation." They additionally expressed concern about harassment of gay and lesbian youth, condemned reparative therapy as potentially harmful and of little or no effectiveness.

International Governments and Law

- **North America:** Homosexuality is legal in all countries of the continent, and discrimination on the basis of sexual orientation is illegal in most places.
- **Europe:** Charter of Fundamental Rights of the **European Union**, adopted in December 2000, included sexual orientation among the prohibited grounds of discrimination. Gay marriage and full rights to gay and lesbian couples are guaranteed by governments by the **Netherlands, Belgium, and Denmark. Sweden, France, England, Germany, Spain, Portugal, and Switzerland** all recognize same-sex domestic partnerships and prohibit discrimination against homosexuals.
- **Africa:** The constitution of South Africa prohibits any discrimination on the basis of sexual orientation.
- **South America:** Governments of **Argentina, Brazil, and Ecuador**, and the countries of **Central America**, including **Guatemala** and **Belize**, all prohibit discrimination against homosexuality and recognize the rights of same-sex couples.
- **Asia:** Homosexuality is legal in **China, South Korea, Taiwan, Japan, Thailand, Laos, Cambodia, and Vietnam.**²

¹ Policy statement, "*Homosexuality and Adolescence*," American Academy of Pediatrics, Pediatrics, 1993-OCT

² Information cited from www.utpopia-asia.com

PRISM LEAFLET ON EQUAL AND INALIENABLE RIGHTS

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*

We are lesbian, gay, transgender, bisexual, transvestite, eunuch, heterosexual, transsexual and

We have the right to life, liberty and security of person*

We shall not be subjected to interference with our privacy, home or correspondence, nor attacks upon our honour and reputation*

We have the right to recognition everywhere as a person before the law*

We have the right to be equal before the law and are entitled without any discrimination to equal protection*

We have the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers*

We have the right to freedom of peaceful assembly and association*

We have the right to a full and wholesome life.

* *Universal Declaration of Human Rights*, United Nations General Assembly.

PRESS RELEASE

PUBLIC ACTION AGAINST SECTION 377 IN NEW DELHI

July 1, 12pm to 2pm, Jantar Mantar, New Delhi

The public action is a demonstration of solidarity against the injustice meted out through Section 377. All progressive groups and individuals are united in their effort to combat an archaic and oppressive law that provides absolutely no protection to these communities against state and non-state violators of human rights. In addition to protesting the silence around issues of sexuality and homophobia in Indian society, as well as contesting homogenous views of “public morality,” we will be making a direct appeal to the newly formed Congress-led United Progressive Alliance Government to take steps to end discrimination under Section 377. *The existence of this law also hinders the drafting of a substantive new law on Child Sexual Abuse – a law that is critically needed and being constantly demanded by child rights groups across the country.*

We would also like to draw the attention of the UPA Government to the petition filed against Section 377 in the Delhi High Court. The next hearing of the petition is on July 7, 2004. The petition calls for a “reading down” of Section 377, which would imply that consensual same-sex sexual activity between adults and in private would no longer be a criminal offence.

Section 377, as it exists today, violates equal access to the rights of life, health, property and choice. This is a law that affects all of us, regardless of our sexual orientation and goes against the fundamental beliefs of this nation – democracy, equality, a belief in human rights, dignity and freedom from violence for all. **DISCRIMINATION OF ALL KINDS UNDER SECTION 377 MUST END NOW!**

Voices Against 377 is a Delhi-based coalition of groups working on women's rights, child rights, human rights, sexual rights, right to health, and lesbian, gay, bisexual, and transgender issues. This group seeks to draw public attention to Section 377 of the Indian Penal Code, 1860 – the law that penalizes “carnal intercourse against the order of nature” and effectively criminalizes same-sex sexual activity between consenting adults, and even certain sexual practices among heterosexual consenting adults, in private. It is a law that has given legitimacy to gross and sustained human rights violations against lesbian, gay, hijra, transgender and bisexual people, thus negating the constitutional claim of equal citizenship and protection for all.

Thus far, **members of Voices Against 377** include: Amnesty International India, Anjuman, Breakthrough, CREA, Haq, Jagori, Nigah Media Collective, Nirantar, Partners for Law in Development, PRISM, Saheli, Sama and TARSHI. We invite other groups/individuals who would like to lend support or learn more to join us at the public action, and/or contact us at voicesagainst377@hotmail.com.