

India: What Effect does the Law that Criminalizes Same-sex Behavior have on Culture and Society?

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Abstract

On December 11th, 2013 the Indian Supreme Court upheld a 150 year old law known as Section 377. Section 377 of the Indian Penal Code criminalizes same-sex behavior between consenting adults. The ruling fails to protect the basic human rights of sexual minorities and contributes to a culture in India that has made homophobia and discrimination acceptable in Indian society. The law has a direct effect on social norms and has created complex sexual identities in society that often have disastrous results on personal relationships, particularly the heteronormative institution of marriage.

The law has also created a culture that makes it difficult to address public health issues with sexually transmitted diseases, particularly with the Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) pandemic. Sexual minorities face not only a risk to their health, but also their personal safety. Law enforcement has preyed upon feelings of internalized homophobia, in order to blackmail or extort money from those who find it necessary to keep their sexual identities a secret.

Given that sexuality and social norms are highly connected with each other, laws regarding sexuality should be ethical and practical. I recommend that Indian parliament should work to repeal Section 377 and enact laws that safeguard children and protect sexual minorities from hate crimes and discrimination. Once parliament has acknowledged that sexual rights are human rights, India should work with International Governmental Organizations (IGOs) to address the basic human rights needs of its sexual minorities. Through the UK Human Rights and Development fund, the UK could also play a special role in helping India adjust to a post-Section 377 society.

TABLE OF CONTENTS

SECTION 1: INTRODUCTION AND LAW	3
INTRODUCTION	3
INDIAN PENAL CODE: SECTION 377	4
PRECOLONIAL SEXUALITY	5
IMPERIALISM AND COLONIAL LAW	6
1971 LAW COMMISSION OF INDIA REVIEW	8
PETITIONING SECTION 377	9
DECRIMINALIZATION	13
RECRIMINALIZATION	13
SECTION 2: LITERATURE REVIEW	16
PATRIARCHAL THEORY	16
GENDER RELATIONS	16
SOCIALIZATION THEORY	18
QUEER THEORY	19
SOCIAL CONSTRUCTION	21
LEGAL THEORY	23
THE WOLFENDEN REPORT	25
SECTION 3: LAW AND CULTURE	27
HETERONORMATIVE CULTURE	28
THE ORDER OF NATURE	29
HOMOPHOBIA	31
INTERNALIZED HOMOPHOBIA	32
CORRUPTION	32
SECTION 4: SEXUAL MINORITIES IN SOCIETY	33
SEXUAL IDENTITIES IN INDIA	33
SOCIAL PRESSURE TO MARRY	35
PUBLIC HEALTH	36
HIV/AIDS IN INDIA	38
LEGAL STATUS FOR HIJRAS	39
HUMAN RIGHTS AND SEXUALITY	40
ARGUMENTS IN FAVOR OF THE LAW	41

SECTION 5: POLICY RECOMMENDATION AND CONCLUSION **42**

POLICY RECOMMENDATIONS **42**

CONCLUSION **44**

Introduction

Same-sex behavior and the struggle for sexual rights is a worldwide phenomenon. The rights of the lesbian, gay, bi-sexual and transgendered (LGBT) community to be legally recognized and protected vary widely across the globe. In India, same-sex relations are punishable under a 150 year-old sodomy law known as “Section 377.” Under the law, any sex that would not result in procreation is punishable with a prison term that carries a maximum sentence of up to life in prison. The law is interpreted to include any sexual act between men, or even a woman and a man.

Laws are often a reflection of societal beliefs about what is ‘good’ or ‘bad.’ Laws have a very powerful effect on society, and many would argue that laws exist to protect people. This thought led me to ask the question: What kind of effect does the law that criminalizes same-sex behavior have on Indian culture and society? The law clearly targets a segment of the population: the sexual minority. I will use the term ‘sexual minorities’ over LGBT in this paper, as you will see that a complex set of sexual identities have developed in India that do not conform to the Western concept and meaning of LGBT.

The effects of the law on India’s sexual minority population are extremely important from a human rights standpoint. Sexuality is part of human nature, and the basic freedoms of expression and liberty are being challenged under current Indian law. India is home to 1.3 billion people, with an estimated sexual minority population with estimates ranging from 2% to 10% (<http://timesofindia.indiatimes.com/india/Gay-count-varies-from-2-to-13-of->

population/articleshow/4731097.cms). The most conservative estimate of 2% would mean there are at least 26 million people affected by the law.

In this paper, section one will explore the history of sodomy laws in India, as well as the recent legal challenges surrounding it. Section two will look at various theories of law and sexuality that can better help us understand the arguments involved with the law. Section three will look at the cultural development of sexual identities in India. Section four will look at Indian law, society, and the treatment of sexual minorities. In section five, I will offer policy recommendations and conclude the paper.

Indian Penal Code: Section 377

In 1860, British Colonial powers enacted a law in India aimed at promoting the sexual mores of its Victorian rulers. Indian Penal Code section 377 was the first of many sodomy laws that were enacted by the British, which sought “to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses (Gupta, 2008, p. 5).” The law seems to embrace a Christian belief that sexuality should only be used for pro-creation, and not recreation. Gupta argues that imposing this law on colonial subjects “was a way for segregating the Christian, European self (Gupta, 2008, p.14)” from native populations who had widely varying sexual customs and religious beliefs.

The Indian Penal Code was first drafted by Thomas Babington Macaulay in 1837, although the final approved version of the Indian sodomy law did not go into effect until 1861 (Gupta, 2008, p. 16). Section 377 of the Indian Penal Code addresses “unnatural offences.” The law 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 a fine. Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section (Thomas and Rashid, 2014, p.928).”

In 1914, Khanu vs Emperor was a clarification for many when it defined sodomy as any type of sexual interaction that could not result in procreation (Kannabiran and Singh, 2008, p.55-56), by declaring "the natural object of sexual intercourse is that there should be the possibility of conception of human beings (Bhalla, 12 December 2014)". The implication of this is the interpretation that all homosexual activity is punishable under the law.

Pre-Colonial Sexuality

In the ancient Indian text known as the “Kama Sutra”, men who have sex with men are referred to as “the third nature (Graupner and Tahmindjis, p. 171-172).” The appearance of homosexuality in this ancient Indian text is an indication that same-sex behavior did not carry the same taboo that it did beginning in the 19th century. Hinduism has itself embraced the idea of a third sex, or third gender applied to those known as hijras. Hijras can be “transvestites, transgender, or passive homosexuals (p.172),” and are rumored to have occult powers. Hijras are often hired to appear at weddings, or other special occasions, such as the birth of a child.

Devdutt Pattanik (2014) looks at Hindu mythology in India and finds that “patriarchy, or the idea that men are superior to women, was invented (p.11).” Through the Mahabharata, writings reveal that there was a time in Indian history when marriage did not even exist. Hindu scriptures also support the belief of a “difference between the soul and the flesh. The soul has no

gender (p. 11).” Pattanik’s work “Shikhandi” argues that queerness is not a modern concept, but a concept that deep roots in Indian mythology.

Pattanik (2014) finds that “there are stories of men who become women, women who become men, of men who create children without women, and women who create children without men (p. 12).” One fascinating story from mythology involves the story of Bahuchara. The story tells the tale of a married couple that never have sex. One night, the wife, Bahuchara, followed her husband into a forest. When she discovered him, he was found to be ‘behaving like a woman’.

The wife asked him why he was behaving as such, the husband explained “that he was forced into marriage so that he could father children and continue the family name (p. 106).” Bahuchara then “declared, ‘men like you should castrate themselves, dress as women, and worship me as a goddess (p. 106).” Bahuchara is often considered the patron goddess for hijras, also known as members of the transgender or intersex communities. This story also highlights the cultural practice of men being pressured into marrying women, no matter what their sexual preference might be.

Imperialism and Colonial Law

One important aspect when considering colonial laws, and that is they were often put in place to control populations and put power in the hands of the colonizer. Ronald Hyam looks at the relationship between the British Empire and sexuality in his 1992 work, “Empire and Sexuality.” Hyam (1992) credits racism as one factor that prompted the British Empire to enact sexual laws. “Disillusionment with non-Europeans accumulated as actual experience grew of trying to govern and convert them. This was a key factor in the hardening of racial

attitudes...[and] added to governmental demands for the maintenance of ‘social distance (Hyam, 1992, p. 201)’.” Hyam also found evidence that homosexual relationships between males was commonplace, but “this was, however, almost entirely opportunistic or the product of circumstance, without prejudice to relationships with women (Hyam, 1992, p. 212).”

Starting in the 1860’s and exploding in the 1880’s, Great Britain began a “purity” campaign that sought to regulate the behavior of British soldiers overseas as a further attempt to keep the races separate. In the end, Hyam concludes that “sex is at the very heart of racism. Racism is not caused simply by sexual apprehensions, and there are many other factors involved, such as the fear of the unfamiliar, fear bred by historical memory of conflicts, fear of demographic swamping by the superior numbers of a culture perceived as alien and inferior...[and] competition for limited resources (p. 203),” and he argues that racism dictated the treatment of sexuality in the empire.

Carabine (2004) finds that social imperialism started in Britain, where public concern grew about the viability and superiority of the British people. Social imperialism “invoked and constituted traditional notions of the family, motherhood, fatherhood, appropriate male and female sexuality, gender roles and sexual relations (p. 25).” Conversations on these topics helped define the norms for each of these identities.

In “The Rise of Gay Rights and the Fall of the British Empire,” Richards (2013) argues that British imperialism and gay rights were at odds, and gay rights in Britain were only able to rise once the Empire was mostly dissolved. Richards sees the struggle for gay rights as “an ethical movement within liberal democracy, one struggling against the ways patriarchy corrupts and undermines liberal democracy (Richards, 2013, p. 208).” Richards credits the lack of a

patriarchal system as one of the main reasons gay rights made progress in places like Great Britain and the United States and sees patriarchy “as one of the most important factors in shaping our normative understanding of sexuality and gender (p. 231).”

On the topic of India, Richards (2013) argues that because the British did not seriously take steps to introduce democracy into the colonies, the ex-colonies were never able to learn much about constitutional democracy from them. Richards (2013, p. 222-223) gives credit to the anti-imperial movement in India for the emergence of the Congress Party, and not British democracy itself. He believes that the “patriarchal power of the caste system still remains powerful in India (Richards, 2013, p. 230),” and thus more development will need to take place for in order for gay rights to be recognized as human rights in India.

1971 Law Commission of India Review

In 1968, there was public and government support for a revision of the Indian Penal Code. In 1971, Law Commission of India (LCI) made a proposal to change the Indian Penal Code, and specifically the question about using Section 377 to punish homosexuals. In the report, the LCI mentions the Wolfenden Committee Report in England, which is often considered the vehicle for getting England to rid itself of its own sodomy laws in 1967. They raised some of the same questions that the Wolfenden Committee attempted to answer, such as the argument for privacy which argues that if an “act harms nobody that it falls within the sphere of private immorality which is not the law’s business (LCI, 1971, Section 16.125 p. 281).”

The LCI report also mentions an argument that putting homosexuals in prison exclusively with other men for long periods of time “can hardly result in anything but the reinforcement of homosexual tendencies (P. 281).” In the end, the LCI felt that there were several good reasons to

keep the law. The LCI report acknowledged that consensual acts done in private “do not in themselves constitute a serious evil...[but] there is a risk involved in repealing legislation which has been in force for a long time (LCI, 1971, Section 16.126 p. 281)”. It argued the homosexual acts often take place by one spouse cheating on another, and that in itself is a social justification for maintaining the law.

And finally, the ILC concluded that the way in which homosexual behavior “ought to be punished depends on the view one takes of the relationship of criminal law to morals...Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults may indulge in it in private (LCI, 1971, Section 16.126 p. 281).” The final changes suggested by the ILC included suggestions that references to bestiality be removed from section 377, and that buggery (anal sex) between adults should be punished with a maximum of 2 years, or a fine, or both. Specific reference to an adult committing sodomy with someone less than 18 years would be punishable with up to 7 years of imprisonment (ILC, 1971 Section 16.127 p.282).

Petitioning Section 377

ABVA

The first petition to challenge the Section 377 law was filed in 1991 on behalf of AIDS Bhedbhav Virodhi Andolan (ABVA). ABVA was a non-governmental organization that was concerned with the treatment and prevention of AIDS in India and the protection of sexual minorities. In its early stages, ABVA maintained a free clinic for sex workers in Delhi’s red-light district. A number of sex workers in the red-light district reported that they were being forced to get HIV tests from government authorities with the help of the local police. ABVA began

protesting these forced HIV tests, and advocated any government action related to HIV infection should also include “good quality condoms, humane treatment, and rehabilitation schemes (ABVA, 1991, p. 2),”

ABVA challenged Section 377 when it filed a petition in court in response to a Tihar jail that refused to make condoms available to its prisoners. The prison officials used Section 377 to confirm their belief that handing out condoms to men in jail would only be encouraging homosexual (illegal) activity. As in many other countries, Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) is most prevalent among men that have sex with men (Vanita, 2002, p.15-16).

The most resistant official to providing prisoners with condoms was Karan Bedi, the head of the Tihar jail. The Tihar jail became the center of a controversy after a 1994 survey by Dr. K. K. Aggarwal was published that “concluded that two-thirds of Tihar prisoners participated in homosexual activity (Vanita, 2002, p. 15).” This survey was conducted in 1994 by Aggarwal in response to the growing number of HIV/AIDS infections that were being reported inside India’s largest prison.

ABVA’s request was that “Section 377 be deemed unconstitutional, illegal, and void...that condoms be made available free of cost to Tihar prisoners...and finally, that jail officials regularly consult with the National AIDS Commission (Vanita, 2002, p.16).” Unfortunately, by the time the court case was ready to be heard in 2001, ABVA had already disbanded, presumably due to a lack of funding, combined with an all unpaid volunteer staff, and no full time lawyer, “so when it finally came up ABVA failed to appear and the case was dismissed without their knowledge (Misra, 2009, p. 20).”

Naz Foundation

In 2001, a Delhi-based NGO known as the Naz Foundation filed a writ petition with the High Court of Delhi requesting a ‘reading down’ of Section 377. Naz is a registered NGO in India that focuses on the treatment and prevention of HIV in the community, with a focus on the MSM community where HIV/AIDS is the most prevalent in India.).” The request to have a ‘reading down’ of the law, Lawyers Collective attorney Gautam Bhan explains, is that “a reading down is different from asking for a repeal—the petition is not asking for the law to be removed, only for its interpretation to be changed (Narain and Bhan, 2012, p. 42).

Bhan (2012) goes on to explain the main reason for requesting a reading down is because there is no separate law for child sexual abuse, and “one cannot leave the victims of child sexual abuse without recourse to justice, and hence, until a new child sexual abuse law is created (Narain and Bhan, 2012, p. 44-45).” By eliminating private consensual adult sex as ‘unnatural,’ the law would still give protection to child victims, an idea that has been fully supported by gay activist and child activists’ alike (p. 45).

One of Naz’s fundamental beliefs is that the best approach to HIV prevention/intervention is an “Integrationist Policy”. Naz argues that integrationist “policy postulates that the best way to prevent the spread of HIV-infection is to promote, respect, and protect the human rights of vulnerable populations, especially the MSM community. Strengthened human rights enable vulnerable populations to be better positioned and equipped to negotiate safer sexual behavior (Naz Foundation vs the Government of NCT of Delhi 2001, p.5).”

Naz specifically raised questions about Section 377's constitutionality, in particular to Article 21 of the Indian Constitution which states that: "No person shall be deprived of his life or personal liberty except according to procedure established by law (Government of India Constitution)." Naz used this article, often associated with basic human rights, to point out that Section 377 is an infringement on the personal privacy of consenting adults, that it should not be used to regulate sexual activity. Since sexuality is an inalienable component of human life, the "social stigma and police/public abuse perpetuated by Section 377 is violative of the right to life, as guaranteed under Article 21. (Naz Foundation vs the Government of NCT of Delhi 2001, p.10)."

Naz goes on to argue that Section 377 fosters an environment of discrimination against the MSM community, who are most vulnerable to the HIV/AIDS epidemic. "Discriminatory attitudes exhibited by state agencies towards sexuality minorities, which often include gay men, MSM, lesbians and transgendered individuals (Naz foundation vs the Government of NCT of Delhi, 2001, p.6)," have created an atmosphere in which sexual minorities have been denied their basic human rights, and has subjected them to harassment and discrimination from both the public, private and governmental institutions. The petition was dismissed in 2004, when the Delhi High Court ruled that Naz was not personally affected by the law, and therefore had no right to challenge it (Misra, 2009, p. 23).

Naz filed a new petition after the dismissal, but that request was also dismissed. In 2005, Naz special appeal with the Supreme Court of India, which ruled that the case should not have been dismissed, primarily because it is entirely legal to file court cases even if the matter didn't affect you personally (<http://www.lawyerscollective.org/vulnerable-communities/lgbt/section->

377.html). The issue was sent back to the High Court to Delhi in 2005 with orders that the petition is valid, and the High Court should have a hearing on the matter.

Decriminalization

Finally, on July 2nd 2009, the Delhi High Court ruled that Section 377 was “unconstitutional, insofar as it criminalizes consensual sexual acts of adults in private, since it is violative of Articles 21, 14, and 15 of the Constitution (Thomas and Rashid, 2014, p. 928).” The Delhi High Court concluded that Section 377 did discriminate against sexual minorities, and “that Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual (Naz Foundation vs The Government of NCT of Delhi and Others, 2009, Section 131, p.104).”

The ruling effectively decriminalized same-sex behavior for the entire country. The ‘reading down’ did not remove Section 377 from the Indian Penal Code, but only declared that punishing same-sex behavior between consenting adults as unconstitutional. The High Court also acknowledged that the Indian Constitution does not expressly guarantee a right to privacy, it is implied through articles that guarantee freedom of speech and expression, freedom of movement, and the right to life and liberty (Naz Foundation vs The Government of NCT of Delhi and Others, 2009, Section 31, p.28).

Recriminalization

Opposing Arguments

Immediately following the ruling, several petitions were filed by religious affiliated groups. These opposing parties included: “Mr. B. P. Singhal, a former BJP politician, submitted an affidavit arguing that Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of Indian society and therefore it is deserving of criminalization (http://www.voicesagainst377.org/?page_id=133),”

The summary also includes an argument offered by the Home Ministry, which sought to save Section 377 because it felt that Section 377 represented the values and morals of society, and that law should be a reflection of society’s values. The most extreme view came from an organization called the Joint Action Committee of Kannur, who disagreed with Naz’s and the National AIDS Committee Organization (NACO) position that Section 377 impedes the treatment and prevention of HIV. JACK “argued that Section 377 in fact served to prevent the spread of HIV by deterring people from engaging in high-risk activity. They also denied that HIV causes AIDS (http://www.voicesagainst377.org/?page_id=133).”

The Ruling

On December 11th, 2013, the 2009 decision was overturned by Justices Singhvi and S. J. Mukhopadhaya, thus reversing the 2009 ruling and upholding the 150-year-old law criminalizing same-sex behavior. The Supreme Court found that Section 377 “does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable (Koushal vs Naz Foundation, 2013, Section 54, p. 97).”

The Supreme Court Justices took into consideration that there were a very low number of prosecutions under the law, declaring that the “Delhi High Court overlooked that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders, and in more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution (Koushal vs Naz Foundation, 2013, Section 43, p.83).”

The Justices also criticized the Delhi High Court for referring to international cases in the U.S and European Courts as a basis for the 2009 judgement, denied there is much evidence of sexual minority discrimination, and addressed the issue of police harassment by stating that in their “opinion, this treatment [harassment] is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section (Koushal vs Naz Foundation, 2103, Section 51, p. 91).”

The recriminalization of same-sex behavior has provoked an international response. In a statement from the Human Rights Campaign (HRC). The HRC is an American NGO that supports equality for the LGBT community in the U.S. CFO Jeff Krehely said the following: “It is incomprehensible that a court of law would take the side of discrimination against LGBT citizens...Criminalizing LGBT relationships leads to dangerous situations, not just for committed couples, but also for LGBT youth, who today received a deeply harmful message that they are less than equal. We call on fair-minded people around the world to show solidarity with India’s LGBT community at this critical moment (Human Rights Campaign Staff 2013, para. 2).”

Theories

Patriarchal Theory

John Ferguson McLennan described patriarchal theory as a society that favors the “enlargement of the family, and the family as a group composed first of a man and his wife and children...many such groups would be formed around the original family, and all of these would acknowledge the first father, as the chief or patriarch, as long as he lived (McLennan, 2000, p.12).” McLennan’s patriarchy put an emphasis on the importance of tracing male lineage back to a single source of male power, and less emphasis on lineage that can be traced back through females in the family. Although McLennan believes that blood lines through lineage are the most important, he does acknowledge that strong bonds can be formed outside of blood lines.

McLennan (2000) makes specific reference to patriarchal society in India, by making reference to ancient Hindu traditions in India, and their formation of society as an organized collection of patriarchally managed families. Patriarchal theory and 19th century Hindu tradition favor men as property owners, and attempt to deny inheritance rights from being granted to anyone other than the eldest son (p. 50). McLennan paints a patriarchal image of Indian culture, where men have all of the rights and family life and commitments are the most important thing in society.

Patriarchy and Gender Relations

Sylvia Walby (1990) argues in “Theorizing Patriarchy,” that the concept of patriarchy is crucial to the understanding of societies treatment of gender relations, and how the theory of patriarchy “is essential to capture the depth, pervasiveness, and interconnectedness (p. 2)” of gender relations, and “can be developed in such a way as to take account of the different forms

of gender inequality over time, class, and ethnic group (p. 2).” Walby uses feminist perspectives to explain to explain patriarchy and its effects on sexuality and sexual practices in society.

Walby (1990) asks “what is the significance of sexuality to the degree to which sexual practices are determined or determining of other social relations, together with the related one on the connection to social control (p. 109).” Walby concludes “heterosexuality constitutes a patriarchal structure (p.123),” and this structure flourished during the 19th century, when “there was an increase in the direct control by husbands and fathers of the middle classes over the sexual conduct of their wives and daughters (p. 124).” She argues that greater significance attached to sexuality combined with political pressure has done much to open up a space for wider tolerance of sexual minorities, but “not all aspects of male dominance through sexuality (p. 127)” has changed.

Walby (1990) discusses the varying definitions of the term patriarchy. Similar to McLennan, Walby believes most discussions of patriarchy before the mid-20th century referred to “a system of government in which men ruled societies through their position as heads of households (p. 19).” This traditional view saw older men dominating the familial unit in general, not just the domination of women in the household. Walby’s own definition of patriarchy is “a system of social structures and practices in which men dominate, oppress and exploit women (p. 20).”

Walby (1990) sees the relationship of patriarchy and the state as “having systematic bias towards patriarchal interests in its policies and actions (p. 21).” In terms of sexuality, Walby argues that patriarchy imposes compulsory heterosexuality and a sexual double-standard (p. 21). Walby also makes a distinction between private and public patriarchy. Private patriarchy has

domestic roots and deals with the oppression in the home or family. Public patriarchy takes place outside the household, often with issues of employment and state (p. 23-24).

Socialization Theory

The concepts of masculinity and femininity are found at all levels of social interaction. These concepts are part of what contributes to patriarchal society. Walby (1990) argues that “ideology and culture have been considered to be best understood as a set of beliefs which are related in some other way to social phenomena (p. 90).” Socialization theory sees the development of masculine and feminine identities as a result of socialization.

Socialization is said to take place “primarily during childhood, during which boys and girls learn the appropriate behavior for their sex...masculinity entails assertiveness, being active, lively, and quick to take the initiative. Femininity entails cooperativeness, passivity, gentleness, and emotionality (Walby, 1990, p. 91).” The process of socialization sets out a system of rewards and punishments based on how feminine or masculine one’s behavior might be. These gender ‘norms’ are reinforced through the toys that children play with, books and magazines, as well as television and other media (p.93).

Walby (1990) explains that institutions and family also play an important role in the process of socialization, all of which contribute to the cause of “differentiation of the genders into masculine and feminine subjects (p. 93).” Walby (1990) argues that “socialization theorists made an effective argument against notions that femininity and masculinity were biologically given attributes. But were limited to accounts of how people became feminine or masculine, and could not account for the content of these ideas (Walby, 1990, p. 103).”

Queer Theory

In “Queer Theory, Gender Theory,” Riki Wilchins (2004) takes a close look at Jacques Derrida, Michel Foucault, and Judith Butler. Wilchins explains queer theory primarily as “an inquiry into the truth of individuals and the questions about self-understanding they are called to answer (p. 108),” and suggests a modernist perspective to “solve the problem presented by bodies, genders, and desires that transgress through more and better knowledge (p. 34).” Wilchins credits Derrida with declaring the term post-modernism and stresses how much emphasis he placed on the use of language. The use of language, Wilchins argues, is what makes the “meaning of *women*, by excluding everything that is non-woman, and vice-versa for *man* (p. 36).”

Defining men and women in language and then in society created “idealized templates for what is perfectly masculine or perfectly feminine by excluding whatever doesn’t fit: the queer, the different, and the mixed (p. 34).” Derrida is also credited with creating ‘*deconstruction*,’ which “sought to demonstrate how any given set of truth claims was possible because of a prior set of assumptions that didn’t ‘show’ once they were in place (p. 44).” Deconstruction finds that truths are culturally constructed and usually dependent on smaller truths for power.

For Foucault, “the institutionalism of sexuality led individuals to willingly manage their own private behavior in ways they would have never undertaken otherwise (p. 52).” The institutionalization of sexuality has allowed the state and bodies of medicine to have immense power over sexual minorities that were now “deemed deviants in need of treatment (p. 3).” Foucault wants us to “go a step further and ask what it means to understand one’s self through a

form of knowledge that scarcely existed 200 years ago, but which today forms the core of one's identity (p. 56)," and try to understand "how such identities are created, what effects they have on us, and whose ends they serve (p. 57)."

Judith Butler questions the widely understood belief that identity is "gender, sex, sexual orientation, and race (p. 123)." Butler looks at traditional identities and asks "how they were created, what political ends they serve, what erasures have made them possible, and how they are able to present themselves as real, natural, and universal (p. 124)." Butler argues that identity politics is a permanent problem, because "the concept of identity that underlies it—of being one's race or sex or sexual orientation—is itself seriously flawed (p. 125)."

Carl F. Stychin (1995) traces the development of queer theory to the 1990's in "Law's Desire." Since the 90's, issues and concepts of identity and gender perceptions have become more prevalent along with the rise in gay activism. Stychin argues that law and legal reasoning around cases involving sexuality have "inadvertently contributed to the development of a 'queer' political stance and identity (p. 140)."

Stychin (1995) uses the term 'queer' as a category of identity that can be applied to LGBT persons. Queer identity deals with the problem of sexual identities that do not fit into the historically constituted ideas of sexuality. "Queerness thus suggests the 'subversion of identity' at the same time that a category of identity is tenuously constituted (p. 141)." Queerness is not a fixed identity, but can be used to describe any other identity that is not heteronormative, thus identity "is always open to signification, it is self-consciously provisional and tenuous, and it knows no bounds (p. 146)."

Stychin says “while the categories of identity may be constraining and exclusionary, they must also be recognized as politically necessary and personally liberating (1995, p. 154).”

Stychin argues that the goal of queer theory or social theory must be “the self-conscious attempt to negotiate this paradox between the constriction and deconstruction of identity categories, and to connect identities back to the social structures within which they operate in relation to dominant background norms (p. 154).”

Stychin (1995) also argues that attempts to change sodomy laws hinge on the judicial ability to separate ‘conduct’ from identity. In order to warrant legal protection, “it must be argued that the primary gender direction of the sexual object choice creates a category that matters, and warrants legal protection (p. 155).” In his view, sodomy laws have historically walked a gray line between the definition of sexual identities and sexual acts. Stychin concludes that “both law and legal identities are social constructions...[and] law remains a powerful tool in the constitution and regulation of identities, as well as in their repression (p. 156).”

Social Constructionism

Steven Seidman (2003) writes about the “Social Construction of Sexuality.” Social constructionism is a theory that sexuality is actually constructed by society. Constructionism “states that sexuality is a learned way of thinking and acting (p. 27).” Seidman points out that “several theories have been advanced to defend the notion of the naturalness of heterosexuality, for example, that it is an innate reproductive or family instinct, that it is the basis of the survival of the species, or that it expresses something of the natural fit between the bodies and psyches of men and women (p. xv).”

Seidman argues that homosexual arguments might look to social research to determine if heterosexual parents are proven to have better parenting skills, examine the results of psychological studies related to homosexuality, and challenge the view that distinct and opposite gender roles are better for society. Seidman posits that taking “a social view encourages a public discussion of the morality and politics of sexuality that include all interested citizens... a social view doesn’t protect us from ignorance or stereotypes (p. xix).”

Seidman discusses the difference between the famous sexologists like Alfred Kinsey and Masters and Johnson and theories of the social construction of sexuality. Sexologists believe “that all humans are born with a sexual nature, and that sexuality is part of the biological and genetic make-up of all individuals (p. 20).” Sexologists believe that heterosexuality is the most natural form of sexuality, and that sexuality is largely ‘managed’ by how the individuals decide to use their sex drive.

Social constructionists argues that sexuality and sexual identity is learned from society, and society’s treatment of gender norms. Individuals become heterosexual through positive reinforcement in society, such as economic incentives. Individuals stand to gain more by becoming heterosexual, otherwise they may subject to “ridicule, harassment, and violence towards gender deviants and homosexuals (p. 21).”

Social constructionists would argue that a person may feel desire towards another member of the same sex, “but he or she must learn that these feelings are sexual and that they indicate a homosexual identity (Seidman, 2003, p. 26).” Coming of age in a society that is centered on heterosexuality and the idea of marriage and family building, individuals learn to classify behaviors into gender roles. Essentially, social constructionists believe that “we are born

with bodies, but it is society that determines which parts of the body and which pleasure and acts are sexual (p. 39).”

Carabine (2004) offers that sexuality can be “interpreted as being historically and culturally specific and socially constructed. Sexual identity is not assumed to be a fixed aspect of an individual’s life, separate from sexual identities, which are not always a fixed aspect of individual lives (p. 8-9).” Social constructionism “rejects and challenges the essentialist views of sexuality as a natural, biologically determined force...[and] concerns itself with the development of individual sexual identity rather than with sexual activity (Carabine p. 8).”

Legal Theory

In “Challenging the Rule(s) of Law (2008),” gay activist and attorney Arvind Narrain attempts to explain why queer theory and criminology seem so divergent. Narrain argues that queer theory attempts to explain social behaviors and sexual preferences and how they play out in society, criminology only seems to focus on one thing, identifying the homosexual and asking “the question of who the homosexual/criminal is (Kannabiran and Singh, 2008, p. 48).”

Narrain credits the queer movement for changing the way criminology looks at homosexuality, shifting the focus away from sexual minorities as deviants to victims that are often subject to having their own human rights threatened. The Indian justice system has yet to address the abuse of hate crimes, resulting in a system where “crimes against queer people enjoy absolute impunity (Kannabiran and Singh, 2008, p. 51).” Narrain argues that it is not just the justice system that polices sexuality, but it also takes place in many institutional and political contexts through social norms that include “the family, marriage, the medical establishment and

the media play a strong role in the simultaneous stigmatisation (p. 52)” of sexual minorities in Indian society.

Law professor Herbert L. Packer (1968) argues that there is little to no evidence that laws in place to control sexual behaviors are effective as a deterrent. Packer argues that not much would change should sodomy laws be removed from the books, because most who are engaging in same-sex behavior are likely doing so already, and the social stigma involved with same-sex behavior would likely create an environment where members of the community would be hyper-vigilante against the signing up of ‘new recruits’ (Packer, 1968, p. 302).

Packer notes that enforcement activity of sex laws has been historically low, and changing sodomy laws to exclude consenting adults, would barely change enforcement activity which is likely focused on the sexual abuse of minors (p. 303). Packer (1968) posits there are 8 main reasons that support the elimination of sodomy laws:

1. Rarity of enforcement creates a problem of arbitrary police and prosecutorial discretion.
2. The extreme difficulty of detecting such conduct leads to undesirable police practices.
3. The existence of the proscription tends to create a deviant subculture.
4. Widespread knowledge that the law is violated with impunity by thousands every day creates a disrespect for law generally.
5. No secular harm can be shown to result from such conduct.

6. The theoretical availability of criminal sanctions creates a situation in which extortion and, on occasion, police corruption may take place.

7. There is substantial evidence that the moral sense of the community no longer exerts strong pressure for the use of criminal sanctions.

8. No utilitarian goal of criminal punishment is substantially advanced by proscribing private adult consensual sexual conduct (Packer, 1968, p. 304).

Packer (1968) goes on to say that one of the biggest problems with unenforced law is the effect that it has on the violators and the general public. The violators of the unenforced law see themselves as victims of an unjust system, and they will react against the law by rallying together to fight it. The social stigma of the law may relax a little bit, but in the end, “imaginary offenses turn out to have affects that are far from imaginary (Packer, 1968, p. 305).”

The Wolfenden Report

The Wolfenden Report (1963) is credited with eliminating the sodomy laws in England. The Wolfenden Committee was appointed on August 24th, 1954 “ (a) to consider the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts and (b) the law and practice relating to offenses against the criminal law in connection with prostitution and solicitation for immoral purposes, and to report what changes, if any, are in our opinion desirable (Wolfenden Committee, 1963, p. 19).”

The Wolfenden Report is cited most often in the majority of publications that attempt to discuss the decriminalization of same-sex behavior. The majority of the countries today that ban same-sex behavior were once part of the British Empire. The Empire largely disbanded in the

mid-19th century, and as colonies became independent they often maintained the systems of law and language that were put into place by the British.

The Committee acknowledged “the relationship between the law and public opinion...that is any legal enactment is markedly out of tune with public opinion it will quickly fall into disrepute (Wolfenden, 1963, p. 24).” It also referred to Alfred Kinsey’s reports that found 4% of the male population to be exclusively homosexual, and that 10% of the population surveyed acted exclusively homosexual for a period of 6 years or more (p. 37).

In considering whether homosexuality should be considered a legal offense, the committee addresses the three main arguments that are often made in support of keeping the sodomy laws. These arguments were:

1. “It menaces the health of society
2. It has damaging effects on family life
3. A man who indulges with another man may turn his attention to boys (Wolfenden Committee, 1963, p. 43).”

The Committee (1963) found that there was no evidence to support that homosexual’s menaced the health of society. It did find reason to believe that homosexuality can have a damaging effect on family life, largely due to the fact that most gays feel pressured to get married and this can lead to the dissolution of marriages, which would be damaging to society. In regards to the third argument addressing pedophilia, expert witnesses did not find evidence that homosexuality had any influence on pedophilic tendencies or behaviors (p. 43-46).

The Wolfenden Committee concluded by recommending that same-sex behavior between consenting adults be decriminalized, established an age of consent at 21 years old, and that further research should be made into various methods of medical treatment involving homosexuality (p. 187-189).

Law and Culture

Laws are one of the ways in which we develop cultural norms in society. Carabine (2004) sees this process of normalization as the way “individuals are compared and differentiated according to norms (p. 37).” Social policy performs a normalizing role in the sphere of sexuality, because social policy “contributes to the defining and reaffirming of heterosexuality as it is constituted at any specific moment as acceptable and appropriate sexuality (p. 37).

Normalization also operates through social policy “explicitly through the legislation and statutes which prescribe the boundaries of legal and illegal sex...and implicitly through the assumptions that are made about heterosexuality as normal and natural, which underpin and inform social policy...and produces differentiating effects and fragmented impacts which are in turn variously regulatory, penalizing, or affirmative in respect to different groups (Carabine, 2004, p. 38-39).”

Arvind Narrain (2008) also looks closely at the use of Section 377 in three famous cases in which consensual sex between adults was prosecuted under the law. In two of the three cases, the consensual acts were discovered and reported by police or other individuals who clearly used an invasion of privacy to become an eyewitness. In *Nowshirwan vs Emperor*, a policeman looked through the keyhole of a locked door to write his report, and in *D.P Minnawalla vs*

Emperor, a 'concerned citizen' entered the sleeping quarters of a working class adult in order to satisfy their suspicions that homosexual relations might be taking place (p. 60-61).

Arvind Narrain argues that it is remarkable that no judge had ever "saw fit to interpret Section 377 using the Indian Constitution as the touchstone: the right to equality, freedom of expression, and the right to live with dignity...this colonial law has been completely immune to any influence from the constitutional law of democratic India (p.65)." Narrain concludes with a question: "Is the stigmatisation of homosexuality as abnormal really underpinned by the idea of heterosexuality as normal (p. 73)?"

Heteronormative Culture

Bhan (2012) argues that "notions of hetero-normativity, modesty, privacy and patriarchy are encoded in the law and that allows queer desire to be considered unnatural (p. 43)." These patriarchal beliefs give legitimacy to the law, which in turn gives legitimacy to the discrimination and unequal treatment of sexual minorities.

In "Because I Have a Voice" (2012), Narrain and Chandran argue that there are actually three systems of knowledge that impact Indian understanding of same-sex behavior. These systems are: religion, law, and medicine. It is often thought that the Stonewall riots of 1969 in New York may be a turning point in getting the medical profession to change their views on homosexuality as an illness. Activists like Frank Kameny promoted the idea that the homosexual community should be the ones to decide what is right or wrong, and that psychiatrists should not have the authority to speak on behalf of the LGBT communities (p. 53).

Vikram Seth, a gay author who has been an outspoken critic of the law, interviewed with Outlook magazine in 2006. In his interview, Vikram argues that section 377 "casts a shadow of

illegality on the personal lives of a whole lot of people. They can't live openly and with dignity. Because even their families and well-wishers tend to use the existence of the law to justify their prejudices (Reddy, 2006)". Vikram also explains that even though he has had the opportunity to live abroad, he is Indian, and he chooses to live in India, but what bothers him most about the law in India is that it makes him feel like a criminal.

The Order of Nature

The idea of what is normal and natural is a central theme to the battle for LGBT rights in India, and across the globe. In an essay titled "How Natural is Normal," Nivedita Menon offers, "Why would we need laws to maintain something that is natural? Are there laws forcing people to eat or sleep? But apparently you need a law to ensure that people have sex the 'natural' way. (Narain and Bhan, 2012, p. 37)." She further argues that human beings in general do not live 'natural' lives. We are naturally born nude and then given cloth to cover ourselves up. We take food that is raw from nature and cook it. We also "build elaborate shelters from the natural elements (2012, p. 38)." Menon argues that "equating 'unnatural' with 'immoral/wrong' is simply a way of suffocating debate (p. 38)."

Menon raises the question: why must society have rules that dictate what normal sexual behavior is or isn't? For Menon, patriarchal society dictates what normal sexual behavior is that which seems to go hand in hand with "the passing on of property and lineage through men (p. 38)," and these norms are "produced, maintained, and rigorously policed by the state, laws, and social institutions. It is far from being natural or private (p. 38)." Menon concludes that "heterosexuality is painfully constructed and kept in place by a range of cultural, bio-medical

and economic controls (p. 39),” to maintain the current system that separates class, caste, and gender.

In “What’s Wrong with Homosexuality,” John Corvino (2013) argues that morality is not a private matter, morality is how humans treat each other, and that is what makes morality an issue for public concern. For Corvino, morality is about “the kind of society that we want to be: what we will embrace, what we will tolerate, and what we will forbid...people’s moral views strongly influence how they vote, and thus, ultimately, what laws get passed (Corvino, 2013, p. 6-7).”

Corvino (2013) believes that moral beliefs are passed down from parents and families, neighbors, or even religious education (p. 19). Corvino acknowledges that the question of homosexuality and morality goes as far back as Plato, along with the question of what is “unnatural.” He argues that the word unnatural “has a normative force, as well as strong emotive connotation...to call something unnatural is to call it grotesque, perverse, monstrous (p. 78).” Corvino (2013) goes into a discussion on the 13th century writings of St. Thomas Aquinas, who argued that “all sin is unnatural, because it is against reason, which is distinctive to human nature (p. 78).”

Corvino raises the questions: “Why do many people consider masturbation natural, but not homosexual conduct? Why do they consider heterosexual oral sex natural, and homosexual oral sex unnatural? Why is it fine for me to use my mouth for licking envelopes, chewing gum, or blowing a horn, but not to use it for romantically kissing [another] man (p. 79)?”

Corvino concludes that if “the unnaturalness charge is to carry any moral weight, those who level it should be able to do two things. First, they should be able to specify exactly what

they mean, explaining why the label applies to homosexual acts, but not other acts they don't normally wish to smear (p. 79)." He goes on to point out that moral challenges to homosexuality are "about the kind of relationships that society is willing to embrace, or short of that, to tolerate. It is about the fact that relationships are good for people, that social support is good for relationships (p. 150)."

Homophobia

A study appearing in "Stigma and Sexual Orientation (1998)" by Mary Kite and Bernard Whitley measured heterosexual attitudes towards homosexuals. With the assumption that beliefs about homosexuals were rooted in a "broader belief system about women, men, and their appropriate roles (Herek, 1998, p. 40)," Kite and Bernard's research found that men and women's gender belief system was influenced by an American society that pushed men "to suppress any aspect of the self that might be associated with femininity (Herek, 1998, p. 40)." Attitudes towards gay men were less favorable than towards lesbians, and that Men's less negative attitudes towards lesbians may result from men's sexualization of lesbianism (Herek, 1998, p. 56)."

The study (1998) found that men had a "more rigid adherence to gender roles...[which led] to their more negative attitude (Herek, p. 46)" towards homosexual behavior. Kite and Bernard argue that heterosexual men found homosexuality to be a 'violation' of the traditional male role, which seems notable since men "generally hold more permissible attitudes towards sexual behavior than women (p. 47)." Kite and Bernard also propose that further study needs to be done on attitudes towards individuals versus attitudes towards social groups, "because

presenting social groups as an attitude object calls their stereotypes of the group to mind, which are usually negative in respect to gays and lesbians (p. 55).”

Internalized Homophobia

Clinicians use the term ‘internalized homophobia’ to refer to the internalization of society’s homophobic attitudes. Ilan Meyer and Laura deal argue in “Stigma and Sexual Orientation” that societal attitudes do “shape a sociocultural environment characterized by rejection and discrimination (Herek, 1998, p. 160).” This environment can lead to personal rejection as well as private and public discrimination. Internalized homophobia occurs when “expectations of rejection and discrimination, [in combination with] actual events of anti-gay violence and discrimination (p. 161).”

Sexual minorities may develop negative self-perceptions which may lead to a “devaluation of the self and resultant internal conflicts and poor self-regard (Herek, 1998, p. 161).” Sexual minorities often do not receive protection or support from their families, and in have difficulty finding access to other homosexuals who may have a healthier view of the self. The Meyer and Dean study argues that “long before they begin to realize their own homosexuality, homosexually oriented people internalize societal antihomosexual attitudes to varying degrees...a deviant identity begins to emerge that can threaten the psychological well-being of the homosexually oriented person (Herek, 1998, p. 163).”

Corruption

Due to their ‘illegal’ status (real or perceived) sexual minorities often do not report the crimes against them. Because of cultural conditions, many sexual minorities feel shame, as if they somehow are responsible for being victimized. On April 15th, 2015 The Government

Railway Police (GRP) of Belapur division came under investigation after the arrest of struggling Marathi actor Ajinkya Shinde for being involved in an extortion racket.

According to the report, Shinde was asked to pose as a gay man in train station restroom by rail police officials. The actor would lure the gay men to a remote area, where police officials would take over the situation. They would then extort money from the victims by threatening to reveal their sexual orientation to their families. As many as eight officials and a Marathi actor were involved in the racket. Shinde was reportedly lured by the Government railway police who promised him a police job if he worked with them. The racket came to light when an attempted target reported the matter and even contacted the GRP commissioner Dr Ravinder Singal.

According to Times of India reports, Shinde was made the scapegoat and was the only one arrested while the constables involved weren't

(http://timesofindia.indiatimes.com/entertainment/marathi/movies/news/My-husband-is-not-gay-says-Supriya/articleshow/46916876.cms?intenttarget=no&utm_source=TOI_AShow_OBWidget&utm_medium=Int_Ref&utm_campaign=TOI_AShow).

Sexual Identities in India

Rahul Rao (2010) sees the development of sexuality into personal identities as a “recent and culturally specific development (p. 173).” He argues that these expressions of sexual identities in developing nations has been made possible due to the popularity of capitalism and the global AIDS crisis. Some same-sex behavior has been tolerated over the years in Eastern cultures, but the expression of homosexuality as an identity has not. Rao posits that this has led to “physical, mental, and emotional costs...[and] broken relationships, sham heterosexual

marriages, suicides, lack of legal and social recognition of otherwise deeply fulfilling personal relationships, lack of access to health care, etc; (Rao, 2010, p. 178).”

Rao (2010) credits Western activism and funding as the catalyst that has allowed Indian gay activism, but argues that a “broader strategy that includes social, cultural, medical, and other interventions (p. 193)” will be necessary for the LGBT community to gain acceptance in India. Rao describes 2 main approaches to queer activism in India, cosmopolitan and communitarian. The communitarian view is that LGBT rights are essentially a Western concept, and this has no place in the Indian community. LGBT activists trying to appeal to communitarians will argue that there is evidence homosexuality existed peacefully before the foreign intervention of colonial law.

Narrain and Bhan (2012) discuss some of the sexual identities that have come to be considered a part of the LGBT movement in India. The term LGBT is often applied to those living in metropolitan areas and identify as gay, lesbian, or transgendered. Those identifying as LGBT are often English speaking and belong to the middle and upper class urban society. Hijras include men who take hormones, those who opt for sex-change surgery, and hermaphrodites. Kothis are men that have adopted some feminine forms of behavior or dress, and generally do not conform to gender. Kothis are often from lower and middle class society, and typically identify as non-English speaking. Other less common identities that are also gender non-conforming in India include jogappas, jogtas, shivshaktsis, and ganacahris (Narrain and Bhan 2012 p.4-5).

Men involved in same-sex activity in India often do not associate themselves with the term “gay.” These men prefer to identify as a group of “men who have sex with men (MSM).”

The 1991 ABVA report “Less than Gay: A Citizen’s Report” discusses the case of Indu, a male taxi-driver from a rural Indian village. Although Indu says he is happy with his wife and four children, Indu also engages in sexual relationships with men. Indu does not see anything wrong with his behavior, and does not refer to himself as homosexual. Indu is not familiar with the term ‘gay,’ since he doesn’t speak English, but instead identifies as an MSM (ABVA, 1991, p. 11).

In 1999 study by Jeremy Seabrook titled “Love in a Different Climate,” 75 MSMs are interviewed in New Delhi. Seabrook posits that MSM “who penetrate others do not see the gender of the object of their sexual desire as having any significant implications for their sexual identity (p. 5).” Interviewees overall did not identify with the Western concepts of ‘gay,’ and many referred to sexual activity between men as “a kind of fooling around which is expected of young males (p.5)” which does not require classification.

Societal Pressure to Marry

Singh, Dasgupta, Patankar, and Sinha (2013) argue that the conventional social construction of a family is that of a man, a woman, and their children (p. 7).” Sing et al. argue that the idea of a family in India is so strong, that individual’s identities are often “subsumed in family and community identities (p. 7).” Within the family structure, each member of the family has roles that are defined by gender. Marriage is viewed as a cultural and social necessity in India, marriage “signifies adulthood, social responsibility, and the achievement of ‘personhood’ (p. 9).”

In Indian society, remaining unmarried “is often seen as an aberration or a sickness, bringing shame and dishonour on the family (Singh et al., 2013, p. 13).” A study conducted in 1998 found that most men were compelled to hide their sexual preferences in order to comply

with society's obligations to marry and have children. The study found that 40.5% of married men and 59.5% of unmarried men declared that they would continue to hide their sexual preferences for the same-sex. It is also notable that 96.6% of the unmarried men said they did intend to get married in the future (Singh et al., 2013, p.13).

In April of 2015, recent headlines describe the tragic suicide of Dr. Priya Vedi. Dr. Priya Vedi was the 31 year old wife of Dr. Kamal Vedi, a fellow doctor at the famed AIIMS Hospital in New Delhi. Priya Vedi committed suicide on the 19th of April in a hotel room in the Parharganj district of New Delhi. "According to the police, the couple got married five years ago and soon after the marriage, Priya came to know that her husband was a 'gay' ('Gay' doctor of AIIMS sent to 14-day judicial custody, TOI, 20 April 2015)." Dr. Priya Vedi left a suicide note as well as a message on Facebook, detailing her discovery of her husband's sexual experiences with men.

In her letters, Priya Vedi acknowledged that she had accepted that her husband was gay, but committed suicide due to spousal abuse from her husband and his family. Priya's suicide letter accused her husband Kamal of "putting her through immense mental torture after she learned that he was gay (Mujumdar, 2015, Priya Vedi's Suicide Highlights Complex Societal Issues in India)." Kamal Vedi was subsequently arrested on charges of abetment of suicide and harassment for dowry charges (Shekhar, AIIMS doctor arrested over wife's suicide, TOI 19 April 2015).

Sexual Minorities and Public Health

In India, traditional forms of medicine that include homeopathy and Ayurveda are often the first with the public. These more informal systems of medicine have "survived the very

introduction of Western medicine into India as part of the colonial project of pacification and control of the Indian subject (Narrain and Bhan, 2012, p. 55).” Arvind Narrain and Vinay Chandran interviewed a number of mental health workers in Bangalore. Narrain and Chandran found that the beliefs of the doctors they interviewed were a sum of medical discourse, legal discourse, and religious values.

Dr. PE offers that he treats patients for homosexuality because he “cannot ignore the patient’s distress. It’s not my job to tell him it’s okay to be gay, but my rather my duty to deal with the patients distress by treating him (2012 p. 56).” Narrain and Chandran believe there is a common assumption that heterosexuality is superior, leading mental health professionals to believe that the “best result for a patient is to make him/her heterosexual, even if briefly, and as a conditioned response (p. 57).”

Dr. CPB, a clinical psychologist, found it more problematic “when the person is not distressed about homosexuality, but its consequences. Since you cannot separate the individual from society, the attraction leads to a problem (p. 57).” The distress is often more related to the social challenges involved in coming out in India, which include a lack of social acceptance, and may result in a lack of support from family and friends, or disapproval in other social circles. Doctors in the study also noted that they believed homosexuals often did not have relationships that lasted long, and likely suffered depression “due to a lifestyle with frequent sexual partners (p. 59),” and likened “homosexuality akin to an addiction like alcoholism and drug abuse (p. 61).”

Posner (1992) believes that the inability of same-sex couples to enter into legal marriage, may promote a culture where sexual desire is never tamed, resulting in a more promiscuous

lifestyle. Homosexuals may substitute long term relationships with short term sexual relationships, reinforcing the public perception that gays lead a promiscuous lifestyle (p. 302).

Posner also posits that a lack of sex education in public schools and private homes may actually promote experimentation among adolescents wanting to experiment with same-sex behavior, since they cannot learn about it another way than trying it for themselves (p. 302).

HIV/AIDS in India

Ramasubban and Rishyasringa (2005) describe AIDS as “a silent, symptomless infection caused by a virus-the human immunodeficiency virus (HIV)-that could enter the body during unprotected sexual encounters, through blood transfusions, infected needles, or from mother to child (p.4).” At the time of writing, 85% of infections were transmitted through sex, and those most affected were groups that had a higher number of sex partners, “such as sex workers, migrant workers, truck drivers, and men who have sex with men (p.8).”

HIV/AIDS has become a major social problem for India, because many individuals do not have access to preventative knowledge, or are unable to exercise their own sexual freedom and are subject to “oppressive frameworks of sexuality compounded by poverty and gender inequalities (p.9).” Ramasubban and Rishyasringa (2005) argue that those worst affected by the HIV epidemic are sexual minorities, “who have to resort to great secrecy in matters to do with their own identity (p. 10).” The high risk groups for sexual behavior often fail to use condoms, are more susceptible to STD’s, and typically put off medical treatment due to fears of sexual minority discrimination (p.11).

Indian societal expectations for marriage often mean that many of the MSM and sex workers are also married, and that condom use within a married couple would be quite

uncommon. There are also double standards for genders, where sexual norms are more permissive for boys and men, but not for girls and women. Due to these complex relationships, the risk of exposure to HIV infection is “tilted against those who are disadvantageously placed in relation to any or all of the above contexts (p. 9).” Singh, Dasgupta, Patankar, and Sinha (2013) report that in India “more than 90% of women acquire HIV from their husbands or their intimate sexual partners (p. 2).”

Indian culture often victimizes the HIV patient, where hospitals often avoid treatment of the long-term illnesses due to costs, a lack of existing social programs to help people deal with HIV issues, and a lack of social support from the community in general. Mills says “it is often the case that the family will blame the patient and ill treat him (2000 p.29),” and goes on to describe situation where one family refused to let their HIV infected daughter back into the family home.

Legal Status for Hijras

In April of 2014, the Supreme Court of India passed a law officially recognizing the existence of a third sex, an option that could be used for those who may be intersexed, or perhaps in the transition stages from one sex to another. Khaleeli (2014) argues that recognition of a third sex now means that hijras will receive more legal protection, helping them better face challenges such as the refusal of medical treatment by doctors, harassment from police authorities, and more access to employment opportunities.

Prior to this law, hijras often found small job as entertainers or had to turn to begging or sex work in order to survive. “The effect of this dangerous work and the community's limited access to health and welfare services can be seen in the staggering fact that HIV rates among

hijras stand at 18% in Mumbai, while the rate among the wider population is only 0.3% (Khaleeli, para. 5, 2014).” While the law does much to address the human rights needs of the hijra community, some hijras would prefer not to be “referred to as ‘third sex’. Many would simply prefer to be classified simply by the gender they have chosen, as women or men (Khaleeli, para. 6, 2014).”

Human Rights

The concept of gay rights as human rights arises often in discussion of the legality of Section 377 and its effects on sexual minorities in India. In “Development with a Body,” Kate Sheills argues that “sexual rights embrace human rights that are already recognized in national laws and international standards (Cornwall, Correa, and Jolly, 2008, p. 45).” Sexuality is a part of human nature, and it is therefore an aspect of life force that all human beings contain. Sexual rights should therefore be considered human rights when we talk about personal freedom and liberty. Declarations about personal liberty and freedom are part of many state constitutions and international agreements, such as Article 3 and 7 of the United Nations Declaration of Human Rights.

Article 3 states that “everyone has the right to life, liberty and security of person,” and Article 7 decrees that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination (<http://www.un.org/en/documents/udhr/>).

Donnelly (2013) challenges these post-war declarations by pointing out they may not capture modern day society’s views. He argues that “the International Human Rights Covenants

are largely fixed standards that reflect attitudes of the 1940's, 1950's, and 1960's, when no country had a substantial gay rights movement (p. 285)." Donnelly (2013) points out, "race, color, sex, language, religion, national or social origin...were previous grounds for discrimination and today are almost universally considered illegitimate bases (p. 276)" for the treatment of the human subjects worldwide.

Arguments in Support of Section 377

When Naz filed the petition to request a reading down of Section 377 in 2001, several parties submitted affidavits to the court, some parties arguing that it would be better for society to keep Section 377 the way it is. Voices Against 377, a representation of civil society who would like to see Section 377 abolished, provide a short summary of opposition from 3 major parties who voiced their disapproval at making any changes to the law. These opposing parties included: "Mr. B. P. Singhal, a former BJP politician, submitted an affidavit arguing that Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of Indian society and therefore it is deserving of criminalization (http://www.voicesagainst377.org/?page_id=133),"

The summary also includes an argument offered by the Home Ministry, which sought to save Section 377 because it felt that Section 377 represented the values and morals of society, and that law should be a reflection of society's values. The most extreme view came from an organization called the Joint Action Committee of Kannur (JACK), which disagreed with Naz's and the National AIDS Committee Organization (NACO) position that Section 377 impedes the treatment and prevention of HIV. JACK "argued that Section 377 in fact served to prevent the

spread of HIV by deterring people from engaging in high-risk activity. They also denied that HIV causes AIDS (http://www.voicesagainst377.org/?page_id=133).”

Policy Recommendations

Indian Parliament should repeal Section 377 and enact laws that protect sexual minorities from hate crimes and discrimination. This would include the installation of a system where victims would be able to seek remedies, as well as sensitivity training for civil workers and law enforcement. In order to explain their approaches politically, parliament will have to use dual approach to help overcome the cultural challenges that have developed over the last 150 years in response to the ‘moral’ law that was imposed by Great Britain. In order to gain public support for changing the law, Rahul Rao’s cosmopolitan/communitarian approach will work best. Any changes to the law should consider human rights based arguments through cosmopolitanism, as well as communitarian points of view.

In order to gain the support of communitarianists, a new law should acknowledge the existence of sexual minorities in Indian culture prior to colonization, and underline that Section 377 was essentially a Western import, imposed by the British as a form of control over the India population. The need for this dual approach is clear from reading the judgement from the Delhi High Court, which promoted that idea that sexual minorities deserve human rights, and the Supreme Court judgement, which emphasized the Indian community and the importance of law as a reflection of society’s values. Once parliament has acknowledged that sexual rights are human rights, India should work with International Governmental Organizations (IGOs) such as

the Commonwealth of Nations and the United Nations to ensure they are in compliance with the international agreements they have signed promising to uphold human rights.

The Commonwealth Foundation should use some of its resource power, which is supported by significant United Kingdom (UK) contributions, to promote sexual education programs that underline the idea that sexual rights are human rights and help Indian society understand that decriminalization isn't about promoting sodomy, it's about protecting identities. Identities are important in Indian culture, this is evident by the number of regional languages that are spoken across the country.

The UK should play a special role in supporting the equal treatment of sexual minorities in India. The UK and India share a common history and language, and are both members of the Commonwealth of Nations. Ties between the UK and India are very close. In 2013, Indian's were one of the top ten nationalities applying for asylum in the UK, Indians also constituted the largest group of immigrants to receive work visas from the UK, and former Indian nationals received the highest number of grants for citizenship.

(<https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2014/immigration-statistics-january-to-march-2014#citizenship>).

The UK Human Rights and Democracy Fund (UKHRDF) does not include India in its list of '27 countries of concern' (<http://www.hrdreport.fco.gov.uk/>). India should be added to this list so that funds may be directed to India expressly for the purpose of addressing the human rights needs of its sexual minorities. Funding from the UKHRDF und could be used to support the education of medical professionals and others in the health industry. The 2012 interviews by

Narrain and Chandran of medical professionals show that cultural beliefs play a role in the way health professionals treat patients.

The UK has sets a great example to lead by. The UK government a does a great job of addressing the needs of its LGBT people. The UK government has officially recognized the rights of LGBT people in public policy. Government policies aim to decrease homophobic bullying in schools, increased penalties for hate crimes against the LGBT population, and supports equal marriage rights (UK Government Equalities Office, 2015, Appendix 8). Given how similar the government institutions are between the two nations, UK officials should be able to furnish India with the information it may need to get these issues addressed in Indian Parliament.

Conclusion

The law created an environment where it has become legally and morally acceptable to discriminate against Indian sexual minorities, which is an infringement on their basic human rights. Social groups cannot exist without shared norms of structure and meaning, and until the law is eliminated the human rights of sexual minorities are being denied. The purpose of the law seems to target only one facet of society: the sexual minority community. The law has influenced the culture so much, that it is not just the act of sex itself that is being punished. The term ‘unnatural’ is often applied not just to sexual acts; but to the sexual minority culture at large.

Indian Sexuality does appear to be socially constructed. The development of distinct Indian sexual identities is proof that Seidman’s (2003) theory of the social construction of sexuality is valid. Sexual identities are really just words that have been applied to internal feelings. If one didn’t have the words to describe it, it would not be up for discussion. Everyone

has a body, but society tells us which parts of the body may be used and what they may be used for. In India, the law classifies what pleasures are good and what pleasures are bad. In turn, this classification has created a society that punishes those who do not conform to the heteronormative standard set by the law.

Social constructionism also focuses on the social meanings that individuals apply to specific sex acts. We can see from the different identities that have formed in the East and the West. The law has effectively given social meaning to any sex that is non-procreative. Society has promoted heteronormative ideas that center the self among the family unit in India. Sexuality should not be viewed as an identity, but only an expression of pleasures with the body.

India's institutionalization of heteronormativity has meant that sexual minorities lack state protection and are subject to discrimination in private and in public. The cases of Priya Vedi and Ajinkya Shinde are evidence that the law doesn't just affect those who don't conform to 'natural' standards. The sodomy law has far-reaching implications for a society that is so concerned with how consenting adults use their bodies in private. Personal and marital relationships are failing, public health is at risk, and a culture of corruption has developed that victimizes sexual minorities and makes a mockery of law enforcement operations.

Ideas about what is right and natural have changed over the years. Some of the most constant arguments that have stood the test of time include the idea of sex existing only as a procreative function, or that without heterosexuality the human species would die out, or even the argument that men and women's bodies are naturally designed to have sex with each other. Since Victorian times, attitudes towards former sexual taboos such as masturbation, oral sex, or sex before marriage have changed. Sexual intimacy should be the most private aspect of all

of our lives, in India and the rest of the world. Section 377 infringes on the privacy of all Indian adults.

It was not too long ago that the Jim Crow Laws in the US provided a legal basis for racial discrimination. Once discriminatory laws are changed, societal awareness has often resulted in support for legislation that takes the protection of minorities or protected groups even further. Caste discrimination was common practice before the amending of the Indian constitution to outlaw caste discrimination. Indian society may still harbor some citizens that believe in the caste system or in 'untouchability,' but changing the laws to protect those minorities has meant that lower caste members of society have been able to mobilize, and have been elected to positions in public office, which will further the cause of equality for the untouchables in society.

Law has a direct effect on social norms in Indian society. The examples above highlight the effects that law has had on culture. Racial discrimination in the US and caste discrimination in India are still a problem. Changing or enacting laws cannot eliminate personal bias, but it does have the effect of eliminating institutional barriers to personal freedoms. Section 377 is not reflective of contemporary ideas about sexuality, and the law fails to protect the basic human rights of sexual minorities and contributes to a culture in India that has made homophobia and discrimination acceptable in Indian society.

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