

## MSM, HIV/AIDS and Human Rights in South Asia

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It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for.

*United Nations Secretary General, Kofi Anan<sup>1</sup>*

Realisation of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS

*Page 24, Booklet of the Declaration of Commitment on HIV/AIDS: United Nations General Assembly, Special Session on HIV/AIDS, 25-27 June 2001, United Nations*

Sexual health is the integration of the somatic, emotional, intellectual and social aspects of sexual being in ways that are positively enriching and that enhance personality, communication and love.

*Education and Treatment in Human Sexuality: The Training of Health professionals (p6, WHO, 1975)*

### Introduction

It is increasingly being recognised by people of good will, that responses to the global HIV/AIDS pandemic and its local manifestations, cannot be effective unless the human rights of those infected with and affected by the virus are clearly and unequivocally addressed. The virus is not only about personal behaviours, but is also about the social, economic and cultural environment in which behaviours take place and have meaning. This is particularly true with regard to sexual behaviours and practices, and none more so than for those who term “men who have sex with men”, or MSM. Denial, ignorance, illegality, myths, fears, violence, abuse, exclusion, invisibility, all these feature in current discourses on MSM issues. At the same time, exclusionist discourses on sexual identities, orientation, and “sexual minorities” tend to ignore the simple fact that the majority of MSM are exactly that – “men” with a specific sexual behaviour without a sexual orientation or identity. Such understandings will have a significant impact on rights-based approaches to HIV/AIDS.

For what do we mean by the term “men who have sex with men”? Who are these “men who have sex with men”?

For many it has become synonymous with “homosexuals”, or of “gay” men, while it is often signified within the context of discussions of “vulnerable groups”, or “target populations”, or “at risk groups”. Further, the use of the term “men” in MSM creates a universal category of MAN, ignoring the local cultural constructions of manhood and masculinity.

In other words MSM is often taken to mean a specific and exclusive “sexual identity” in opposition to “heterosexuality”, where MSM form an exclusive and bounded group. Too often programmatic decisions are taken within this limited view of what is essentially a behavioural term.

While this paper addresses the human rights concerns of “men who have sex with men” in South Asia. in regard to vulnerability to HIV/AIDS, I wish to initially address a query in regard to language and terminology that arises from the specific cultural contexts within this region.

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<sup>1</sup> From 25 Questions and Answers on Health and Human Rights, Health and Human Rights Publication Series, Issue No. 1, July 2002, World Health Organisation

The word “men” can be problematic in that this is also a culturally loaded word. In South Asian cultures, manhood (and adulthood) is defined by specific responsibilities, duties and obligations, and not by biological age. Marriage and the production of children (particularly male children) are cornerstones in this socio-cultural definition of manhood.

A second point that I wish to make is that adolescence and youth (whatever that means) does not preclude sexual activity of all kinds, and such activities may well be consensual.

Thirdly, those who do not conform to normative socio-cultural definitions of masculinity are not deemed men by their male sexual partners (and often do not perceive themselves as such) although they are biological males.<sup>2</sup>

It was with these concepts in mind that Naz Foundation International began to use terms such as “male-to-male sex” and “males who have sex with males”. While this may not appear to be of any great significance in the larger debate it does have an impact upon what we are addressing when we discuss human rights issues and concerns. It is also central to the discourses that reflect rights based approaches on sexual orientation, and/or on sexual health.

In this context, which rights-based approach will be utilised in address MSM, HIV/AIDS and human rights is critical in ensuring equal access for all to health and liberty. If we only address equality and rights based on identity/sexual orientation, then what happens to those males whose sexual behaviours with other males are outside the purview of such rights because they do not see themselves possessing a sexual orientation other than a normative masculinity as men?<sup>3</sup>

#### MSM in South Asia<sup>4</sup>

*What follows is based on over seven years intensive experience of working with male-to-male sexual behaviours, masculinities, sexualities and practices in South Asia, where NFI has not only conducted a range of social and situational assessments amongst males who have sex with males in a number of cities across the region, but has also provided technical support and assistance to implement over 28 CBO sexual health projects in response to these assessments.*

Sexual identities, masculinities and sexualities take shape within psychosocial and historical processes, which in turn are contextualised by religion, culture and language. Euro-American understandings and discourses on “gay identities”, heterosexuality, homosexuality, bisexuality,

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<sup>2</sup> See NFI reports on a number of Situational And Social Assessments on MSM in a range of cities in South Asia accessible on its website [www.nfi.net](http://www.nfi.net)

<sup>3</sup> See: The risks of categorisation, Shivananda Khan, Pukaar, Issue 21 April 1998; Varieties of homosexuality in Bangladesh, paper presented by Dr. Carol Jenkins at the 12<sup>th</sup> World AIDS Conference, Geneva, June 28-July 3, 1998, Pukaar, Issue 24, January 1999; Men and HIV: sociocultural constructions of male sexual behaviours in South Asia, Shivananda Khan, Pukaar, Issue 28, January 2000; Males who have sex with males in South Asia – a kothi framework, Pukaar, Issue 31, October 2000. Pukaar is the quarterly journal of Naz Foundation International and available on its website [www.nfi.net](http://www.nfi.net) as pdfs

<sup>4</sup> I have written extensively on this issue. See the range of NFI publications on its website [www.nfi.net](http://www.nfi.net). Also see: Under The Blanket: bisexualities and AIDS in India, Shivananda Khan, in Bisexualities and AIDS, Taylor and Francis, 1998, Through a window darkly: males selling sex to males in Bangladesh and India, Shivananda Khan, in Men Selling Sex, Taylor and Francis, 1998; Conspicuous by their absence? - men who have sex with men (MSM) in developing countries - implications for prevention - a joint paper with Richard Parker and Peter Aggelton, published in Critical Public Health, 1998; Interventions for men who have sex with men in developing countries - joint chapter with Peter Aggleton and Richard Parker, in Preventing HIV infection in developing countries, editor: L. Gibney, R. DiClemente & S. Vermund, New York: Plenum, 1998; HIV and men who have sex with men: perspectives from selected Asian countries with Roy Chan, Ashok Row Kavi, Greg Carl, Dede Oetomo, Michael Tan and Tim Brown, 1998; Males who have sex with males (MSM) and HIV/AIDS in India: The Hidden Epidemic: Gregory Pappas, Omar Khan, Jason Taylor Wright, Shivananda Khan, Lalitha Kumaramagalam, Joseph O'Neill, AIDS and Public Policy Journal, 2002.

or even the use of the term “sexual minorities” can be misleading, which actual invisibilises to a significant extent the range and level of male-to-male sexual activities and those involved in them.

South Asian cultures are supremely patriarchal, gendered and hierarchal, so that the word MAN is defined not so much by biological age, but by gender roles and performance, religious rituals along with family/marital duties and obligations. Those who fall outside such normative masculinity would not be defined as MAN, but as NOT-MAN. In this situation, the penetrated male sexual partner is seen as NOT-MAN, while the penetrator perceives himself, and is perceived by others, as a normative man.

In such phallogentric patriarchal cultures with sex defined reproductively, masculinity is defined by the act of sexual penetration and gendered roles and not by “sexual orientation”. Those who are penetrated would thus be perceived as less worthy, feminised, debased males, and would be highly stigmatised leading to a range of violence and abuses, as well as sexual accessibility without diminishing the masculinity of the penetrator. The male penetrator is not deviant and is a part of the general male population. It is the penetrated that is subjected to the perception of deviancy and thus of abuse. This perception is further reinforced by the socio-cultural realities of invisibilisation of sexual behaviours, gender segregation, social policing of women, an acceptability of male homosociability and homoaffectionalism<sup>5</sup>, male dominance over public spaces and discourse, a culture of shame where family and community respect and honour holds sway, compulsory and arranged marriage, pressure of reproduction (particularly of male children), understanding of sex only in its reproductive sense, joint and extended families, and the negation of the self before the community/family.

However, South Asian frameworks of male-to-male sex are substantive, divergent and broadly inclusive, involving not only the more visible gendered males who self-identify as *zenanas/kothis/metis*<sup>6</sup> and are usually penetrated, but also their more invisible males/men partners who take on the penetrating role (known as *giryas/panthis/ta*<sup>7</sup> by *zenanas/kothis/metis*) accessing *zenanas/kothis/metis*, *hijras*<sup>8</sup>, and at times, adolescent males.

Other dynamics also include normative males who access other normative males for discharge and/or desire to be penetrated, males who desire male-to-male sex and do not gender themselves and usually indulge in mutual sexual activity - ‘giving and taking’, friends who have

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<sup>5</sup> Homosocial and homoaffectionalist culture: In South Asia gender segregation of social spaces is a strong form of social policing of gender relationships. Primary relations are between the same gender (homosocial). Homoaffectionalism, in the sense that the term is used in this text, means social acceptance of the public display of male-to-male or female-to-female affection. For example, it is common in Bangladesh to see two males holding hands or arms wrapped around each other as they walk. Often male friends will also share beds when sleeping, wrapping themselves around each other. (See Hardman: 1993; Also Khan: 1996, where he points out that the boundary between homoaffectionalism and homosexual behaviours is very “thin” particularly in shared spaces and “under the blanket.”)

<sup>6</sup> *Zenana/Kothi/Metis* - A self-identifying label for those males who feminise their behaviours (either to attract “manly” male sexual partners and/or as part of their own gender construction and usually in specific situations and contexts), and who state that they prefer to be sexually penetrated anally and/or orally. *Zenana/kothi/meti* behaviours have a highly performative quality in social spaces. Self-identified *zenanas/kothis/metis* use this term for males who are sexually penetrated, even when their behaviour is not feminised. This is the primary and most visible framework of MSM behaviours. *Zenanas/kothis/metis* state that they do not have sex with other like themselves, only “real men”; however, they may also be married to women. Note that the term *kothi* tends to be used in India and Bangladesh, *zenana* in Pakistan and *meti* in Nepal.

<sup>7</sup> *Panthis/Giryas/Tas* - A *zenana/kothi/meti* label for any “manly male.” A panthi/giriya is by definition a man who penetrates, whether it is a woman and/or another male. Panthis/Giryas may also be married to women and/or access other females. Their occupations vary across the social class spectrum from rickshaw drivers to businessmen.

<sup>8</sup> *Hijras* - A self-identified term used by males who define themselves as “not men/not women” but as a “third gender.” *Hijras* cross-dress publicly and privately and are a part of a strong social, religious, and cultural community. Ritual castration may be part of the *hijra* identity, but not all *hijras* are castrated. Sex with men is common. They also have their own language, known as *ulti*.

sex with friends for mutual pleasure, and males in all male institutions. Amongst the educated and urban elite, a Western gay sensibility and community is also emerging in parallel to this.

We can thus say that what seems to exist is a range of masculinities and gendered behaviours with differing contextualisation of sexual practices, sex partner choices, perceived sexual needs, pleasures and desires. In other words, MSM phenomena is highly complex and often cannot be reduced too simply “an at risk group”.

Further male-to-male sex work is also a significant factor of vulnerability in South Asian cities. *Hijras, zenanas/kothis/metis, malishias*, male youth, and other males will sell sex to men usually because of poverty and unemployment. Without a welfare system, and with significant levels of unemployment or low level incomes, male-to-male sex work can be a survival strategy in terms of supporting the self and family. This is not to imply that males involved in sex work do not enjoy sex with other males. Often they will also have a regular partner - a *pucca dost/parik*<sup>9</sup>.

What is clearly seen is that language, behaviour, and identity is to a large extent gendered, within a hidden context of polymorphous behaviours, and that behaviour and sexual practice are more significant markers for the majority of males involved in male-to-male sex than a specific sexual identity. In a way it could be said that there are limited numbers of MSM with specific gay/homosexual identities, but significant levels with a gendered identity or with perceived masculine “body needs” which shaped sexual practices.

The issue of female sexual health is also highly pertinent. Cultural tradition makes marriage socially compulsory. Many MSM, of whatever framework or gender identification, are married or going to be married, even those who self-identified as *zenanas/kothis/metis*. Many manly sex partners from the general male population would also be married or going to be married.

*See Annex 1 for a mapping of male-to-male sex in South Asia.*

### **MSM, Vulnerability and Stigma<sup>10</sup>**

Not only does poverty, class and education level stigmatise individuals along with the fact of HIV infection, but also the specific gendered role and identity that some MSM identify with. Thus *zenanas/kothis/metis* are doubly stigmatised because as biological males they are sexually penetrated – and thus not perceived as men. Their feminisation, their crossing of the gender roles and barriers accepted as social norms, reinforces the stigmatisation, leading to exclusion and denial of access to services and to the social compact. This often results in such males who are living with HIV/AIDS to be stigmatised by others who are also living with HIV/AIDS but whose routes of infection are deemed “normal”.

Such feminised males are vulnerable, not only because of poverty, but also because of the sexual and gender roles they play within male sexual practices which often leads to significant levels of manly sex partners, sexual abuse, violence, rape, and harassment, often from an early age.

In other words, social justice and human rights issues for MSM are a complex matrix of issues, concerns, and needs that reflect personal psycho-sexual histories, economics, poverty, gendered roles, social-cultural polices and attitudes, as well as legal concerns, that create a context for MSM, but particularly for feminised males, of low-esteem, disempowerment, and

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<sup>9</sup> *Pariks/Pucca Dost* - A *zenana/kothi/meti* label for the “husband” of a *kothi*. The *parik/pucca dost* may also be married to a woman and have sex with other women as well as males.

<sup>10</sup> See NFI Briefing Paper No. 7: Social Justice, human rights and MSM

marginalisation that leads to further abuse, violence and social exclusion. It is a vicious circle that constantly reinforces itself.

On the other hand, the masculine partners of *zenanas/kothis/metis* easily merge into the general normative male society, their sense of masculinity maintained because they are the penetrators, not of other men, but of “not-men”.

Power inequality dynamics arising from South Asian constructions of masculinity, social attitudes towards feminised males and their sexual practices, sexual abuse, assault and rape, stigmatisation and poverty, discrimination and disempowerment, all configure the lives of most *zenanas/kothis/metis*. As a consequence they play a significant role in the emotional, sexual, physical and economic exploitation of feminised males, and give rise to a range of physical, psychological, and emotional problems, which further increase vulnerability and disempowerment. This disempowerment creates significant levels of suicidal impulses and self-damage, an expression of self-hatred and despair. And this of course leads to significant increases to risks of STI/HIV as well as impeding successful implementation of risk reduction strategies.

Those who are meant to be protected, sustain abuse and violence. Many *zenanas/kothis/metis* not only face harassment, sexual violence and rape from law enforcement agents, but also from those whom they have called friends in schools and colleges, from those in positions of trust such as relatives, neighbourhood elders, elder friends, and teachers. Gang rape is not uncommon. And of course such forced sex is always unsafe and often results in serious physical injury such as a ruptured rectum, internal haemorrhage and so on.

One of the central issues that have arisen from NFI research and understanding is that often it is effeminacy and not the factual knowledge of male-to-male sexual behaviour that leads to harassment and violence. That harassment and sexual violence results from the fact that many *zenanas/kothis/metis* do not live up to the expected normative standards of masculine behaviour.

It is this belief that leads to the notion that those who are feminised can be exploited and abused, that being feminised somehow weakens the person, a notion often harboured by the *zenanas/kothis/metis* themselves.

*“I don’t mind if my ‘husband’ beats me up. It only shows how manly and powerful he is.”*

*“When my parik beats me, I feel as helpless as a woman. Since I want to be a woman, it actually makes me feel good”.*

Accepted notions around effeminacy are therefore one of the major factors that lead to disempowerment and opens *zenanas/kothis/metis* to abuse and assault and to a refusal of service provision. The fact that *zenanas/kothis/metis* themselves have internalized these notions so strongly, means that specific tools will need to be developed for *zenanas/kothis/metis* in order to empower them to start valuing their lives and enhancing their self respect.

It is clear that legal, judicial, political and social advocacy is urgently needed that not only is about living with HIV/AIDS or about social justice and human rights for MSM. It will need to include challenging accepted notions of masculinity and femininity so that discrimination and stigmatization, social exclusion and marginalization can be effectively challenged as they confront the daily lives of *zenanas/kothis/metis*.

## MSM and Human Rights

Sexual and social vulnerability, poverty, marginalisation, violence, and social exclusion lead to a disempowering environment, which fuels the AIDS epidemic. The disempowerment and daily violence that so many MSM experience because of their sexuality and/or feminisation substantially increases these vulnerability and invisibilises them in human rights discourses.

A leading player in the increasing levels of harassment and violence of many MSM is the policy conflict between home ministries and health ministries in the region and the government responses to HIV/AIDS in their countries. AIDS has increased the visibility of MSM as a phenomenon, by bringing it into the public domain for discussion, debate and responsiveness. But because of unresolved ministerial and policy conflicts, it has resulted in increased fear, abuse, harassment, violence and intimidation.

While a range of international and national agencies working in the field of HIV/AIDS have recognised that for effective and sustainable strategies to prevent the spread of HIV/AIDS and to control emergent epidemics in a range of localities, countries and regions, MSM should be seen as a vulnerable “group” and their sexual health concerns need to be addressed in ways that enable “community-based” responses. A range of papers, documents, and policies have all been written about empowerment, creating and enabling environment, community-based strategies and so on, towards risk reduction, along with the tools to produce such a change. However, without addressing the day-to-day violations that confront so many MSM, vulnerability to HIV/AIDS will remain high.

In a study conducted in 2000 by NFI consultant Aditya Bondyopadhyay with Bandhu Social Welfare Society in Bangladesh<sup>11</sup>, significant findings included:

33% reported assault of a sexual nature<sup>12</sup>, or rape at the hands of friends’ i.e. those who the respondent knew and trust, which was next only to sexual assault or rape at the hands of *mastaan/goonda* (traditional terms for hoodlums or bullies) and the police.

48% of the respondents reported that they have been sexually assaulted or raped by policemen, and 65% have reported that they have been sexually assaulted or raped by *mastaans/goondas*.

64% of the total respondents reported facing harassment of one kind or the other at the hands of the police.

Rape and sexual assault also results when *kothis* or male sex workers refuse to pay the extortion demands of “hoodlums” or police. It may be noted that all the male sex workers in this study were self-identified *kothis*.

Reported gang rape by policemen was significant, where *kothis* were rounded up and taken either to police barracks or the police post and raped by groups of policemen. Such forced sex

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<sup>11</sup> See study report The Impact of legal, sociocultural, legislative and socio-economic impediments to effective HIV/AIDS interventions with MSM, June 2000, NFI, Aditya Bondyopadhyay, Bandhu Social Welfare Society, Bangladesh, funded by UNDP.

<sup>12</sup> The cultural understanding of rape involves the act of penetration. The law on rape in Bangladesh as it stands in the Bangladesh Penal Code also reinforces this belief. However many times a person is sexually assaulted in a way where he may receive grave psychological and/or physical injury, but it may not involve anal penetration. This fact was explained to the outreach staff in the workshops, and they were asked to include all grave assault of a sexual nature {as opposed to minor harassment of a sexual nature} that may not have resulted in actual penetration in the response to the questions on sexual assault.

is always unsafe and often results in serious physical injury like ruptured rectum, internal haemorrhage etc. It is also generates risks for the police officials.

The other factor that contributes to the abridgement of the basic safety of MSM and *kothis* in public areas is that *mastaans* are often in cohorts with the beat policemen. *Kothis* therefore do not receive any protection from the police when any harassment or assaults by the *mastaans* are actually reported.

Other than sexual assault, rape, and gang rape, the other harassment that respondents reported facing at the hands of police range from, extortion on the threat of imprisonment, prolonged blackmail, beatings, restriction of movement in public places, and disclosure of sexual practices to *mastaans* and family, amongst others.

71% of the total respondents stated that they had faced some or the other form of harassment from *mastaans*. Other than rape, these are, extortion [38%], beatings [45%], threats and blackmail [31%].

87% of the respondents stated that they had been subjected to sexual assault or rape simply because they are effeminate. This is of course an indication of the whole issue of feminised males and gender, which is dealt with hereafter, but it is also indicative of the high percentage of MSM who suffer sexual assault and rape.

41% of those who had faced some form of harassment at the hands of the police say that the police guessed that they were MSM from their feminised behaviours. 55% of those who had faced harassment from *mastaans* also reported that the *mastaans* guessed they were MSM from their feminised behaviour.

Victimisation by family members was not uncommon. Of the 25 respondents whose near relatives were aware of their sexual behaviour, only 19 said that they had not accepted it. Their families had reacted negatively with beatings, forced marriage, disinheritance, throwing the person out of the house, taking them to doctors for curing them of homosexuality and so on.

48% of the respondents stated that fellow students or teachers had harassed them in school or college because they were effeminate. 55 out of the 60 respondents who said that they have faced harassment by teachers or fellow students also said that their studies have suffered due to this, and that they could have progressed more if such harassment had not taken place.

Of the 59 respondents who have said that they did not face harassment in the educational institutions, 40 had studied up to 4<sup>th</sup> standard or less, 13 up to secondary level, and 5 up to higher secondary level. All those who had gone to university reported sexual harassment in either school or college.

36% of the respondents reported that they had faced harassment from religious leaders due to their sexuality.

Such regular experiences along with the fact that such feminised males live in culture which constantly validates normative masculinity creates internalised pain, shame and trauma along with deep sense of failure as men. This usually leads to self-blame, a lack of hope, and self-destructive behaviour.

33% of the respondents reported that they have either thought of or tried to commit suicide at some point in their lives.

77% [96 out of 124] of the respondents stated that they know of others who have also faced such harassment. Of this 96 who admitted to knowing such other persons, 46 stated that they know of less than 5 such persons, 33 stated that they knew between 5 to 10 such other persons, and 17 stated that they knew of more than 10 such persons.

It was also clear from the study that beat constabulary often target outreach workers of sexual health projects too with extortion demands, and if such demands are not met the work of outreach is obstructed. This has a direct impact on vulnerability and risk of HIV.

Many times local constabulary make arbitrary arrests under the laws related to powers of detention on suspicion. This is a law that is abused with impunity to target outreach staff and MSM in the field. This law is also used as an excuse to justify any detention of MSM.

Sufficient evidence exists, and regularly reported to NFI from its partner agencies, that similar levels of abuse occur in the other countries of the region.

It is a largely excepted premise that the fights against HIV/AIDS must be allied with addressing human rights concerns of the most vulnerable, along with protecting the rights of those affected and/or infected by the virus.

Governmental policies for combating the HIV pandemic are often in conflict with the penal laws of the countries within the region. Therefore we find that on the one hand the health policy of the government seeks to address male-to-male sexual behaviours for HIV intervention. But on the other hand we also find that the continuation of the criminalisation of such behaviours discourages those in need of information and services to seek the same. It therefore means that the delivery of services cannot be optimised. Further the outreach staff of intervention agencies and the targeted audience are susceptible to police excesses because the criminal laws are in direct conflict with the HIV policies. They are also open to abuse as due to the criminality in law, they are deterred from seeking any remedy. This directly impedes HIV outreach.

In Bangladesh, India and Pakistan, legislation left over from British colonial times hangs over effective and appropriate HIV interventions amongst MSM like a Damocles sword, where in several cases outreach staff and others have been harassed and/or arrested and charged with “corrupting society” “aiding and abetting the commission of a crime” (the act of sodomy), and publication of obscene literature (use of materials for education purposes).

The particular legislation in question is the infamous Section 377 of the Bangladesh/Indian/Pakistan Penal Code, which states:

*“Anyone who voluntarily has carnal intercourse against the order of nature with man, woman or animal, shall be punished with imprisonment of either description which may extend to life, or to ten years and shall also be liable to fine”*

*The explanation appended to the sections states “Penetration is sufficient to constitute the offence as described in this section”.*

In India, the meaning of penetration has been broadened to include oral sex, mutual masturbation and inter-femoral (thigh) sex also through a range of court judgements over the last 50 years or so!

The existence of this so-called anti-sodomy law has a range of adverse consequences:

- Proper intervention efforts cannot be organised since such interventions can be construed as an abetment of a criminal act.

- It helps in the further marginalisation of an already vulnerable “community” – MSM, afraid of attracting criminal sanction, do not come forward to access care, help and information.
- Most importantly, it is no more only a moral or legal issue. It is a tool of harassment and extortion in the hands of public authorities and is therefore also a corruption issue.
- It is very difficult to prove, but easy to charge with, which is the reason it is abused more often than it is used. This abuse in turn leads to the MSM going underground and not accessing information and help, thereby increasing vulnerability to HIV/AIDS.
- It violates the privacy of the individual and is based on premises that have been scientifically established as false and untenable, yet it remains in the statute books and continues to be an impediment to intervention efforts.
- Unless it is repealed there can be no effective advancement of the other rights of the MSM population such as recognition of common law partnerships, inheritance, adoption and maintenance rights.

Another concern that any effective intervention efforts amongst MSM face are the Obscenity laws, and laws pertaining to loitering and public indecencies/nuisance, and abetment.

These laws are often invoked to impede the intervention process and the process of dissemination of safer sex and health information. They are also used to target MSM in public spaces of socialisation, which are used by intervention agencies for dissemination of information. Most importantly, the laws on abetment are vague enough to attract sanction against intervention agencies as abettors of a criminal offence.

It has been recognised and articulated by UNAIDS and others that for building sustainable risk reduction strategies in the context of HIV/AIDS prevention and care, community ownership, mobilising and active participation of those most at risk, are central for success. For vulnerable networks such as varieties of MSM, the lack of safe spaces and space for socialisation is a fallout of 377. Criminalisation also gives the state the authority to break up or disallow any such interaction. Further, this lack of safe spaces in turn also gives rise to incidents of violence, blackmail, extortion and threats, which closets the population and discourages the spread of safer sex information and prevention efforts, and increases vulnerability to HIV/AIDS.

Lack of support structures is also the fallout of discriminatory laws and the lack of safe spaces. This leads to isolation of individual MSM and causes psychological and other distress. It also opens up the MSM to abuse and does not allow him to have proper access to legal/medical redress when abused or hurt.

Further systemic and sustained interventions are a casualty, and this affects the entire population by making them vulnerable to HIV/AIDS and other STIs. Thus most MSM, particularly those with feminised identities and/or anal problems, usually cannot access care and health facilities as knowledge of their sexual behaviour may attract criminal sanction. Existing laws therefore violate the right to health, which is a guaranteed fundamental right under Article 21 of the Indian Constitution, along with similar articles in the Constitutions of the other countries in the region.

In a paper prepared by Miriam Maluwa, Law and Human Rights Advisor to UNAIDS<sup>13</sup>, a strong case was argued that current international human rights treaties and conventions, along with those dealing with HIV/AIDS created “the human rights framework which gives access to existing procedural, institutional and other accountability and monitoring mechanisms which

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<sup>13</sup> Presented at the special UNAIDS convened Inter-Agency meeting on Working with Men who have sex with men for HIV/AIDS Prevention and Care, 1<sup>st</sup> November 2002,

can be used to monitor and advance a rights based approach to HIV programmes, including those addressing men who have sex with men”<sup>14</sup>

However, this author believes that there is an inherent weakness in this in that the discourse is being taken to mean sexual orientation. While this of course is extremely important, it is inadequate in addressing many of the concerns highlighted above. These are that the human rights and sexual health concerns of the range of gender variant males amongst MSM which reflect stigma, discrimination and social exclusion, and the abuses that arise based on non-conformity to normative masculinity, are not being included.

Another concern this author has is that a rights based approach singularly focused on sexual orientation (or even gender variance) and which argues that “sexual minorities” such as lesbians, gay men, transgendered persons and hijras (and other gendered identities) should have the same rights as any other minority as legislated in the different countries in the region and often embedded within their Constitutions, would still be inadequate to address all the human rights concerns of MSM. Such an argument does not address the behavioural choices of those who do not identify as a “sexual minority”.

In Sonia Katyal’s essay “Exporting Identity”<sup>15</sup>, the argument for the rights to privacy, gender choice, the right to form associations, to meet, and behavioural practices where consensuality is involved, may be a broader and more inclusive approach to begin to the above identified concerns.

It is suggested that any rights-based approach to the sexual health needs of MSM should not only take into account the World Health Organisation’s definition of sexual health as a cornerstone, but also must address the rights to privacy and freedom of association, along with repealing any and all laws, regulations, and policies that impede the right to sexual health for all.

As part of the advocacy work of Naz Foundation International a *Charter for Social Justice for MSM* was drafted at the 3<sup>rd</sup> NFI Regional MSM Consultation Meeting held in New Delhi, India in April 2003, which tries to address these concerns and seek action to be taken by State institutions, donors, and HIV/AIDS agencies. *See Annex 2.*

The time for action is now. Concerted efforts must be made to ensure that all peoples, and within the context of this paper, all varieties of MSM have the rights to “life, liberty and the pursuit of happiness” that is often talked about, but no meaningful action is taken.

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<sup>14</sup> See NFI Briefing Paper No. 10, statement by Miriam Maluwa

<sup>15</sup> Exporting Identity, published in Yale Journal of Law and Feminism, Volume 14, Number 1, 2002



## **ANNEX 2**

### **A Charter for Social Justice**