

## Abstract

*In this era of the rise of the Hindu Right (Hindutva), sexuality is being defined and articulated by activist communities in two distinct ways—both as an identity concern and as a health concern. What are the implications and the ramifications of Hindutva for those working to protect the sexual health and human rights of vulnerable populations as well as for those who are putting forward concerns based on sexual identity? Are the two concerns separate, or do they intersect? This article uses concrete case studies to analyze the effects that Hindutva has had on sexuality and human rights in India. It makes the point that the “queer” in the Indian context becomes the target of Hindutva’s political project, thereby necessitating a rethinking of strategy. These examples clearly demonstrate a larger point: namely that, in a state that criminalizes sodomy, work on health and sexuality must address the surrounding legal and political context.*

*À notre époque de montée de la Droite hindoue (Hindutva), la sexualité est définie et expliquée de deux façons distinctes par les communautés activistes—à la fois comme un problème d’identité et comme un problème de santé. Quelles sont les implications et les ramifications du mouvement Hindutva pour les activistes qui s’efforcent de protéger les droits à la santé sexuelle et les droits humains des populations vulnérables, ainsi que pour les personnes qui expriment des préoccupations basées sur l’identité sexuelle ? Ces deux efforts sont-ils complètement séparés, ou ont-ils des points communs ? Cet article utilise des études de cas concrets pour analyser les effets du mouvement Hindutva sur la sexualité et les droits de l’homme en Inde. Il affirme que le « Queer » dans le contexte indien devient la cible du projet politique du mouvement Hindutva, ce qui nécessite de repenser les stratégies. Ces exemples démontrent clairement un problème de plus grande envergure : à savoir que dans un État qui criminalise la sodomie, les activistes travaillant sur la santé et la sexualité doivent tenir compte du contexte légal et politique de leurs actions.*

*En esta época de ascenso del Derecho Hindú (Hindutva), la sexualidad está siendo definida y expresada por grupos de activistas en dos formas bien diferenciadas: una como un asunto de identidad y dos, como un asunto de salud. ¿Cuáles son las implicaciones y las ramificaciones de la Hindutva para los que se esfuerzan en proteger la salud sexual y los derechos humanos de las poblaciones vulnerables, así como para aquellos que están planteando preocupaciones en base a la identidad sexual? ¿Son los dos temas separados, o se cruzan sus trayectorias? En este artículo, se usa casos concretos para analizar los efectos que la Hindutva ha tenido en la sexualidad y en los derechos humanos en la India. Se explica como los “queer” en el contexto de la India se vuelven el blanco del proyecto político de la Hindutva, exigiendo así una reconsideración de las estrategias. Esos ejemplos demuestran claramente un punto más amplio: concretamente que, en un estado que criminaliza la sodomía, los programas de salud y sexualidad deben abordar el contexto legal y político.*

# THE ARTICULATION OF RIGHTS AROUND SEXUALITY AND HEALTH: Subaltern Queer Cultures in India in the Era of Hindutva

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Issues of sexuality remain inextricably linked to questions of both health and human rights. The discourses surrounding health have had a deeply contradictory impact on the human rights of “queer” people in the Indian context.<sup>1</sup> At one level there is the medical discourse which, under the rubric of the International Classification of Diseases, classifies ego dystonic homosexuality as a pathology. At another level, the emergence of the HIV/AIDS pandemic, and the consequent identification of vulnerable populations such as men who have sex with men (MSM), has opened up spaces for discussion and work around sexuality. This work around sexuality has brought to the fore the existence of various subaltern queer cultures in India as well as the peculiar set of issues that those who come under the rubric of queer have to confront.<sup>2</sup> This form of subaltern assertion has arisen, however, at precisely the moment when a religion-based nationalism—Hindutva—is also on the ascendant.<sup>3</sup>

The events of the past decade, beginning with the demolition of the Babri Masjid in 1991 and culminating with the state-sponsored genocide in Gujarat in 2002, have shown that aggressive Hindu nationalism is poised to challenge secularism, which is a part of the basic structure of the Indian Constitution.<sup>4,5</sup> This fascistic turn in Indian politics has wide-ranging implications. As Aijaz Ahmed notes, “The true object of its [Hindutva’s] desire is not mere Muslim

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submission, but state power and the remaking of India as a whole politically, ideologically, historically; and, true to form, this project of remaking India in its own image involves a great deal of unmaking, both through selective appropriation as well as outright rejection of very large parts of our past and present histories."<sup>6</sup>

In this era of the rise of the Hindu Right, sexuality is being defined and articulated by activist communities in two distinct ways—both as an identity concern (identity-based activists who use the terms sexual minority, gay, lesbian, hira, and queer) and as a health concern. What are the implications and the ramifications of Hindutva for those who are working to protect the sexual health and human rights of vulnerable populations as well as those who are putting forward sexual-identity-based concerns? Are the two concerns separate or do they intersect? And what effects has Hindutva had on sexuality and human rights in India?

### **Subaltern Queer Cultures in the Indian Context**

During the last decade of the 20th century in India, the hitherto private realm of sexuality emerged as a focal point and basis for various forms of political assertion. India is increasingly witness to people asserting their right to be different as sexual beings in terms of their sexual orientation, gender identity, and sexual practices. The more established definitions of activist politics are now being forced to engage with new political concerns articulated by people who claim gay, lesbian, hijra, transgender, kothi, and numerous other identities under the rubric of queer.<sup>7</sup> Common to each of these identities—apart from their roots in sexuality—is their questioning of the heteronormative ideal that claims that the only way in which two human beings can relate romantically, sexually, and emotionally is in a heterosexual context. I use the word queer here in the sense that David Halperin uses it. For Halperin, queer is:

. . . whatever is at odds with the normal, the legitimate, the dominant. "Queer" then demarcates not a positivity, but a positionality vis-à-vis the normative. . . . Queer in any case, does not designate a class of already objectified pathologies or perversions; rather, it describes a horizon of possibility whose precise extent and

heterogeneous scope cannot in principle be delimited in advance. It is from this eccentric positionality occupied by the queer subject that it may become possible to envision a variety of possibilities for reordering the relations among sexual behaviors, erotic identities, constructions of gender, forms of knowledge, regimes of enunciation, logics of representation, modes of self constitution and practices of community.<sup>8</sup>

In India, the word queer is not commonly used. However, the realities of the non-normative experience—i.e., gender identities, sexual practices, sexual identities, culturally sanctioned forms of erotic behavior—all contest the embedded nature of heterosexism in law, medical practice, culture, and society. They have traditionally existed and continue to exist in the contemporary context. It is these diverse forms of identities and practices that come under threat with the rise of a politics that seeks to homogenize these identities within a more puritanical notion of culture.<sup>9</sup>

### **Rights Articulation and Subaltern Queer Cultures: Key Issues**

A well-established framework of rights, applicable through the Constitutional framework, exists in India. The Indian judiciary has played a significant role in expanding the understanding of rights in the Indian context. Various court decisions have made it clear, for instance, that the right to health is a part of the right to life under Article 21 of the Indian Constitution.<sup>10</sup> This right includes, for example, the right to emergency medical care and the right to the maintenance and improvement of public health.

However, the question that remains unanswered is whether subaltern queer people can benefit from this constitutional enunciation of the right to health. Will their queerness remain an impediment to accessing public health resources? In this context, the answer really lies in an understanding of some of the issues that the diverse range of identities and practices described as queer face in India today.

### ***Lack of Social Acceptance***

The struggles of some social movements in India—like the feminist movement and the dalit movement—have by

and large been successful in establishing some legitimacy in the broader public culture. This is due in large part to the coordinated political pressure that these social movements have organized and operationalized. In the realm of queer activism, on the other hand, the struggle for public legitimacy depends upon more people being willing to take forward queer concerns. There are still very few people identifying themselves as queer and taking forward queer issues. In large part, this silence is due to social attitudes both towards sexuality in general and towards what is perceived as perverse sexuality in particular.

Social attitudes of intolerance to queer sexualities become embedded in institutions such as the family, media, law, and work, conditioning the ways in which society understands and speaks about queer people. Pathological and criminological perspectives mold the rhetorical space within which one can speak of queer issues. In particular, the construction of homosexuality by the law and the medical establishment directly affects the issue of social acceptance. These effects can be devastating to individuals:

I approached a psychiatrist, assuming he would help me. "Help" he did. "It's all in the mind," he said. My depression (which I never realized arose from bottling up my gay orientation), he glibly informed [me], was a disease called schizophrenia. "Your gayness is the cause of delusions and hallucinations." He prescribed Orap and Serenace, which are powerful neuroleptic medications. The nightmare began in earnest, lasting 15 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<sup>11</sup>

We can't live apart from each other any more; our homosexual love will not be accepted by the society. Not only that, others have come to know about our homosexual relationship. Even if we get married, we have to live separately from each other." -The suicide note of two lovers, Geetalaxmi and Sumathi<sup>12</sup>

The neighbors started teasing me. They would call out to me and say, "Why don't you go out and work like a man?" or "Why are you staying at home like a girl?" I liked being a girl. I felt shy about going out and working. Relatives would also abuse me about that. Every day I would go out of the house to bring water. And as I would walk back with the water, I would always be teased. I felt very ashamed. I even felt suicidal. How could I live like that? But my parents never complained. They were helpless. Then one day my parents asked me to leave the village to avoid the shame. "Go work somewhere else," they said. I don't know how to read or write. I never went to school. How would I ever get a job? That night I cried a lot. I realized that for my parents, respect in society was much more important than their own son. – Sachin, a 23-year-old kothi<sup>3</sup>

Common to each of these narratives is the extreme hostility of Indian society to any expression of either same-sex desire or gender non-conformity. Societal institutions function under an imperative to mold the non-conformists into a heterosexist framework. The narrative of Hemant, in which the psychiatrist tried to "cure" him of his homosexuality, emphasizes how the discourse of medicine functions to produce what Michel Foucault called "normalized bodies."<sup>14</sup> The suicide note by the two lesbian lovers indicates the tragic realization that "our homosexual love will not be accepted by society." Sachin's narrative powerfully indicates the nature of societal expectations about what masculinity should be. With families valuing their standing in society over their child's happiness, there is no refuge for non-conformists like Sachin.

Thus it is through the medical discourse, as well as the powerful, unwritten codes inscribed in the daily functioning of institutions such as the family, religious institutions, and popular culture, that social intolerance is produced. Social intolerance can have severe psychological effects, as individuals perceive themselves as perverted, dirty, and unclean—forcing some, like Hemant, to attempt to change themselves, or driving others, such as Sumathi and Geetalaxmi, to commit suicide. It is clear that this un-

remitting social intolerance impacts both other people's perceptions of queer people as well as queer people's self-perceptions.

### ***A "Silenced" Community***

The enormous psychological effects of this social intolerance manifest themselves in the social attitudes of those who come within the rubric of queer. The rigorous and harsh policing of the borders of "normal" sexuality means that various forms of fear are part of the daily life of queer people: the fear of being caught by the police, the fear of one's family or colleagues at work discovering one's sexuality, the fear that sooner or later one's secret will be discovered, and so on. This anxiety stems from the fact that discovery could mean a great deal of shame for the person and could have a ruinous impact on his or her future life. The emotion of fear goes hand-in-hand with the feeling of shame about possessing what society insists are abnormal sexual desires. This feeling of guilt mingled with shame is poignantly captured by the following narrative:

I began to dislike myself for being a homosexual and felt ashamed that I had to hide my sexuality all the time. Many questions haunted me. Why did I become a homosexual? Am I not man enough? What if somebody discovers I am gay? Would I be able to live the rest of my life with shame? I could own my sexuality under the cover of darkness, in a world peopled by anonymous individuals; everywhere else I had to suppress it. Leading a double life was tearing me apart.<sup>15</sup>

The result of this fear and shame is that many of those whose desires could be described as queer are extremely wary of taking any steps towards the formation of a queer community. The amorphous group of individuals with same-sex desires and non-conforming gender behaviors is thus in many cases under-confident, silent, and completely closeted about the reality of their queer desires.

This lack of social acceptance and its consequent silencing of individuals and groups has led to the persistent violation of rights of all those who come within the rubric of queer. There is as yet no developed activist vocabulary to

name the violence described above as the necessary outcome when compulsory heterosexuality is embedded as a normative value in popular culture, law, and medical practice. Indeed, such violence has been normalized as a part of the daily existence of queers. The degree of normalization is such that even human rights groups in India generally do not want to have anything to do with queer rights.<sup>16</sup>

A recent report by the People's Union for Civil Liberties-Karnataka (PUCL), unusual in that it brings public attention to this persistent violence and stigma, conceptualizes these violations as inflicted both by the state (through the laws and police) and by civil society (through the family, media, popular culture, workspaces, and household spaces).<sup>17</sup> Emerging prominently and forcefully in this report is the specific nature of the violations—usually both understated and little understood—to which “sexuality minorities” (as the report puts it) are subject. These violations include routine extortion, harassment, abuse, illegal detention, and rape, all of which are perpetrated by the police under the cover of legitimacy provided by the criminal law framework. Such violence is further underwritten by the social codes of intolerance towards queer sexualities.

In fact, one of the characteristics of these violations is their strong basis in civil society. A recent example is the series of reports that appeared in the Kerala press indicating that at least 21 women who wanted to live with their partners have committed suicide.<sup>18</sup> When women decide to take their lives purely on the grounds that their society or family will not tolerate their desire to marry each other or live together, it becomes clearly necessary to expand the traditional focus of rights activism beyond the “state as violator.” It is also essential to examine seriously how institutions such as the family and the community deny basic autonomy to women whose desires do not conform to the norms of heterosexist society.

As noted earlier, mainstream Indian society does not understand the harm and severity of these violations. Even the victimized communities sometimes have little idea how these actions constitute violations that are unacceptable within a human rights framework. The queer internalize the



daily violence and stop seeing it as anything out of the ordinary. Indeed, they may see it as part of the natural order, as evidenced by statements such as those of a hijra person, "The police were very nice; they beat me only once."<sup>19</sup> Statements like these, according to the PUCL team, show "the degree of internalization of self-hatred wherein the person believes that he actually deserved to be beaten up. This is a serious psychological consequence of abuse."<sup>20</sup> These statements further indicate that there is no conception of incidents like these as serious human rights violations.

### **Queer Rights Articulation: Dilemmas Around Section 377 of the Indian Penal Code**

The coercive heteronormative context articulated above significantly impedes those who come within the rubric of queer from enjoying the rights to which they are Constitutionally entitled and, furthermore, creates a situation conducive to persistent violation. Rights articulation remains stillborn, primarily because of the peculiar nature of oppression exercised on queer subjects.

Over the past two decades, however, an emerging activism by various groups has begun to broaden the context within which rights are articulated. The process started with a series of events: a hijra conference in Bhopal in 1986; the founding of *Bombay Dost*, a gay magazine, in Bombay in 1990; the establishment of Sakhi, a lesbian collective, in Delhi in 1991.<sup>21</sup> These protracted but significant beginnings have engendered a number of queer groups in various parts of the country, from the major metropolitan centers to smaller towns such as Akola, Gulbarga, and Trichy. The categorization of men who have sex with men (MSM) as a group vulnerable to the risk of HIV infection by the National AIDS Control Authority (NACO) has resulted in funding for MSM intervention projects and spurred the development of sexual minority networks. This in turn allowed for the formation of groups in cities where MSM interventions were taking place and in the formation of networks between groups in various cities. The initiation of direct political action that would question the ubiquity of violence against the queer, however, is really a result of sus-

tained activism by human rights groups and queer groups, which have played a leading role in questioning that violence as well as the existence of unjust laws.

In particular, concerns have centered around Section 377 of the Indian Penal Code, which is the provision that criminalizes all non-procreative sex and is the de-facto justification for the persecution and harassment of all those whose sexual expressions might qualify as queer. Section 377, drafted in 1860 by Lord Macaulay as a part of the colonial project of regulating and controlling the Indian subject, reads:

**Unnatural sexual offenses:** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment which may extend to ten years, and shall also be liable to fine.

**Explanation:** Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.<sup>22</sup>

Through the past century-and-a-half of judicial interpretation, “carnal intercourse” has come to mean all forms of sex which do not result in procreation. Both anal sex and oral sex (as well as thigh sex) would come under the category of carnal intercourse. Furthermore, there is the requirement that the sex must be penetrative to constitute the offense. The history of the use of Section 377, however, shows that it has predominantly been used to prosecute cases of child sexual abuse (including abuse of both girls and boys). It has never been used to prosecute cases of sex between a heterosexual couple or a lesbian couple. Even in the case of men having sex with each other it has been rarely used.

To base the impact of Section 377 purely on the grounds of the precedent of past court cases, however, might be to misread the issue. Section 377 provides the legitimacy for the police to arrest, blackmail, sexually abuse, and “out” any individual they consider to be violating Section 377. The problem with Section 377 is that it creates and legitimizes the culture of violence and intolerance towards the queer. It is important to note that any further legal change seems to be premised upon the repeal of

Section 377. Whenever queer activists bring up the issue of legal reform, the response of state authorities is inevitably that homosexuality is an offense.<sup>23</sup>

The HIV/AIDS community has also taken up the issue of Section 377, contending it impairs work on HIV/AIDS by criminalizing same-sex acts and thereby driving one of the vectors of the disease underground. The National AIDS Control Authority, a governmental agency, has stated in its policy, "Government will review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups."<sup>24</sup> This bold statement, however, has not been followed by any real action to bring about a change in the criminal law.

The concerns of these two groups—queer advocates and HIV/AIDS activists—intersect in activism around Section 377. Two case studies—the Lucknow case and the constitutional challenge to Section 377—illustrate both the difficulties and opportunities embedded in this activism. Moreover, these case studies demonstrate how an articulation of queer rights can expose the connections of power in the attacks on persons doing HIV/AIDS outreach.

### **The Lucknow Case: Health Interventions as Promoting Deviance**

One of the key problems facing HIV/AIDS advocates in the MSM sector is that constant police harassment and surveillance hamper both fieldwork and outreach among the MSM community. This is perhaps best exemplified by the events in Lucknow in 2001.

On July 7, 2001, the police, acting on a complaint by a man that he had been sodomized by someone in a park, raided the park that was frequented by hijras, kothis, and others who come within the rubric of queer and arrested 10 people. Among those arrested was an activist from Bharosa (an NGO working with the MSM community). Thereafter the police raided the offices of Bharosa and Naz Foundation International (another NGO working on safer-sex issues), seized safer-sex material, and registered a complaint under Section 377 (unnatural sexual offenses), Section 120B (con-

spiracy to commit an offense), Section 109 (abetment), and Section 292 (sale of obscene material).

The arrest was followed by a media blitz with prurient headlines such as "Gay Club Supplied Boys to Politicians," "Gay Culture Started In UP In 1998," "Lucknow Police Raid Gay Clubs, Ten Arrested," and "Call Boy Racket Sends Shock Waves in Lucknow."<sup>25</sup> Both the climate of homophobia generated by the arrests and the subsequent media coverage were sanctioned by state action. B. B. Buxi, Lucknow's Senior Superintendent of Police, claimed, "The two organizations, Naz and Bharosa, were running gay clubs in contrast to Indian culture and ethics under the garb of educating the masses about AIDS and HIV."<sup>26</sup> As if to complement the rank prejudices exhibited by the police, the Magistrate who heard the case also noted that these men were to be denied bail, with the judge approvingly quoting the Public Prosecutor (who opposed the bail application) on the grounds that "they . . . are polluting the entire society by encouraging the young persons and abetting them for committing the offense of sodomy."<sup>27</sup> Finally, it took an appeal to the High Court for the accused to be released on bail after being in jail for almost one-and-a-half months.<sup>28</sup>

These arrests made one thing unmistakably clear: work around HIV/AIDS has become irrevocably linked to issues of deviant sexuality. The fact that the organizations were working on safer-sex issues could not be divorced from the criminalizing force of Section 377. The targeting and the intimidation of organizations working on MSM issues was a direct outcome of the existence of Section 377. To the health-worker community, the arrests plainly and forcefully demonstrated that health interventions could not (and still cannot) exist outside the state politics criminalizing homosexual acts. The sheer difficulty of getting the accused released on bail amply illustrates the criminal and deviant aura surrounding this case.<sup>29</sup>

Neither the state nor the media chose to view or portray the events in Lucknow through a lens that would have revealed the seriousness of the HIV/AIDS epidemic. In fact, this case was framed around homosexuality, with its attendant shame and disgrace and with serious repercussions for those held. As one of the activists noted:

Ten people are kept in jail and all over the city malicious reports are being written about them. These 10 people are emotionally and physically tortured. Their reputation has gone down forever. What is one of the most important things for anyone? Food, money, empowerment, etc., isn't it? Now, it would be next to impossible for these 10 people to go to any place in Lucknow where they can get a job. . . . These people are compulsorily out as rapist MSMs (conspirers of sodomy), not in the family but in the society and in the city too. That is not a very good experience. Their sister[s] would not be getting married easily. Brothers would be looked down upon. Fathers and mothers would be commented on negatively.<sup>30</sup>

It is painfully clear post-Lucknow that as long as Section 377 exists there is no possibility of anyone approaching HIV from a health perspective alone. The formation of alliances and coalitions under a human rights framework—in which queer groups work along with feminist groups, civil-liberties groups, and groups working on HIV/AIDS to understand and address the ways in which health intersects with the state's need to regulate sexuality—has now, after the experiences and lessons of Lucknow, become a critical necessity.<sup>31</sup> The emergence of this alliance would, of course, depend upon the willingness of diverse groups to take on broad concerns (beyond their narrow “core” concerns). Thus it would mean that sexuality-based groups would have to take on broader human rights concerns, and vice versa.

### **Constitutional Challenges to Section 377: Homosexuality As Framed by Hindutva**

While the Lucknow case is emblematic of how work on health issues with the MSM community has become caught up in a wider debate around homosexuality, the state's response to the constitutional challenge to Section 377 illustrates how clearly Hindutva is implicated in concerns around health. The concern with sexual health post-Lucknow has become essentially a concern about homosexuality. As the government's response to the petition challenging Section 377 clearly illustrates, the concern with homosexuality itself is a part of the wider nation-building project of the Hindu Right.

In 1994 the AIDS Bhedbhav Virodhi Andolan (ABVA), a human rights group, filed public interest litigation in the Delhi High Court. Their petition challenged the constitutional validity of Section 377, arguing that the section violated Articles 14-15 (right to protection against discrimination), Article 19 (right to freedom of speech and expression), and Article 21 (right to life and liberty, which encompasses the right to privacy) of the Constitution of India. The petition also advocated for supplying condoms to jail inmates, with a plea to restrain the authorities from segregating or isolating prisoners with "homosexual orientations" or those suffering from HIV/AIDS.<sup>32</sup>

This petition was filed in the wake of a report by a medical team that had visited Tihar Jail in Delhi and reported a high incidence of sodomy in the male wards. As there was a risk of HIV infection being transmitted to the jail inmates, the team recommended making provisions for condoms in the jail (as recommended by WHO guidelines). The jail authorities refused to do so because they felt that it would both encourage male sexual activity in prisons (which would be encouraging an offense under Section 377) and amount to a tacit admission that homosexual sex exists in prisons.<sup>33</sup> Unfortunately, the petitioner group fell apart and the petition never came up for hearing.

It was only in 2001 that this legal strategy was revived when the Naz Foundation (India) Trust, an NGO working with HIV/AIDS-related issues, approached the Delhi High Court to "read down" Section 377. That is, rather than ask the Court to repeal the entire section, the group asked the Court to officially circumscribe and limit (read down) the acts the section criminalizes so as to remove all consensual sexual activities between adults if done in private.<sup>34</sup> The justification for this reading down was that Section 377 "is a major impediment to carrying out HIV/AIDS-related work with the MSM community, as it drives high-risk behavior in terms of unprotected oral and anal sex underground and beyond the reach of safe-sex interventions, and it violates the fundamental right to privacy and equality to sexual minorities guaranteed to every citizen of India under its Constitution."<sup>35</sup> In effect, this petition asked for all consen-

sual sexual intercourse between adults to be removed from the criminalizing force of Section 377, provided these sexual acts were done in private. Thus the provision itself would remain on the statute book but would be used to prosecute only cases of child sexual abuse as well as, disturbingly, cases of public sex—a problematic result as most of the people who are harassed by Section 377 happen to be those who do not own any private space and hence are forced to engage in sexual encounters in parks or other outdoor spaces.

The reason the group opted for this strategy is linked to the use of Section 377 by child rights groups to prosecute child sexual abuse, as there is no comprehensive alternative statute in this area. Rape law is limited by gender (applicable to women only) and is further limited only to cases of penile-vaginal intercourse. Without Section 377, there would be a huge gap in the ability to protect children (both male and female) from the many forms of sexual abuse that do not fall under rape law. The argument in the Naz petition is really a pragmatic compromise in the absence of a law on child sexual abuse.

There is, however, a valid critique that this compromise makes a mistake in asking for the decriminalization of same-sex sex acts in private because this means that Section 377 would still apply in public spaces. This is, on its face, discriminatory: public same-sex activity should be subject to the existing panoply of nuisance laws found in the Indian Penal Code and state Police Acts, which in any case apply to both heterosexual and homosexual conduct. A further justified criticism is that if the objective is to decriminalize oral sex and anal sex so that such behavior is not driven underground (and thereby intensifying the risk of unsafe sex), the objective stands defeated by excluding public sex from the ambit of the reliefs claimed.

Common to both the stillborn ABVA petition as well as the Naz petition is the attention paid to the issue of health in the challenges of Section 377. More specifically, in the case of Naz's petition, the understanding is that work to prevent HIV/AIDS cannot be done satisfactorily within a political system that criminalizes same-sex activity. From the standpoint of health work, it is significant that the approach

in this petition was not based on the assertion of identities (such as gay and lesbian) but was rather based on the articulation of a health concern—MSM, a category recognized by the Government of India through the National AIDS Control Authority (NACO).

However, the Government of India's response to the Naz petition shifted the terms of this discourse. The Government's affidavit questioned the *locus standi* of the petitioner, asserting that "Sec. 377 applied to cases of assault, where bodily harm is intended or caused and deletion of the said section can well open floodgates of delinquent behavior and be misconstrued as providing unbridled license to the same."<sup>36</sup> The affidavit denied that Section 377 violated the right to life, the right to equality, or the right to freedom of speech and expression. In fact, the affidavit disingenuously made the case that Section 377 was applied to cases of child sexual abuse and rape of women and that it therefore actually fulfilled the Constitutional mandate to protect women and children. It went on to observe, "While the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large."<sup>37</sup>

The Government's response essentially buries any hope that Section 377 could be read down with governmental cooperation. In fact, the Government's response indicates a virulent homophobia and an unwillingness to provide any space for emerging queer articulations. The Government response indicates that it sees Section 377 as articulating and reflecting public morality, protecting women and children, and keeping closed the floodgates of delinquent behavior. In the face of these challenges, the protection and defense of Section 377 has emerged as a key state concern, and the state has significantly enhanced its public role as the guardian of societal morality.

Perhaps one should read this response by the state as being part and parcel of the Hindu Right's ideology, which is based on demonizing and stigmatizing difference, be it religious or sexual in nature. The Hindu Right already has a proven track record of hostility towards religious minorities such as Muslims and Christians. However, the Hindu Right



first publicly exhibited its deep and unremitting hostility to homosexuals—who it has defined as “aliens” and threats to Indian culture and values—through the violent protests around the release of the movie *Fire*.<sup>38</sup> The very expression of same-sex desire between women was deemed to be against Indian culture and generated organized and violent protests by the Hindu Right.

The affidavit is in ideological continuity with the protests around *Fire*, construing Section 377 not from a perspective based on health but rather from a perspective whose primary concern is the purity of the Hindu nation. As the affidavit notes, “objectively speaking, there is no such tolerance to practice homosexuality/lesbianism in the Indian society.”<sup>39</sup> This raises a number of troubling questions, particularly why, when lesbianism/homosexuality are not the concerns of the petition, the state chose to deliberately introduce the notion of lesbian and homosexual identities as “alien” to Indian culture as a way of rebutting the very need to read down Section 377. One wonders what the ostensible lack of tolerance presages for the queer population in India. Could this intolerance go so far as to allow for state-tolerated pogroms against queer people? Or will it restrict itself to “merely” vigorously opposing the repeal of Section 377? Only time will tell.

The larger point that emerges here is the fundamental complexity of the problem. It is no longer (if it ever was) a simple issue of removing a provision that affects the work around HIV/AIDS because the state has now construed Section 377 to have beneficial purposes: to articulate and reflect public morality, to protect women and children, and to hold delinquent behavior at bay. All this, of course, comes under the broad rubric of protecting Indian culture and societal morality. Section 377 is now a linchpin in the nation-building project of the Hindu Right, positioning homosexuality/lesbianism as another category needing to be stigmatized in order to construct the pure Hindu nation.

In response to this complex matrix of forces undergirding Section 377, HIV/AIDS activists, human rights groups, and queer activists all need to actively contest the existing socio-political context, recognizing that a suc-

cessful challenge to Section 377 would first need to confront the logic of the Hindu Right. In a context where the state and its various institutions have become increasingly susceptible to the biases of the majority, to expect a positive judgment might have been a serious error of strategy. What is now clearly required is to move from a narrow legal demand and build a political struggle that takes on board the concerns of the queer community, of HIV/AIDS activists, and of those committed to safeguarding the pluralistic ethos of the Indian Constitution.

Many contend that the law remains an important site of struggle, but legal change must be located as one necessary part within a wider socio-political change. The petition should be the peg upon which hangs a campaign whose objective is to question the homophobic resilience of Section 377 in the structures of media, medical establishment, and public opinion. The legal outcome should not be the focus of the campaign but rather the process of questioning itself. This, of course, flows from the understanding that since Section 377 is not merely a legal issue, the way we tackle it cannot be through the courtroom alone.

## **Conclusion**

Thus, a complex web of politics, culture, and the law is producing incongruous and ultimately counterproductive results: just when the incipient form of queer activism is beginning to register its presence as a legitimate and powerful force, the ascendant Hindu Right poses a formidable challenge; just at the moment when various queer cultures might emerge as deeply politicized, the culture of India may cast them as either impure (hijras and kothis) or alien (gays, lesbian, bisexuals) or both; just as HIV/AIDS is becoming a major health issue, queer sexualities are becoming highly stigmatized in Indian politics and law.

Therefore, work to change Section 377 means negotiating a hazardous, tricky terrain covering sexuality, health, and, increasingly and most disturbingly, a religious nationalism. Effective strategies for change—from coalition-building to the tactical use of the court—will have to factor in and respond to the increasingly contentious and politically charged context within which these struggles are being waged.

## References

1. The term "queer" is used as a term of political analysis to refer to the diverse forms of resistance to the heterosexual norm. It may not necessarily be the term employed by the various actors who resist heterosexism, but is intended to capture the politics which underlie the taking of non-mainstream sexual identities as well as the performance of subversive and forbidden sexual acts. Thus when the term "queer" is used in this article it is not to imply that this is an identity of a specified group of people but rather to give a political understanding to the way they experience the marginalization of their sexual identities as well as to restore politics to the performance of forbidden sexual acts.
2. In the words of Ranajit Guha, one of the founders of subaltern studies, "the word 'subaltern' ... stands for the meaning as given in the Concise Oxford Dictionary, that is, 'of inferior rank.' It will be used in these pages as a name for the general attribute of subordination in South Asian society whether this is expressed in terms of class, caste, age, gender and office or in any other way." Guha goes on to note that "subordination cannot be understood except as one of the constitutive terms in a binary relationship of which the other is domination, for subaltern groups are always subject to the activity of ruling groups, even when they rebel and rise up." See R. Guha (ed.) *Subaltern Studies 1* (New Delhi: Oxford University Press, 1992), p. vii. Of course the fact that even *Subaltern Studies* in its nine volumes has not chosen to mention or study queer culture speaks to the invisibility of identities and practices, which exist outside the heteronormative framework. The history of those identities and acts that question the dominance of the heterosexual norm is yet to be written. Thus the queer subaltern still awaits the writing of her history.
3. In India, Hindutva is a movement that asserts Hindu nationalism (that the Indian nation is a Hindu nation). M. S. Golwalkar, one of the founding fathers of the right-wing RSS (Rashtriya Swayamsevak Sangh), makes the case for Hindutva being cultural nationalism, which basically means that the nation-state of India is meant only for Hindus. This is at great variance with the more inclusive philosophy of the Congress Party, which has ruled India for most of the period since independence. Thus the peculiar brand of RSS nationalism was never really anti-colonial as much as it was anti-minority (anti-Muslim, in particular). According to Aijaz Ahmed, "what Golwalkar means is that the real Indian nation is composed of Hindus exclusively; that Hindu cultural nationalism, which seeks to create in India not a secular polity but a Hindu Rashtra (nation), is the authentic form of Indian nationalism; that the secular, multi-denominational nationalism which seeks to be wider and more inclusive is in fact anti-Hindu treachery, since it denies the superiority of Hindu exclusivist claim to the whole of this territory, where others may live only in so far as they accept the superiority of the Hindu race." A. Ahmed, *Lineages of the Present* (New Delhi: Tulika, 1996), p. 274.
4. The Babri Masjid was a mosque which was in dispute between the Hindu and Muslim communities. In 1991, the mosque was demolished by a Hindu mob, led by very senior leaders of the Bharatiya Janata Party

(BJP). The destruction was followed by targeted pogroms against the Muslim community in various parts of India.

5. See Upendra Baxi, Notes on Holocaustian Politics, Seminar, May 2002. Available at: <http://www.india-seminar.com/2002/513/513%20upendra%20baxi.htm>

6. A. Ahmed (see note 3), p. 274.

7. The queer could be said to encompass at the least the following sexual identities and practices, as well as gender non-conforming identities and behaviors. There is no obvious solidarity between the struggles of various groups identified below (in fact, there are serious differences, particularly around issues of class and gender which need to be acknowledged) but the queer political project, which is at an incipient stage, really attempts to build one community out of a diverse range of communities and practices.

The *hijras*: As a community, hijras represent an existing Indian tradition which clearly contests heteronormativity. Hijras include men who go in for hormonal treatment, those who undergo sex-change operations, and those who are born hermaphrodite. The hijra community has its own cultures and ways of living, including its own festivals and gods and goddesses. Hijras divide themselves into *gharanas* (houses) and the strength of the hijra community lies in its close-knit relationships.

The *kothis*: The kothi is a feminized male identity, which is adopted by some people in the Indian subcontinent and is marked by gender non-conformity. A kothi, though biologically male, adopts feminine modes of dressing, speech and behavior and would look for a male partner who performs masculine modes of behavior, speech, and dress.

The “modern” communities that have emerged to contest the heteronormative framework are the lesbian, gay, and bisexual communities.

Resistance to heterosexism takes place through a proliferation of identities and practices such as jogtas, shivshaktis (both of which are traditional and culturally sanctioned forms of gender non-conformity, particularly by men who take on the gender identity of women), etc., which are too many to be enumerated. Outside the framework of communities there are stories of individual people who assert their right to a different life. The most publicized example is the marriage of Urmila Shrivastava and Leela Namdeo in 1988, two women from a rural background who were serving in the Madhya Pradesh constabulary. This, of course, is not the first such instance of resistance as there have been at least 10 documented cases of women who not just live together but want societal recognition for their relationship and hence attempt to marry each other. What is interesting to note is that these women have invariably been from a small-town background and have had little exposure to Western culture or the queer-rights discourse. Thus, even without the strength of a community to back them, these women have individually contested the heteronormative social order.

8. D. Halperin, *Saint = Foucault* (Oxford: Oxford University Press, 1995), p. 62.

9. See D. Ludden (ed.) *Making India Hindu* (New Delhi: Oxford University Press, 1996). Ludden makes a persuasive argument on how making India Hindu puts the minorities under threat. However, the same argument needs to be made to understand how diversity of the subaltern queer cul-

tures is threatened by the rise of the Hindu Right.

10. See the decisions of the Supreme Court in *Vincent Parikulangara v. Union Of India* (1987) 2 SCC 165; *Murli Deora v. Union of India & Ors.* (2001) 8 SCC 765; *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42; *M. C. Mehta v. Union of India and Ors.* (1999) 6 SCC 9; *'X' v. Hospital 'Z'* (2003) 1 SCC 500; *Parmanand Katra v. Union of India* (1989) 4 SCC 286.

11. R. Thomas, "Gay in the Garden City," *Bangalore Monthly* September (1998): p. 82.

12. *Dina Thanthi* (Bangalore edition), 10/4/02, p. 10.

13. People's Union of Civil Liberties-Karnataka, *Human Rights Violations Against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India* (People's Union of Civil Liberties-Karnataka, 2003), p. 25. Available at: [www.altawforum.org](http://www.altawforum.org)

14. M. Foucault, *Discipline and Punish* (London: Penguin, 1977).

15. E. Manohar, "Many People, Many Sexualities: A Personal Journey," *Voices*, April 1999.

16. The PUCL-K report notes, "Sexuality is sometimes viewed even in liberal and radical circles as a frivolous, bourgeoisie issue. In such a context, homosexuality is seen implicitly as something deviant and unnatural that is at best defended as an individual freedom but not a matter of priority for the human rights movement. Generally, issues of poverty and gender, class, and caste oppression are seen as more important than that of sexuality." Available at: [www.pucl.org](http://www.pucl.org)

17. People's Union of Civil Liberties-Karnataka (see note 16). The report makes clear that the violence experienced by those who fall under the rubric of queer is directly proportional to their positions in the class hierarchy. The lower you are in the class hierarchy, the more experience you are likely to have with violence. Thus kothis and hijras face the brunt of police violence.

18. The Sahayatrika Project, working for LGBT rights in Kerala (with a special emphasis on support for lesbian and bisexual women), has been crucial in documenting the cases. To take just one example: Two tribal girls, who also happened to be relatives, ended their lives because of the trauma of not being allowed to live together. The two had been living together for some time. They had even asked their relatives to allow them to marry each other. When the relatives objected, they approached the local police station with the same request. The police sent them back after some counseling. Both also underwent psychiatric treatment from a doctor. Eventually, out of sheer frustration, the two girls took their own lives. *Matrubhoomi*, 8/26/01.

19. People's Union of Civil Liberties-Karnataka (see note 16), p. 18.

20. People's Union of Civil Liberties-Karnataka (see note 16), p. 18.

21. See B. Fernandez (ed.) *Humjinsi* (India Centre for Human Rights and Law, 2002), pp. 182-183.

22. For a powerful analysis of the constitutive role that law plays in producing a regime in which sodomy laws function as symbolic statements and as threats of criminal punishment, which ultimately encourage queer people to police themselves, see R. Goodman, "Beyond the Enforcement

Principle," *California Law Review* 89 (2003): p. 643.

23. Former Chief Justice J. S. Verma, when he was the Chairman of the National Human Rights Commission (NHRC), was asked why the NHRC was not accepting the complaint by a homosexual man who was being treated for being homosexual. He responded by saying that until the law was changed nothing much could be done. See A. Narrain, *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change, 2004), p. 120.

24. National AIDS Control Program, "National AIDS Prevention and Control Policy." Available at: <http://www.naco.nic.in/nacp/ctrlpol.htm>

25. "Gay Club Supplied Boys to Politicians," <http://sifyspecials.sify.com>;  
"Gay Culture Started In UP In 1998," *The Times of India*, 7/10/01;  
"Lucknow Police Raid Gay Clubs, Ten Arrested," *The Hindustan Times*, 7/8/01; "Call Boy Racket Sends Shock Waves in Lucknow," *The Times of India*, 7/ 9/01.

26. "Call Boy Racket Sends Shock Waves in Lucknow" (see note 25).

27. Criminal Misc. Case No. 2054/2001.

28. T. K. Rajalakshmi, "Targeting NGOs," *Frontline* September (2001).

Available at: <http://www.flonnet.com/fl1818/18181130.htm>

29. An elementary analysis of the relevant provisions on bail reveals that even in cases such as those under Section 377 there have to be reasonable grounds for the withholding of bail. In the above case, the bail was denied because of the completely unfounded belief, for which no material was adduced by the prosecution, that "they . . . are polluting the entire society by encouraging the young persons and abetting them for committing the offense of sodomy." Criminal Misc. Case (see note 27).

30. "Khush List: List for South Asian Queer Topics," Yahoo Group.

Available at: <http://groups.yahoo.com/group/khush-list/>

31. The need for the alliance cannot be underestimated. Groups working on HIV/AIDS-related MSM interventions have persisted with their work without building alliances with either feminist or civil-liberties groups. The collective ability to respond to "Lucknow" would have been far stronger if there was an alliance between queer, feminist, HIV/AIDS, and civil-liberties groups in place.

32. R. Dhir, "Men Who Have Sex With Men & The Law,"

<http://www.hri.ca/partners/lc/unit/homosexuality.shtml>

33. Kiran Bedi, the IG (Prisons), maintained that there were no HIV-positive prisoners in Tihar Jail and that "[w]henver any such case is brought to the notice of the concerned authorities, the prisoners are separated." She further held that homosexual activity in Tihar was "not a problem" (i.e., did not exist) and that "there is no justification and legality for the supply of condoms in the prison. Supply of condoms will promote homosexuality." The ABVA's plea was taken by Bedi as an attempt to force "western solutions" on "Tihar Ashram." *India Today*, 5/11/94. A similar position was taken by Dr. Janak Raj Rai in his writ filed at the same time as the ABVA's, claiming that the supply of condoms would be tantamount to legalizing sodomy. *The Hindustan Times*, 9/13/94.

34. 365gay.com, "Indian Gay Suit Seeks to Decriminalize Gay Sex."

Available at: <http://www.sodomylaws.org/world/india/innews04.htm>

35. The Lawyers Collective, <http://www.lawyerscollective.org/lc-hiv-aids/index.htm>
36. *Naz Foundation v. Govt of Delhi and others*, 2001.
37. *Naz Foundation v. Govt of Delhi* (see note 36).
38. The Hindu Right's hostility to homosexuality first came into public view in the context of the protests around the screening of the film *Fire*. The film is about the relationship between two women, Sita and Radha, married to brothers. Set within the patriarchal framework of a middle-class Hindu family in Delhi, the film portrays both women as oppressed in their respective marriages. They turn to each other for tenderness and respect, moving into a sensuous and sexual relationship. They finally break out of the very patriarchal structures that threw them together, to form independent lives. Screenings of the film were disrupted and theatres vandalized. This was justified through references to protecting Indian culture from foreign influences. As Sushma Swaraj put it, "There can be no argument that lesbianism is unnatural and is regarded as such the world over." See Gomathy and Bina, "Fire, Sparks and Smouldering Ashes," <http://www.isiswomen.org/wia/wia199/sex00005.html>
39. *Naz Foundation v. Govt of Delhi* (see note 36).