

Male-to-male sex, and sexuality minorities in South Asia

An analysis of the politico-legal framework

By Arvind Narrain & Brototi Dutta
Alternative Law Forum, India

Information note

A background paper produced for the Risks and Responsibilities: Male Sexual Health and HIV in Asia and the Pacific International Consultation held in New Delhi, India 23-26 September 2006..

Contents

Page

1	Introduction
5	The social-political context in South Asia
7	The legal framework: some legacies of colonialism?
9	Examination of specific country contexts
29	Conclusion

Introduction

It is difficult to understand South Asia as a single region, as the various countries in the region have very unique histories. The political history of modern South Asia is complex and ranges from histories of democracy to military regimes. When we add the complexity of diverse socio-cultural frameworks in these nations, it becomes even more difficult to draw any cross-regional conclusions with respect to the history of South Asian society and the way it has dealt with the realm of sexuality.

It is fair to say that across the region comprising the nations of Pakistan, Afghanistan, India, Nepal, Bhutan, Bangladesh, Sri Lanka and Maldives, the topic of sexuality remains heavily stigmatized. However one has to note that in the course of the last two decades, and more particularly in the last decade, the compact of silence is slowly being broken.

There has been an emerging activism on sexuality and rights with stigmatized and marginalized sexual identities, such as gays, lesbians, bisexuals, *kothis*, *bijras*, *metis* and other regional identities, all finding expression in the public discourse in many South Asian nations. However, one has also to note that the emergence of some voices is also co-existent with a continuing silence from many quarters in South Asia. While the emergence of voices of some sexual minorities from India, Nepal and Sri Lanka is quite encouraging, one should also note the relative absence of any voices from regions such as Afghanistan, Maldives, Bhutan and Pakistan.

What perhaps underlined how far South Asia still has to go to ensure that sexual minorities are treated as equals with the same rights as all other citizens, is the response which the Brazil Resolution before the Commission on Human Rights invoked from South Asian governments.

In April, 2003 the Brazilian government introduced a historic resolution on “Human rights and sexual orientation”. The resolution itself did not go very far as it merely “expresses deep concern at the occurrence of violations of human rights in the world against persons on the grounds of their sexual orientation”, and “stresses that human rights and fundamental freedoms are the birthright of all human beings, that the universal nature of these rights and freedoms is beyond question and that the enjoyment of such rights and freedoms should not be hindered in any way on the grounds of sexual orientation”¹.

It is important to note that the resolution did not in any manner create any new rights, but merely affirms that the existing rights framework should apply regardless of sexual orientation. It recognizes sexual orientation as a area of discrimination, and asks people to use existing human rights mechanisms to give due attention to the subject. In spite of the resolution not creating any new rights, the response from South Asia was unremittingly hostile.

Conversations with the representatives of Bhutan, Nepal, India, Sri Lanka and Pakistan indicated what exactly South Asian Governments thought about sexual orientation and gender identity as human rights issues. I will briefly not the contents of the conversation as it tells us where South Asia is on the issue of sexual orientation.

Sri Lanka

The delegate was very friendly and open to discussion. He noted that the key problem Sri Lanka had was with the word sexual orientation, as the word could also mean pedophilia, adultery etc. He also noted that Sri Lanka had signed a statement of the OIC (Organization of Islamic States) thereby ensuring that they would vote no.

Nepal

The delegation was once again very friendly and completely surprised that we were from South Asia and talking about the issue of sexual orientation. They noted that it was a difficult issue for them as though they were clear that they did not support torture/arbitrary detention on grounds of sexual orientation, they were not supportive of a concern which they thought was clearly western.

¹ (E/CN.4/2003/L.92.)

² Arvind Narrain, ‘Brazil Resolution on Sexual Orientation: Challenges in Articulating a Sexual Rights Framework from the Viewpoint of the Global South’ (<http://bangkok2005.anu.edu.au/papers/Narrain.pdf>)

Bhutan

The delegate was most surprised and was keen to talk a bit more on the issue. She said that she was awaiting instructions from the Ministry on how to vote.

India

On being asked what stand the Indian Government would take, the Indian representative noted that there was a petition in the Delhi High Court challenging the constitutionality of Sec 377 of the Indian Penal Code, but as long as the law remained on the statute books the Indian delegation had no choice but to vote against the resolution. On being asked the reason for such a hard-line stance which was similar to the OIC, on a resolution which did not create any new rights, his response was just by using the phrase sexual orientation, one was creating new rights, and he was not empowered to create new rights, with him receiving directions from Delhi on such a sensitive matter.

Pakistan

We approached the Pakistani delegate and told him that we wanted to understand the reason why the delegation was so strongly opposed to the resolution and whether it had any religious roots. His response was first to ascertain who we were, and then to note that this resolution was sponsored by militant gays from the west in his opinion, and this was not a concern in his country. He noted that there were prohibitions in Islam against this form of behavior and that anyway, he had no choice in the matter, as some other countries in the OIC had very strong views on the matter, and they had no choice but to go along with other countries. He then noted that they were not opposed to prohibiting torture and other forms of violence against all human beings, but so no reason why sexual orientation should be specifically mentioned in the resolution. He also noted that it was not a concern of south based countries but a northern concern. When asked specifically about *hijras* and how there was discrimination against them, he said that she did not condone any violence on grounds of sexual orientation. However he was very strong in stating that it was not a southern concern. The concerns of countries in the south were basic issues such as health, education, and socioeconomic rights which the north opposed. He noted for example, that it was at the instance of France, that the resolution which looked at poverty as a violation of basic human rights, became extreme poverty as a violation of basic human rights.

The responses outlined above range from surprise that anyone could even consider sexual orientation and gender identity as human rights issues, to downright hostility that one dared to even talk of sexual orientation and gender identity within the context of societies which were both traditional and religious. One should not underestimate the importance of religion in a South Asian context, and the role that it can play in controlling sexual speech. For example, Pakistan issued a letter on behalf of the OIC(Organization Of Islamic Conference) which stated that the Brazil resolution, “directly contradicts the tenets of Islam and other religions” and that “its adoption would be considered as a direct insult to the 1.2 billion Muslims around the world”.

The failure of the Brazil Resolution to gather support from across the world, and particularly the developing world, indicates that we have a long way to go on questions of building a genuine global solidarity on questions of sexual orientation. What the failure of the Brazil Resolution indicated, is that in large parts of Africa and Asia, and definitely in South Asia, we have not yet begun to raise sexual orientation as a human rights issue.

What the failure signposts critically for South Asia, is the emergence of two key arguments meant to block the emergence of sexual orientation and gender identity as human rights. Firstly the significance of the argument that “sexual minorities do not exist in our culture”, as a way of trying to erase a history and culture of same sex desire in South Asia, and secondly the notion of same sex desire as being contrary to the fundamental tenets of religions, be it Hinduism, Islam or Buddhism. What is clear, is that discrimination is the result of a combination of politically and socially sanctioned factors, where the very existence of any deviance from the hetero-normative ideal has been consistently denied, and where any such claim has been dismissed as “western” and alien to the traditional “culture”, as well as seen as contrary to religious tenets.

³ *Sexuality minorities* - people discriminated against due to their sexual identity/orientation or gender identity. This includes gays, lesbians, bisexuals, hijras, kothis, transgender, etc. PUCL-K, “Human Rights Violations against Sexuality Minorities in India”, A PUCL-K Fact Finding Report about Bangalore, 2003.

At this juncture, it must be clarified that the expression “sexuality minorities”³ encompasses within itself various groups who remain marginalized because of their sexuality, and most significantly, certain traditional groups particular to South Asia.⁴

The paper seeks to analyze the particular discrimination and oppression faced by sexuality minorities within a broader framework of the politico-legal systems of the countries of the region. It is vital that any discussion of the status of sexuality minorities be placed within the context of the particular socio-political system for it to be meaningful. The study seeks to explore the nature of discrimination faced by sexuality minorities in the countries of Afghanistan, Pakistan, Nepal, Bhutan, Bangladesh, India, Maldives and Sri Lanka.

⁴ In South Asia, the existence of sexuality minorities like the ‘hijras’, ‘kothis’ has long been traditionally accepted and socially sanctioned. In fact, the presence of the ‘hijras’ at wedding ceremonies and at births in families to bless the new-born has long been considered auspicious, and has particularly evolved as a practice. Various studies on the traditional evolution of these communities in South Asia

The social-political context in South Asia

Even before the specific context of the treatment of homosexuality is explored in each of the South Asian countries, it would be useful to get a general and broad overview of the socio-political context in South Asia. It is particularly difficult to draw any general conclusions about a South Asian sociopolitical context. This is because compared to some other regions of the world, South Asia has a very weak level of sub-regional organization.

While Europe has not only economic integration under the European Union, but also a strong degree of convergence with respect to human rights through the European Court of Human Rights, Africa has the African Union as well as the African Charter for Human Rights and Duties, and South East Asia has the trading bloc ASEAN (Association of South East Asian Nations), South Asia has, only the relatively weak regional association called “South Asian Association for Regional Cooperation” or SAARC. SAARC, unlike that of the regional associations of Europe (the EU) or Latin America (GRULAC) does not tend to vote as a bloc. Perhaps the good recent indication of the political fault lines and fissures which divide the South Asian region, is the fact that for the election of the new Secretary General of the United Nations, Sri Lanka, India and Pakistan have announced their own candidates.⁵

In spite of the intense rivalry and distrust which exists between major South Asian states, there are some regional commonalities. Perhaps the one commonality which cuts across all South Asian nations other than Bhutan, Nepal and the Maldives is the long experience of colonialism. In particular, it is the submission that the legacy of colonial rule of the British for close to two centuries, and the nature of Victorian morality imported by them to the region, in their “civilizing attempt”, clearly established the pattern of denial of the very existence of sexuality minorities to be practiced by the countries of the region, even in the post-independence period

The history of colonial domination has been followed by an arbitrary drawing and redrawing of boundaries by the colonial masters, which resulted in the formation of new nation states in South Asia. The post colonial histories of the nations of South Asia have not been uniform, with for example India managing to sustain itself as world’s largest democracy, Pakistan and Bangladesh frequently flirting with military dictatorships, Sri Lanka being ravaged by a civil war, Bhutan and recently, Nepal facing the consequences of absolute monarchies, the Maldives being in the grip of a one party state, and finally Afghanistan, a war-torn nation, which today finds itself in the midst of a game of one-upmanship between US designs and the remnants of a brutal Taliban. These wider political factors, particularly when countries are in the grip of civil war, or being ruled by a theocracy or military dictatorship, play a strong role in the shrinking of space for the very articulation of issues of sexuality minorities. Generally put, democratic space, along with conditions of peace, create a more favorable environment for the emergence of sexuality activism.

The other vital factor which needs to be understood in any delineation of the socio-political context of South Asia, is the strong role that religion plays. South Asia is home to four major world religions, Buddhism, Hinduism, Christianity and Islam. Hinduism is the major religion in India and Nepal, Pakistan, Bangladesh, Maldives and Afghanistan see themselves as Islamic states, and Buddhism is the state religion of Bhutan, and plays a strong role in Sri Lanka politics. Even when a state is dominated by one religious group, there are substantial minorities in each of the states. It’s important to understand the often central role that religion plays in South Asia, because it’s often the norms derived from religious sources which influence the behavior of people in intimate realms such as sexuality. Thus for example, prohibitions on homosexuality derive their moral legitimacy from religious authority, and it is the resilience of the religious discourse which is one of the factors which accounts for the continued stigmatization of marginalized communities.

Finally, if we are making any general points about the socio-political context, the central role that the institutions of family and marriage play in South Asia will have to be noted. “It should be remembered that in South Asian cultures, individuality, and thus a sense of the personal self separated from its social surroundings is weak. Rather, identity is given shape by the family and marriage, which play a more central role in a person’s life. Empowering behaviour change requires intervention strategies to contextualise such work within these multi-levelled dynamics to make any sense and to be effective. Beyond the actual

⁵ http://www.himalmag.com/2006/july/commentary_5.htm

structures and models of intervention, access to appropriate sexual health products becomes essential.”⁶ While the above point may be a generalization, which does not fully capture the dynamic nature of South Asian society with those who have been influenced by the emerging sexuality movement, clearly departing from the above understanding of the nature of daily life in South Asia, it must be acknowledged that the above description does capture the concerns which animate the lives of a large number of those who live in South Asia.

In the particular context of understanding homosexuality as both a behavior and as the basis of identity, understanding the role of social institutions and social contexts becomes all the more important. As Gagnon and Parker note, “Sexual behaviour is not the isolated phenomenon of the individual, but lies within a context of culture, social and economic conditions. ... [research] ... would have to focus not only on the incidence of particular attitudes and practices, but on the social and cultural contexts in which sexual activity is shaped and constituted. Research attention would have to be drawn not merely to the calculation of behavioural frequencies, but to the relations of power and social inequality within which behaviour takes place, and to the cultural systems in which it becomes meaningful. In relationship to HIV/AIDS, as in relation to gender, inequality and sexual oppression, an understanding of sexuality and sexual activity as socially constructed has thus refocused attention on the inter-subjective nature of sexual meanings – their shared, collective quality, not as the property of atomised individuals, but of social persons integrated within the context of distinct and diverse sexual cultures.”⁷

The study will now focus on closely analyzing the context in each country to the way sexuality minorities are treated by the legal regime and how that impacts emerging HIV/AIDS interventions.

⁶ <http://www.globalgayz.com/bangladesh-news.html>

⁷ Richard Parker and John Gagnon, Eds., *Conceiving Sexuality – approaches to sex research in a post-modern world*, Rutledge, 1995, p11. - <http://www.globalgayz.com/bangladesh-news.html>

The legal framework: Some legacies of colonialism?

Before venturing into specific studies of each country, and the way homosexuality is treated in each of the South Asian countries, it would be useful to provide a synoptic overview of the laws governing homosexuality in South Asia.

An analysis of the responses of the legal systems in the countries of South Asia to the question of homosexuality, makes it apparent that the responses are primarily based on the particular criminalization attached to the same in the Indian Penal Code of 1860, introduced by the British in its Empire in the subcontinent, and its subsequent continuation under the legal systems of the independent nation-states of the region. In fact, it is interesting that though Nepal was never a part of the British Indian Empire, it decided to import a similar proscription in its domestic legal system from the Indian legal framework.

Section 377 of the Indian Penal Code reads as follows: “Unnatural sexual offences: - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

While the colonial legacy of Section 377 continues in some countries, a recent trend has been the affectation of a two-tiered form of repression on homosexuals through the secular laws and the religious laws of the land. Therefore in Pakistan and Afghanistan for example, the presence of the renamed Section 377 coexists with forms of religious proscription attached to homosexual conduct and individuals under Sharia law. The sodomy laws of the other countries (except Afghanistan) of the region have used similar language though the penalty in each case differs. Further, in all the sodomy laws (except Sri Lanka); lesbians remain outside the scope of the law, which, however only means that lesbianism is more severely proscribed through social and moral sanctions.

Following is a description of the particular legal provisions and the penalty specified under the criminal statutes of South Asian nations.

Country	Description of legal/religious provision	Penalty	Status
Afghanistan	Governed by Sharia or Islamic customary law. According to the Quran, same-sex intercourse is forbidden, and is outside the natural boundaries set by Allah.	Interpretation of Islamic scholars, nothing less than death penalty. During the Taliban regime, strictly followed, with death by crushing a wall against the accused, the most preferred method. But if survives, considered innocent.	Same-sex male: Prohibited. Same-sex female: No recorded case of prosecution, but Islamic law also prohibits.
Pakistan	Twin prohibition under statute and Sharia. Section 377 of the Indian Penal Code duplicated in their Section 377 Penal Code. Both forms of law can be invoked.	Section 377 imposes a minimum of two years and up to life imprisonment. Sharia prescribes upto 100 lashes or death by stoning.	Section 377 – Same-sex male: Illegal. Same-sex female: No illegality. Sharia – Prohibition for both.

Nepal	<p>Duplication of Section 377 of the Indian Penal Code.</p> <p>Country Code 1963 in part 4, chapter 16 - "Sex with animals", unnatural sex is criminalized in Nepal. There are 5 sections in this chapter:</p> <p>No 1: No one may penetrate an animal or make an animal penetrate him/her or may do or make another person to do any kind of unnatural sex.</p> <p>No 2: if someone penetrate a cow among female animals one may be sentenced to two years jail and if not the cow then one year jail or 500 NRs fine.</p> <p>No 3: If a woman makes an animal penetrate her, she may be sentenced to one-year jail or 500 NRs fine.</p> <p>No 4: In this chapter, not mentioned in other sections, anyone who does or makes someone practice unnatural sex may be sentenced to one-year jail or 5000 NRs fine.</p> <p>No 5: All the cases related to the law written in this chapter need to be reported within one year of the act taken place.</p>	The statute imposes a penalty up to life imprisonment	Same-sex male: Illegal. Same-sex female: No illegality.
Bhutan	Duplication of Section 377 of the Indian Penal Code.	Imposes penalty up to life imprisonment. But due to country conditions, more severely punished at times.	Same-sex male: Illegal. Same-sex female: No illegality.
Bangladesh	Section 377 of Bangladesh Penal Code - duplication of the Indian Penal Code	Up to life imprisonment with a minimum of 10 yrs.	Same-sex male: Illegal. Same-sex female: Not illegal.
Sri Lanka	Section 365A of the Penal Code. Mentions "any act of gross indecency". Different from the Indian Penal Code though similar moral approach.	Up to 2 years imprisonment. But in case of sodomy with child, not less than 10 years and up to 20 years imprisonment.	Same-sex male: Illegal. Same-sex female: Illegal.
Maldives	Duplication of Section 377 of the Indian Penal Code.	Up to ten years or life and fine.	Same-sex male: Illegal. Same-sex female: Not illegal.

Examination of specific country contexts

Afghanistan

Three characteristics have largely determined the historical evolution, the social structures and politico-legal system of Afghanistan. Firstly, because of Afghanistan's strategic location geopolitically, great rival powers have tended to view the control of Afghanistan as an essential part of their national interest. In fact, Afghanistan's internal politics has been considered more as a reflection of international rivalry than as events in themselves.⁸ Secondly, the inability of central governments to establish effective and permanent control over the country has always acted as a barrier to the establishment of a comprehensive and consistent socio-political structure and legal framework. Thirdly, most significantly, one cannot examine Afghan history without noting the key role of Islam.⁹ Religious leaders have always played a political role and, as in many other nations, religion has served as a means of political expression. In 1919, with the signing of the Treaty of Rawalpindi with the British, Afghanistan gained its official independence. But attempts to introduce reforms in the political and legal systems was strongly resisted by the religious leaders, and this trend of the influence of religion and Islamic religious leaders in the political life of Afghanistan has remained a major obstacle to the initiation of secular laws and modernization attempts. It is this factor which is strongly responsible for the severe repression of sexuality minorities in the country.

The Taliban

With the withdrawal of the Soviet troops, the country descended into a civil war between the ethnic tribal groups, and in 1996, an Islamic fundamentalist group called the Taliban succeeded in wresting control of most parts of the country from the central administration. The Taliban used an extremist interpretation of Islam to assert repressive control of society.¹⁰ Under this regime, it has been alleged, "There is no constitution, rule of law, or, as has been demonstrated, independent judiciary. The political fragmentation of the state has imperiled, and in many locales destroyed, the prospects for a civil society based on legality".¹¹ Therefore, the extreme Islamization of the state and its institutions under this regime enabled the regime to interpret laws and norms arbitrarily, and the sanctions were often violent and repressive. In fact, the various forms of human rights violations, particularly against minority groups evoked severe condemnation in the international arena. But the problem was compounded by the fact that international monitoring was absent due to the non-recognition of the Taliban by most national governments of the world, and the barriers to access within Afghanistan created by the Taliban themselves during its regime.

With the US invasion, the Taliban was unseated from power and a regime friendly to the US was installed. However it has been widely noted that the writ of the Karzai government does not cover the entire territory of Afghanistan with the Taliban and other war lords controlling parts of Afghan territory. In such a situation, one should also note that in spite of some changes, the Sharia continues to be a part of the legal system. This has enormous implications for the treatment of homosexuality.

Treatment of homosexuality

Though information regarding the treatment and oppression of sexuality minorities in Afghanistan is not easily forthcoming, documentation and news reports of severe persecution of the community under the fundamentalist Taliban regime have emerged. Under the Sharia, same-sex relations are severely proscribed, with the penalty of death. In Afghanistan, the most common method has been by crushing walls on the ac-

⁸ In fact, historically Afghanistan has been the scene of rivalries between the Mughal Empire in India and the Safavi Empire of Iran in the sixteenth, seventeenth and eighteenth centuries. This phenomenon has continued even in the twentieth century, with the country becoming the arena of cold war politics in the aftermath of the Soviet occupation of the country in the 1970s and the internal strife that followed. "Afghanistan History", Afghanan dot Net, 2005, sourced from: <<http://www.afghanan.net/afghanistan/history.htm>>

⁹ Even Genghis Khan, the Mongolian conqueror was unable to uproot Islam, and within two generations his heirs had become Muslims. An important, if often unacknowledged, event in Afghan history that played a role in the politics of Afghanistan's neighbors and the entire region up to the present was the rise in the tenth century of a strong Sunni dynasty- the Ghaznavids. Ibid. In 1747, the indigenous Pashtun tribe known as the Durrani established their dominance, a rule which continued till 1978. In the 1880s, the Durrani sought to balance the interests of both the British and the Russians, consolidated the various indigenous tribal factions and initiated a restructuring of the socio-administrative system into what is considered the modern Afghan State. In 1893, the Durand Line divided Afghanistan from the British Empire, sowing the seeds of future tensions over the division of the tribes, which continues even to this day. "Country Profile: Afghanistan", February 2005, Library of Congress, Federal Research Division, sourced from: <<http://memory.loc.gov/frd/cs/profiles/Afghanistan.pdf>>

¹⁰ *Ibid*

¹¹ William A. Courson, "Oppression of the Homosexual Community in Afghanistan", Report to the Secretary-General of the United Nations by the Magnus Hirschfeld Institute, 1998, sourced from: <http://www.ilga.info/Information/Legal_survey/Asia_Pacific/supporting%20files/oppression_of_the_homosexual_com.htm>

cused. But the most unique feature of such a penalty is that in case the accused survive, they are considered to be innocent and are then taken for medical treatment and care by the Taliban militia.

At this juncture, an overview of the legal institutions established and functioning during the Taliban regime becomes imperative. All cases related to offences and civil disputes were examined by Sharia courts, based on the tenets of Islamic justice. However, there was no consistency in the laws so applied as it is based on interpretation of Islamic scholars and individual judges.¹² Further, the principles of Rule of Law and natural justice were completely and emphatically rejected by the legal system.¹³ The law was what the Islamic scholars and the Taliban said it was. Again, “throughout areas under Taliban control, the religious police, the Department to Propagate Virtue and Eliminate Vice, enforced their extremely repressive model of public order and morality”.¹⁴

In this backdrop, the persecution of the homosexuals, and particularly in the military was conclusively severe and violent, particularly as no international human rights monitoring was possible. The Report of the Hirschfeld Institute, prepared with assistance from the ILGA, has documented several incidents in 1998 where individuals accused of committing homosexual acts were awarded the death penalty.

- February 24, 1998 - Three Afghan men convicted of sodomy survived an attempted execution in which they were buried alive for 30 minutes, according to reports promulgated by the Afghan government through its official news agency, Afghan Islamic Press.
- March 22, 1998 - Two homosexual men in Afghanistan were buried alive.¹⁵
- April 30, 1998 - In Kabul, members of Afghanistan’s militia severely beat two soldiers before their arrest and incarceration on accusations of homosexuality.
- May 6, 1998 - Two members of the military were tortured and subsequently put to death by their colleagues and commanders on account of homosexuality.

An interesting account of the dilemma faced by the Taliban regime in deciding on the mode of punishment has been recounted in the afore-mentioned report, where the former Governor of Kandahar stated that “Homosexuality is a very big crime”.¹⁶ The above-mentioned incidents clearly demonstrate the oppression faced by homosexuals under the fundamentalist Taliban regime, a phenomenon which reflected its general persecution of all minority groups, particularly women. According to scholars and various reports, incidents of violence against homosexuals must have been widespread, of which the incidents which came to light are but a miniscule portion. However, it is interesting that traditionally, Afghan society has accepted forcible homosexual conduct among men, most significantly in the Pashtun dominated areas themselves, where older men are known to take young boys for pleasure in what is called a ‘hujra’ or the male room. It is considered to be a symbol of prestige.¹⁷

While one may think that that was the past under the repressive Taliban, what is shocking to note that the new Afghan government is no better in its treatment of homosexuality. According to an Associated Press report, although the Taliban has fled, the country’s “sharia,” or Islamic law, remains in place. Fazel Hadi Shinwari, recently appointed chief of Afghanistan’s Supreme Court, said gays can still be punished by be-

¹² According to a Report submitted by the Hirschfeld Institute on Homosexuality in Afghanistan, “Judges in these courts, many of whom are untrained in law, reportedly base their judgments on their personal understanding of Islamic law and the prevailing Pashtun code of justice”. *Ibid*.

¹³ “There are reportedly no provisions for defendants to be assisted by a legal counsel, the presumption of innocence is dispensed with and verdicts are final, with no mechanism for appropriate judicial appeal. It has been frequently reported that the testimonies and statements of convicts accepting their sentences before they are carried out have been extracted under torture. Some convictions appear to have been based solely on the allegations of the complainants, with no probative processes employed”. *Ibid*.

¹⁴ *Ibid*

¹⁵ The two, Abdul Sami, 18, and Bismillah, 22, residents of Herat province, were placed beside a wall of dried mud which was bulldozed upon them. News of the execution was carried by the official Taliban Radio Voice of Sharia, which stated: “Sharia-prescribed punishment has been administered to two sodomites [in] Herat Province. Bakhtar Information Agency informed us [two men] who had been arrested by security officials on charges of committing sodomy were publicly punished for their deeds in the city of Herat today. The cases of the accused were investigated by the public prosecution office of Herat Province where the accused confessed to their crimes without duress or torture”. (Emphasis added).

¹⁶ He stated “We have a dilemma on this; the difficulty is this: one group of scholars believes you should take these people to the top of the highest building in the city and hurl them to their deaths. Other scholars recommend you dig a pit near a wall somewhere, put these people in it, then topple the wall so that they are buried alive.” *ibid*.

¹⁷ Referred from the famous Boston Globe report of Miranda Kennedy, “Open Secrets”, July 11,2004, Boston Globe, sourced from:<http://www.boston.com/news/globe/ideas/articles/2004/07/11/open_secrets/>

ing hurled from a high place or having a wall toppled onto them. Other Islamic laws that have remained include death by stoning for those convicted of adultery; Shinwari added that such punishments would only be carried out following a detailed legal process during which the accused can contest the charges and appeal for clemency, and measures such as paying restitution, could avoid harsh sentences. “We will not be like the Taliban,” Shinwari said. “They used to hold one quick hearing, with no lawyers or witnesses, take the person away to the stadium and carry out the sentence in front of everyone. That was wrong. That blackened the name of Islam.”¹⁸

In the context outlined above its not surprising that the government has no specific programmes for MSM as a vulnerable group for the spread of HIV/AIDS. Afghanistan has only 49 known cases of HIV; however its neighbors Pakistan and Iran have 74,000 and 14,000 cases respectively. This was highlighted in a meeting in late 2005 at a HIV/AIDS Regional Programme in the Arab States. Based on limited (and perhaps imprecise) statistics, whilst the Arab world has one of the lowest prevalence rates worldwide, it has the second-fastest growing infection rate. Dr Salami Ahmadzai, Manager of National AIDS Control Programme, believes that Afghanistan’s statistics could be misleading. According to him, diagnostic capacity varies and the real number of cases may be far higher as screening has been limited to blood donors.¹⁹

Pakistan

Socio-political context

Since its inception, Pakistan has always oscillated between a democratic constitutional political structure and its foundational tenet as a theocratic state, and it is this dialectic that has also formed the core of its legal framework. In fact, the political system in Pakistan has confronted this inner contradiction, where the periods of democratic governments have seen interludes of military dictatorships. One can argue that the political system in effect, has consequently been characterized by instability, and thereby prevented the emergence of a culture and tradition of participation, accountability and respect for human rights. This situation has been further compounded by the colonial legacy that the country inherited from centuries of British rule, a fact apparent when examining the structures, institutions and norms of socio-political life.

The way this constant oscillation between democracy and dictatorship, theocracy and liberalism has manifested itself in legal terms has been through the dialectic between faith based law and secular law. This dialectic is best exemplified by the fact that Pakistan has by the 1973 Constitution a guarantee of fundamental rights. However of equal importance are the Sharia Courts which were set up by General Zia Ul Haq, which have set up a Islamic mode of Constitutional and legal governance.²⁰ It is particularly the Islamization policy introduced by the eleven year rule of General Zia Ul Haq, which set Pakistan onto a dual track of governance with both Islamic Law as well as secular law being of import in the governance of Pakistan.²¹

What should however serve as a note of caution even in the discussion on the harshness of faith based laws to perceived transgressions from the path of Islam, is an understanding the nature of Islamic faith in Pakistan. It is a fact that till today, religious parties have not succeeded in capturing state power in Pakistan. The reason for this, according to some commentators, is the fact that the Sunni faith in Pakistan has followers from two schools. The Deobandi School which accounts for 15 % of Sunnis is committed to a literal and austere interpretation of Islam.²² The majority of Sunnis are followers of the Bareilvi School, whose followers feel that “there was no contradiction between practicing Islam and drawing on the sub-continent’s ancient religious and cultural practices”. The Barelvis regularly offer prayers to holy men or pirs, both dead and alive. To this day, many Pakistanis believe that pirs and their direct descendants have supernatural powers and, each year, millions visit shrines to the pirs so that they can participate in ceremonies replete with lavish supplies of cannabis and music. The Deobandis shun such practices as pagan, ungodly distractions.²³

¹⁸ <http://www.sodomylaws.org/world/afghanistan/afnews010.htm>

¹⁹ <http://www.youandaids.org/Asia%20Pacific%20at%20a%20Glance/Afghanistan/Index.asp>

²⁰ Jeffery A Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 Va. J. Int’l L. 759

²¹ It is clear that we have not seen the end of this dialectic as President Musharaff in contrast to his military predecessor is due to force of circumstances post 9/11 committed to a policy of ‘enlightened moderation’. As General Musharaff noted, “The Hudood Ordinance was authored by one man and it can be changed. However, it should not be abused,” <http://www.hindu.com/2006/07/03/stories/2006070304171400.htm>

²² It is the followers (Talib) of the Deobandi School who came to power as the fundamentalist Taliban in Afghanistan.

²³ Owen Bennett Jones, *Pakistan Eye of the Storm*, Penguin Books, Delhi, 2002. p10.

However as Jones notes, “the situation is complicated by the fact that in many parts of the country, a Deobandi style interpretation of Islam is used as an excuse to justify regressive cultural practices. Separating Deobandi orthodoxy from traditional practice is not easy not least because to some extent, the two feed of each other. It is nonetheless important to remember that more Pakistanis are loyal to the Barelvi tradition. That fact has an important bearing on the nature of the Pakistani state.”²⁴ Jones concludes that “ever since Pakistan was created, the Barelvis have been the Islamic radical’s most effective obstacle.”²⁵

We will now try and understand the way the Pakistani state and law deals with homosexuality and how sexuality minorities cope with the host of cultural, religious, legal and social prohibitions around homosexuality.

Treatment of homosexuality

There is no ambiguity in the way the Pakistani state treats homosexuality. As noted earlier apart from the continuing colonial legacy of Section 377, the Sharia Code clearly criminalizes both sex between men and sex between women. Further the position taken by the Pakistani state with respect to issues of sexual orientation and gender identity was clarified in no uncertain terms, during the debates around the Brazil Resolution on sexual orientation. Thus for example it was Pakistan which issued a letter on behalf of the Organization of Islamic Conference (OIC) which stated that the resolution, “directly contradicts the tenets of Islam and other religions” and that “its adoption would be considered as a direct insult to the 1.2 billion Muslims around the world”.

In a communication from the Pakistani Embassy in The Hague, it was stated that “In Pakistan homosexuality and/or sexual contacts among women and men are treated as immoral acts. There is no legal protection against discrimination of homosexual women and men in Pakistan. The homosexual individual is not accepted as a decent individual. The recorded cases are very few. This fact by itself shows that the offense of this nature is not frequent”.²⁶

The Pakistani state clearly sees a linkage between its role as a key defender of the Islamic faith globally and the need to continually stigmatize homosexuality. It is only by constructing Pakistan as a pure Islamic nation where acts of this nature do not occur and if by chance they occur they would not be tolerated, can Pakistan’s identity as an Islamic state be continually refurbished. As the former military ruler of Pakistan, Zia Ul Haq noted, Pakistan is like Israel, an ideological state. Take out Judaism from Israel and it will collapse like a house of cards. Take Islam out of Pakistan and make it a secular state, it would collapse. For the past four years we have been trying to bring Islamic values to the country.²⁷

While for ideological reasons the Pakistani state may choose to constantly stigmatize and vilify homosexuality, it’s important to understand the nature and expression of homosexuality in Pakistan. As the limited documentation on homosexuality in Pakistan indicates, there exists an active sub-culture of homosexual life in Pakistan. There are cruising sites, internet parlours, private parties and other spaces where homosexuals meet each other.²⁸ Whatever the extent of legal prohibition, what is clear is that same sex activity continues to exist in society.

The question to examine is under what conditions does same sex activity actually take place? What are the consequences of the same and what are the ways Pakistani society monitors, controls, and regulates the expression of same sex desire?

According to a Boston Globe report published in July 2004 entitled “Open Secret”, homosexuals in Pakistan walk a fine line between harsh legal and cultural prohibition and a form of unspoken social acceptance. “Islamic tradition frowns on but acknowledges male-male sex and this plays a role in permitting clandestine sex so long as it is not allowed to interfere with family life, which is of paramount importance, “Cultural and religious tradition keeps such relationships largely hidden in Pakistan”, he wrote, adding “there is no gay life in the Western sense of the word, and any sexual relationships between men have to be concealed

²⁴ *Ibid.* p.11.

²⁵ *Ibid.*

²⁶ sourced from: <http://www.ilga.info/Information/Legal_survey/Asia_Pacific/pakistan.htm>

²⁷ Tariq Ali, *Can Pakistan survive?*, Penguin, Harmondsworth, 1983, p.133.²² It is the followers (Talib) of the Deobandi School who came to power as the fundamentalist Taliban in Afghanistan.

²⁸ <http://www.globalgayz.com/pak-news05-06.html>

and managed behind the context of marriage to a woman”.²⁹

The consequence of keeping one's desire secret and hiding it from society is that it creates a sense of low self-esteem. As the founder of Pakistan Gays, an internet resource site states “you always fear that if the people around you knew about your sexuality, what bad feelings they would have about you. We think that we are born this way, but still we feel we are doing wrong.”³⁰ Haider recounts his own confusion over his gay identity, “Somebody recently asked me, what it is like being gay in Pakistan? I never thought about it. I'm too accustomed to hiding my feelings for other guys”.³¹ Tariq, a 24-yr old homosexual from Pakistan perhaps best epitomizes this sense of psychological bad faith, when he states “My life is a lie and I know it, but this is the reality of Pakistan and this is the reality I have to live with”.³²

On the other hand there have been personal narratives of acceptance and in fact, greater accommodation by friends and families in Pakistan when compared to the western societies.³³ In fact, the overall effect of the socio-legal sanctions seems to be that “what you can't do in Pakistan is to say loudly that you are gay and you think that it is ok to be a gay. You can't talk about religion and homosexuality”.³⁴ However, homosexuals in larger cities of the country perhaps encounter a more permissive society and norms, with internet, safe-cruising areas and private parties where they can interact with other homosexuals. Of course, the pressure of leading a double life in most cases and discrimination in employment opportunities cannot be wholly discounted.

Apart from the gay population there are a significant number of other groups who fall under the rubric of men who have sex with men. ‘While there is little documentation about the extent to which men engage in sexual activity with other men in Pakistan, the limited evidence available suggests that such activity does occur throughout the country. Anecdotal evidence indicates that sexual activity between men occurs relatively frequently in boys' hostels and jails; additionally, research suggests that sex between men is often practiced among long distance truck drivers. Finally, there is a small but highly mobile population of transvestites, transsexuals and eunuchs known as the hijra, who are known to engage in unsafe sexual practices. Lahore had an estimated 38,000 MSM in 2002. The MSM community is heterogeneous and includes hijras (biological males who are usually fully castrated), zenanas (transvestites who usually dress as women) and masseurs. Many sell sex and have multiple sexual partners.’³⁵

However, in spite of the growing social visibility and presence of sexuality minorities in the country, the fear of Section 377, Pakistani penal code looms large. Though the law is not enforced in the country, but like the other South Asian countries with similar provisions, it is used as a repressive tool by the police, particularly to harass, extract bribes and often demand sexual favors.³⁶ Thus, the symbolic and repressive

²⁹ Referred from the famous Boston Globe report of Miranda Kennedy, “Open Secrets”, July 11,2004, Boston Globe, sourced from: <http://www.boston.com/news/globe/ideas/articles/2004/07/11/open_secrets/>

³⁰ *Ibid.*

³¹ He states that “By the middle of my studies, I understood one thing for sure: I didn't want to be considered sissy or feminine so I drastically changed my physical behavior from submissive to dominant. Only hanging around with guys could lead to being labeled a homosexual. So I made a couple of female friends to cover up my sexuality”. <http://www.globalgayz.com/pak-news05-06.html>

³² The idea of coming out has never been an option for him, and recently, he also agreed to follow social norms and like the other homosexuals in Pakistan agreed to get married. “Focus on Gay Rights in Pakistan Extremely Difficult”, 10 May 2005, Source: IRIN - <http://www.irinnews.org/> - The United Nations Integrated Regional Information Networks, cited in <www.globalgayz.com/pak-news05.html>. According to Adnan Ali, Founder of Al- Fatiha a support group for queer Muslims, “There's so much depression and shame,” Adnan says, “The fact we exist is the greatest support for most people. There are a lot of people who don't come to meetings or even ring us up - but knowing there are gay Muslims is a support in itself”. Tania Branigan, “An Islamic Revolutionary”, sourced from: <http://www.sodomylaws.org/world/pakistan/pknews001.htm>

³³ Thus, recounts a Pakistani gay that he feels more comfortable with his identity in Pakistan than he was in the west. He states that he has ‘come out’ to family and friends, and “rarely meet anyone aggressively hostile to gay individuals. I have lived with a lover independently without anyone raising an eyebrow. I have attended gay parties more uninhibited than any I have seen in the West”. He further elucidates this by observing that “What is perhaps closer to the truth is that overt expression of sexuality itself - both gay and straight - is a taboo matter in Pakistani society. But whereas heterosexual courting and coupling is all too obvious, gay socialising can take place without attracting as much attention”. Of course, an appropriate caution is also provided when he says that though it is not easy being gay in Pakistan, the policy of “don't ask, don't tell” equally applies in this society. “Gay Pakistan: ‘Less Inhibited’ than the West”, June 2 2005, BBC News, cited in www.globalgayz.com/pak-news05.html.

³⁴ Danial Cave, “Gay Life in Pakistan”, *Ibid.*

³⁵ <http://www.youandaids.org/Asia%20Pacific%20at%20a%20Glance/Pakistan/index.asp>

³⁶ “Arrests and trials do not occur ... As elsewhere with unenforced sodomy prescriptions, the existence of the law is a threat - a threat conducive to blackmail. While the law is largely irrelevant to life in Pakistan, to those acting in its name it is not.....Police recurrently take money and/or sex from those they know to be involved in same-sex sex”. Referred from Chapter on Pakistan by Stephen O Murray and Badruddin Khan in “Sociolegal Control of Homosexuality”, cited in Miranda Kennedy, Open Secrets, <http://www.boston.com>.

impact of the legal framework, criminalizing homosexuality, and the homosexual in Pakistan continues. In fact, so pervasive is this oppression, compounded by the prohibition under Islamic law that civil society in Pakistan has been forced not to respond publicly to the issue, with most organizations operating in the name of AIDS and health outreach. A local NGO responding to a request for an interview by IRIN underscored the concern people working to tackle the subject face, “Human rights activists like us struggle for the rights of people including gays and other youngsters. If you want to find a person who is campaigning openly for gay rights only, the answer is NO. Some religious persons may kill the person who talks about gay rights”, he warned.³⁷

Thus though Pakistan has acknowledged MSM as a high risk population, the enormous ambivalence of the state towards sexuality minorities means that issues concerning MSM rights including issues of harassment are not discussed. “The overall strategy appears to be cautious while discussing sex workers and MSM, and is very non-participatory in its approach. Targeted condom-promotion finds mention, although issues of empowerment of sex workers and marginalised communities are not raised.”³⁸

The sense of hope that the situation will improve for sexuality minorities in Pakistan emerges from the sense of wrong which gay Pakistanis feel which really is the starting point of activism. As Tariq, the gay Pakistani says in anger, “They tell me it’s a sin to be gay. But the real sin is not being allowed to be who I am”.³⁹

Nepal

Socio-political framework

Nepal’s modern history has been dominated by the confrontation between the monarchy, parliamentary parties and the Maoists. Though the country has for the most part been ruled by a hereditary monarchy, the movement for pro-democracy reforms which began in the late 1980s led to the establishment of Constitutional Monarchy with a multi-party system in the country. However, internal unrest as a result of Maoist confrontations with the State has intensified socio-political conflict, resulting in frequent dismissal and change of governments. The king finally suspended the constitution in February 2005, citing the worsening civil conflict.⁴⁰ In the aftermath of the reinstatement of the autocratic monarchy, there were constant allegations of human rights abuses by the armed forces and law enforcement agencies, with no possibility of international monitoring of human rights practices of the State.

The suicidal move by King Gyanendra when he dismissed the elected government and assumed sole executive power precipitated the grand coming together of the entire parliamentary opposition as well as the Maoists. It resulted in the signing of a Memorandum of Understanding on peace and democracy on Nov 22, 2006 between the Seven Party Alliance (SPA) and the Communist Party of Nepal (Maoist). This agreement was followed by wide ranging protests of such intensity that the King was finally forced to resign. Now the country is at the cross roads as the next stage as per the Memorandum of Agreement is to elect a Constituent Assembly which will then draft the new Nepali Constitution.

In terms of the socio-political framework, the next couple of years are going to be completely vital in determining the future shape of the Nepali polity as vital questions will be debated in the to be elected Constituent Assembly. It’s important that those who are working on questions of sexual orientation, gender identity and HIV/AIDS remain cognizant of this fact and be prepared to intervene effectively in this process. The opportunity is nothing less that historic in terms of trying to ensure that archaic provisions of the law such as the “unnatural sex” provision of the Code is repealed and that the Constitution incorporates progressive developments from other Constitutions such as a non discrimination clause on sexual orientation and gender identity.

Treatment of homosexuality

While religious proscription of homosexuality perhaps is not too severe in Nepal, the social sanctions around the issue of same-sex relations has led to serious discrimination against sexuality minorities in the country, leading in some cases to families disowning individuals or forcing them to conform to social norms by agreeing to heterosexual marriages. Nepal is essentially an agrarian, traditional Hindu society,

⁴⁰ “Country Profile: Nepal”, November 2005, Federal Research Division, Library of Congress, sourced from: <<http://lcweb2.loc.gov/frd/cs/profiles/Nepal.pdf>>

with distinct Buddhist influences. There are histories of same sex love and same sex relations in historical texts and particularly in the temple carvings of the Hindu Kingdom.⁴¹ But in spite of such a history of permissiveness, sexuality minorities have had to face the dual oppression of socio-moral discrimination along with the guardians of law the police taking it upon themselves to sanction and discipline any deviations from the heterosexual norm. In fact, there are several narratives of the victimization of homosexuals by the police.

- January 2003 – Bimal and his friends were returning from performing a cultural show when a group of policemen brutally abused them at the police station. “They humiliated us for being MSM and even penetrated sticks through our anus,” Bimal said recounting. The police also extorted money and threatened to expose them before their families.⁴²
- April 2003 – A police raid in a mixed-gay disco resulted in the ‘Stonewall’ of Nepal.⁴³ In fact, a large majority of police atrocities in the recent past have targeted the members of the Blue Diamond Society, the only LGBT organization in the country. Police violence also particularly targets the cross-dressers in the country.
- August 2004 – 39 members of the Society were randomly arrested and detained for almost 15 days, and subjected to inhuman treatment on the basis of their sexual orientation. This led to an international condemnation, with Human Rights Watch, the ILGA and the UNAIDS demanding their release.⁴⁴

Similar such incidents of police-induced violence have also been documented.⁴⁵ This has therefore, led to the criticism that the police, armed forces and the society at large have enjoyed impunity in the conduct of acts of violence and oppression against sexuality minorities. The presence of the “unnatural sex” provision legitimizes the continued acts of random police raids, abuse, sexual violence, and extortion. The law works along with social proscription to ensure that expressions of homosexuality are always policed.

The position of lesbians in the country remains more precarious due to the existing patriarchal structures, which normatively define the ‘woman’. But significantly, in a number of cases, women have ‘come out’, followed by social condemnation. This public documentation of lesbianism is rarer to come by in the other countries of the region. Two incidents particularly, in March 2000 and December 2003, reported in the media⁴⁶ has drawn attention to the plight of lesbians in Nepal, where the women were incarcerated and encountered violent backlash from the families and the community. According to Manjushree Thapa, Nepali litterateur, “it is easier for gay communities to organize themselves in groups than lesbians”⁴⁷ due to the social structure in the country.

Thus in Nepal, at least for men who desire same sex relations, there is a degree of social networking and spaces which do exist. In Sunil Pant’s description, what emerges is the ‘relative permissibility encountered by the sexuality minorities in urban areas, where the internet, private parties, cruising spaces etc. have provided to them the possibility of interaction with the community, and of ‘coming out’.⁴⁸

However what makes Nepal a bit unique is that this level of social networking has been accompanied by level of ground level organizing so as to combat and collectively protest and combat the everyday nature

⁴¹ In an interview with Richard Ammon, Sunil Pant, the founder of ‘Blue Diamond Society’, the only LGBT organization in Nepal described the traditional permissibility and tradition with regard to homosexual relations in the country. According to him, “When I go to temples I can see stone and wooden same sex carvings. It’s been there for a long time in religion. We call them mit and mitni— man-man woman-woman friendships. You go to a temple, find a witness and exchange flowers. That’s quite accepted by society. Mits share everything including the bed”. Richard Ammon, “Gay Nepal: A Struggle Against History”, sourced from: <<http://www.globalgayz.com/g-nepal.html>> Further, reference has also been made to the same-sex partners carved in wooden arts of in temples, and the presence of active vocabularies like chhipri, singaru, maiphu, kota and koti in different languages spoken in Nepal that refer to homosexuals also vindicates the fact that Nepali society hasn’t been homosexuality-free; nor is the concept an alien one. Ameet Dhakal, “Increasing Police Abuse brings Gay Rights Issue to the Fore”, 28 April 2003, sourced from: <<http://www.globalgayz.com/nepal-news00-03.html>>

⁴² Ameet Dhakal, *Ibid.*

⁴³ Richard Ammon, *Ibid.*

⁴⁴ Referred from various news items, sourced from: <<http://www.globalgayz.com/nepal-news04.html>>

⁴⁵ *Ibid.* The Blue Diamond Society has also been threatened with closure after a lawyer petitioned in the Supreme Court for the same. The case is pending till date, with international condemnation of any such move by the government.

⁴⁶ For details of the cases, refer to the news items, <http://www.globalgayz.com/g-nepal.html>

⁴⁷ “Need for Sexual Minorities to find their Voices”, 20 June 2003 Kathmandu Post, *Ibid.*

⁴⁸ Interview with Richard Ammon, *Ibid.*

of violence. Thus it is important to note that the relatively stronger documentation of violence against sexuality minorities in Nepal does not make the case that Nepal is an exceptional case of rather extraordinary violence against sexuality minorities but rather that in Nepal, unlike many other parts of South Asia, sexuality minorities have become organized enough to raise their voice against acts of egregious violence and brutal state repression.

An evidence of the beginning of some semblance of a movement was the “The Kathmandu Statement on Sexual Orientation, Gender identity and Human Rights”, which was adopted in 2004. The participants brought out another facet of discrimination in Nepal by noting that, ‘We are denied access to health care and basic health information targeted to our lives and needs. National health program has done nothing for our communities. We are omitted from HIV prevention programs. The brave contributions we have made to HIV prevention and treatment doing outreach to our own communities and educating them in the face of state neglect are ignored or actively harassed.’ The Declaration went on to conclude that, ‘We, Nepalese lesbians, gays, bisexuals, and transgender people, do exist. We are part of your country and constituencies. We are watching your deliberations from our home communities, which are also your home communities. We demand that our voices be heard.’⁴⁹

However this emerging activism is not going unchallenged as seen by the petition filed in the Nepali High Court, asking the state to take action against Blue Diamond Society. To quote the petition, ‘The petitioner has made it clear in the foregoing paragraphs how the right to homosexuality is illegal....Therefore, a writ of certiorari, mandamus including whatever order is required be issued in the name of respondent His Majesty’s Government, Prime Minister and Cabinet Secretariat directing thereby to them to prevent the act of the publicity of homosexuality as well as that of motivating right to homosexuality and to take effective measure to prevent the offense under No 4 of the Chapter on Bestiality of the Code.’⁵⁰

However in spite of the emerging opposition, one hopes that the present political conjuncture, with the proposed new Constitution will be the time when the rights of sexuality minorities will finally become a recognized part of Nepali law. Some initial steps in that direction have already been taken by a submission on behalf of the various sexuality minorities in Nepal, stressing the concerns of sexual orientation and gender identity to an Interim Constitution Drafting Committee.⁵¹

Bhutan

Bhutan is one of the most remote countries in the world cut off from many contemporary developments. One gets a sense of how isolated Bhutan is from the rest of the world when one sees that television and internet were banned till as late as 1999. However the ban on the sale and consumption of tobacco (perhaps a vital social lubricant) still remains in force. Since Bhutan remains an authoritarian monarchy, all other forms of expression right from media to public meetings to political parties remain tightly controlled and regulated.

Thus the contemporary political history of Bhutan is simultaneously a history of gross human rights violations by an autocratic hereditary monarchy. Perhaps the most serious human rights crisis faced by the Bhutanese state is the repression of dissent through military force and the persecution of the Lhotsampas who have been exiled to Nepal. The issue of the persecution of Bhutanese of Nepali origin who if they entered the country after 1958 remains a vexed issue in Bhutan and has brought the problem of dismal human rights record of the country into international limelight.

Every aspect of life in the kingdom is guided by the ethics of its official religion, Drukpa Kagyu Buddhism, a tantric form. Religion has had its influence on the internal policies, while the foreign policy has been distinctly influenced by the Tibet and India.⁵² The British influence in Bhutan was the result of its status

⁴⁹ <http://www.globalgayz.com/nepal-news04.html>

⁵⁰ Achyut Prasad Kharel vs His Majesty’s Government and Others, Posted on chr@yahoogroups.com

⁵¹ Posted on chr@yahoogroups.com

⁵² “As has been the case in Nepal, Bhutan’s foreign policy has been affected by its geostrategic location. From the seventh century until 1860, the country’s foreign policy was influenced by Tibet; next followed a period of British guidance over foreign affairs. After India received independence from Britain in 1947, Bhutan came under India’s influence. Thimphu and New Delhi’s relationship is governed by the 1949 Treaty of Friendship between the Government of India and the Government of Bhutan--in force in perpetuity--which calls for peace and noninterference in internal affairs and New Delhi’s guidance and advice in external relations”. Country Study: Nepal | Introduction”, March 1993, Federal Research Division, Library of Congress, sourced from: <[http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+np0004](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+np0004)

as a protectorate till 1949, a fact like the other countries of the region reflected in its politico-legal system. However, the most significant aspect of the political system in Bhutan is that “there is no written constitution or bill of rights, and uses the 1953 Royal Decree for the Constitution of National Assembly”.⁵³ Due to the centrally controlled government system, there are no legally sanctioned political parties in the country. In fact, it has been variously alleged that the living conditions and government policies are highly secretive and questionable in Bhutan.⁵⁴

Treatment of homosexuality

Information regarding the discrimination faced by sexuality minorities in Bhutan is very limited. However, in the light of the extremely poor human rights record of the country, and the regular allegations of torture and persecution of minorities combined with a strictly monitored access to international media and human rights organizations, there remains no doubt as to the reasons for such poor documentation.

The legal framework in the country, as has been mentioned in the previous section, is based on the 1965 Code. The country’s sodomy law is a duplication of the Indian penal provision. However, it is not clear whether there have been prosecutions of homosexuals based on the same. There are no reports on the approach of the law enforcement agency towards homosexuals, though it appears that an “offence” of sodomy could lead to incarceration and even death.⁵⁵

A central problem for sexuality minorities rights in Bhutan also stems from the fact that the very concept of homosexuality as it is understood in the West is perhaps absent. However, traditionally certain practices are permitted.⁵⁶ In fact, so pervasive is the non-acknowledgement of any homosexual ‘identity’ that according to Shahid, a Bhutanese homosexual activist, there is no underground homosexual community in the country.⁵⁷ 98% of gay men are said to be married, as there simply is no other life. There is also very little evidence of the culture of interaction through Internet, private parties or public parks in the community.

In an e-mail interview, a gay Bhutanese citizen stated that “there is no freedom of expression, no newspaper except a government-controlled paper edited in King’s palace, once a week. No reporters and foreign journalists are given visas. No one can talk and argue about human rights in Bhutan; anyone going against the authority is jailed or killed. No international body can visit Bhutan except a handful of people working here in UN organizations”.⁵⁸ This clearly implicates the political and social system in Bhutan, its proven intolerance to issues of human rights, suppression of dissent and a controlled social and cultural environment as factors in completely repressing all claims to alternate sexual orientation, rendering even any acknowledgment of homosexual identity impossible.

This failure to acknowledge the existence of homosexuality obviously has its consequences in the way Bhutan chooses to treat the spread of the HIV/AIDS epidemic. According to government data, ‘The first HIV infection was detected in Bhutan in 1993. On World AIDS Day in 2005, the health minister announced that total number of HIV infected had risen to 76.’⁵⁹ The national response on HIV/AIDS refuses to acknowledge the existence of MSM and the closest the Government comes to acknowledging MSM is the funding accepted from international sources for interventions with vulnerable groups such as ‘truck drivers’ and ‘migrant workers’.⁶⁰

Therefore, from the minuscule information available it appears that in a country where an almost autocratic form of monarchy has severely repressed human rights of various groups and minority communities, envisag-

⁵³ In 1998, a Royal Edict was issued which granted additional powers to the National Assembly. “Bhutan (History and Geography)”, sourced from: <http://www.kingdomofbhutan.com/kingdom/kingdom_2_.html>

⁵⁴ Richard Ammon, “Gay Bhutan”, Summer, 2004, sourced from: <<http://www.globalgayz.com/g-bhutan.html>>

⁵⁵ In the interview with Global Gayz, Shahid, a Bhutanese gay clarifies that “Regarding the jailing of gays, I have heard in the past that one man was killed in jail while he was caught and he was married and had kids but divorced”. Richard Ammon, supra note 11.

⁵⁶ According to Shahid, “men can hold hands, sleep in the bed with same sex even in presence of parents or relatives and friends yet many don’t know that gay sex exist at all. Married men can sleep together in same bed with other married or single men!” *Ibid.*

⁵⁷ He further states that “I don’t know any single gay man in Bhutan personally nor anyone do I dare to ask and get to know one for so many reasons like being caught or known or outcast from office work, family and society. I am sure there are gays. They are married and have kids. I guess they might be finding sex across in India which is on our immediate border”. *Ibid.*

⁵⁸ Excerpts from an e-mail interview with gay Bhutanese activist under the pseudonym Shahid, reproduced in Richard Ammon, “Gay Bhutan”, Summer, 2004, sourced from: <<http://www.globalgayz.com/g-bhutan.html>>.

⁵⁹ <http://www.youandaids.org/Asia%20Pacific%20at%20a%20Glance/Bhutan/index.asp>

⁶⁰ *Ibid*

ing a movement for sexuality minorities in present times is indeed a difficult task. It seems equally difficult to get the government to acknowledge the existence of MSM and begin HIV programmes for MSM.

Bangladesh

Socio-political context

The State of Bangladesh was essentially founded on the ethic of linguistic nationalism. The political system of the country was based on constitutional democracy with a multi-party system, but like Pakistan, it has seen frequent interludes of military dictatorships, which have gone on to rigidify the Islamic religious tenets in political and legal frameworks. Human rights record of the country has consequently, also witnessed several ups and downs, with allegations of persecution of religious minorities in the country. However it is argued that perhaps due to the history of Bangladesh's birth as a state founded on a common language, the form of Islam embraced by the State has been comparatively more tolerant and inclusive⁶¹ than the regimes in Afghanistan or Pakistan.

However this more liberal Islamic heritage is under threat today in contemporary Bangladesh with the continued persecution of religious minorities such as the Hindus, clamp down on other Muslim sects such as the Ahmediyas and the clamping down on the right to freedom of speech and expression as seen in the persecution of Taslima Nasreen, the Bangladeshi feminist-writer.

Treatment of homosexuality

With regard to homosexuality, it has been observed that it is usually tolerated in society with Bengali literature often depicting same-sex love and relationships even in the case of women. In fact, same-sex relations between men in the dorms of Dhaka University is reported to be quite common, and in towns and villages, homosexuality is tolerated despite religious sanctions.⁶² This traditional tolerance for homosexuality is circumscribed and whittled down by the importance of the family in Bangladesh and the centrality of marriage in general South Asian culture. The position of sexuality minorities in Bangladesh is rendered even more precarious by the incorporation of the infamous Section 377 of the Indian Penal Code into Bangladeshi law. Further the key role that the rise of religious fundamentalism plays in whittling down the space which sexuality minorities enjoy in society also has to be noted.

However what is important to understand is that like Nepal, Bangladesh has an emerging history of sexuality minority activism. Some sections of the hijra community in Bangladesh are beginning to organize themselves under the title of Badhon Hijra Shangho (the United Hijra Organisation).

As one of the members of the organization noted, "In the past we used to feel very insecure" says Moni, another member of the 180-strong organisation. "We were tortured by the police and the mastaans (local gangsters); they took our money and forced us to have sex with them for free. We couldn't assert ourselves as human beings because we were sex workers. But now we have a position and if one person gets tortured or attacked we all go to help them. Now we have a community to share our pain."⁶³

Similarly in the upper to middle class circles, groups have started from an Internet presence. In 2003 the gay "community" was only a loose network of isolated individuals who kept in contact by mobile phone or met strangers in cruisey Ramna Park. BoysOnlyBangladesh (BOB) was started with the intention of creating a focused friendship network that offered more than a secret nightlife of at-risk behavior. With over seven hundred current members today BOB friendship circles have widened and resulted in numerous couples as well as some organized social activities. The essence of BOB is the messaging that happens nearly every day as friends and new acquaintances make contact, arrange dinners or hookups.⁶⁴

As the author notes, "the momentum seems to be building to such a readiness. The 'shadow' BOB is a

⁶¹ "In spite of a history of religious strife, Bangladeshi Muslims tended to be accommodating toward adherents of other religions. The Muslim community in the Bengal region developed independent of the dominant Islamic trends in India. The preservation of pre-Islamic cultural elements from Buddhist and Hindu periods made the commitment to Islam uniquely Bangladeshi. Features of Bangladeshi Hinduism, which differed in some respects from Hinduism in other parts of South Asia, influenced both the practices and the social structure of the Bangladeshi Muslim community". "Country Report: Bangladesh Society", September 1988, Federal Research Division, Library of Congress, sourced from: < <http://memory.loc.gov/frd/cs/profiles/bangladesh.pdf>>

⁶² Afsan Chowdhury, "The Shadow Citizens", May 2004, Himal Magazine, sourced from: <<http://www.sodomylaws.org/world/bangladesh/bgnews001.htm>>

⁶³ Ibid.

⁶⁴ <http://www.globalgayz.com/g-bangladesh.html>

courageous start; from a handful of Internet savvy guys who created the Yahoo group—a silent, secretive act—to their current once-weekly public gatherings at the pond and HIV advocacy represents significant progress in this city of 14 million—with perhaps half a million LGBT folks.”⁶⁵

However one should note that family, marriage and religion are central to the continued invisibility and harassment of sexuality minorities in Bangladesh. As one Bangladeshi gay person noted, “They will forgive me if I commit a murder but not if they find out that I have a boy friend,” says Mohsin who is 28 years old, a Bangladeshi, and gay. He refers to the impossibility of ‘coming out’ before his family, now that his family might force him to get into a heterosexual marriage.⁶⁶ According to Lahari and Faraz, Bangladeshi researchers working on homosexuality in Bangladesh, “society at large is living in denial about homosexuals and it is extremely detrimental to individuals to have to suppress their true identity in fear of being labeled ‘socially deviant’ The invisibility of gay men is further perpetuated by such laws like the Penal Code 377”.⁶⁷

This essentially remains the predicament of sexuality minorities, in a country where family remains so important. The covert heterosexism and violence of the social structure is complemented by the overt violence of the legal structure. This emerges most powerfully in the documentation by human rights groups such as Human Rights Watch. In a Report entitled, ‘Ravaging the Vulnerable’, the group documented instances of sexual violence, extortion, arbitrary arrests and physical abuse against both kothis and hijras. To give some indication of the gravity of the violence to which hijras and kothis are subjected to one just has to read Kajal’s testimony. As Kajal notes, ‘he was gang raped by three police officers in November 2002 and that police had gang raped him about nine other times in 2002. Kajal J also told Human Rights Watch about a beating he suffered in mid 2002. ‘A policeman grabbed me by the sari I was wearing. When I tried to release myself, the policeman got angry and beat me badly. I missed a week of work because of that beating.’⁶⁸

The Report not only links up the abuse and violence to the anti-sodomy law but also connects it up to the spread of HIV/AIDS. In addition to the risks of police and mastan violence, men who have sex with men are at high risk of HIV transmission. AIDS awareness and outreach among men who have sex with men is an important part of any fight against HIV/AIDS. All the abuses documented here, rape, abduction, beatings, extortion, arbitrary arrest undermine Bangladesh’s capacity to address the AIDS epidemic. These abuses decrease the control that men who have sex with men have over their lives. They alienate these men from society rendering them more difficult to reach with information and other means of prevention and care.⁶⁹

Sri Lanka

Socio-political context

Sri Lanka is a constitutional democracy which has been ravaged by the ethnic civil war between the Sinhalese and the (Liberation of Tamil Tigers Eelam) LTTE for over twenty years. The roots of the conflict lay in the Sinhala majoritarian policies pursued by the state which led to intense dissatisfaction and the formation of the LTTE. The conflict has been accompanied by numerous civilian deaths, political assassinations and acts of brutality by both parties.⁷⁰ The country since 2002 has been in a precarious state of ceasefire with it being de-facto divided into two regions. The north and the east are under the control of the LTTE with the south being under the control of the Sri Lankan state.

Any attempt to understand how sexual orientation and gender identity are treated in Sri Lankan society will have to factor in the very diverse political authorities in control in both parts of Sri Lanka. One would also have to factor in the fact that the peace is a fragile one with the possibility of the resumption

⁶⁵ Ibid.

⁶⁶ Afsan Chowdhury, “The Shadow Citizens”, May 2004, Himal Magazine, sourced from: <<http://www.sodomylaws.org/world/bangladesh/bgnews001.htm>>

⁶⁷ Afsan Chowdhury, “The Shadow Citizens”, May 2004, Himal Magazine, sourced from: <<http://www.sodomylaws.org/world/bangladesh/bgnews001.htm>>

⁶⁸ Human Rights Watch, Ravaging the vulnerable: Abuse Against persons at High Risk Infection in Bangladesh, 2003, p. 39, <http://www.hrw.org/reports/2003/bangladesh0803/>

⁶⁹ Ibid, p 41.

⁷⁰ See Rajan Hoole, Sri Lanka: The arrogance of power, University Teachers for Human Rights, Colombo, 2001

of hostilities at any point in time.

One point which should be made about the state of war and the threat of war under which the country functions is that Sri Lanka today in both the north and the east and south is a militarized society. Militarized societies by their very nature shrink the space for the articulation of other social concerns and issues. As Sri Lankan gay rights activist, Sherman De Rose notes, the bloody insurgency campaign in the country may make it hard to focus the attention of the two major parties on gay issues: “We don’t expect either party to endorse our cause, and we are only looking to open a dialogue.”⁷¹

Treatment of homosexuality

The struggle in Sri Lanka was initially focused around Section 365 of the Sri Lankan Penal Code. The provision was analogous to Section 377 of the IPC. The movement for sexuality minorities in the country was out and visible enough to begin advocacy to repeal the anti-sodomy law. It was spearheaded by organizations like the Companions on a Journey and Women’s Support Group. These sexuality minorities groups have vociferously demanded the repeal of Section 365 of the Penal Code, and though such assurances were provided by the government⁷², it failed to affect any reform.⁷³ The excuse given by the government has been that the law has never been used at all, thereby making the need for reform superfluous. However, the enormous negative impact⁷⁴ of such un-enforced laws is clearly bought out by Sherman De Rose, who says, “Article 365 (of the penal code) attaches a stigma to those who are gay. It leads to a lot of abuses of gay people in our community”. He further questions, “What we say is why keep in statute books something that you are not going to use?”⁷⁵

The advocacy by these groups had wholly unintended consequences as during the process of criminal law reform instead of dropping Section 365, a new provision Section 365 A was introduced. What is unique about the Sri Lankan legislation is that it was introduced in 1995 and was actually seen by gay rights activists as an opportunity to decriminalize same sex relationships. But what happened through the amendment was that the criminalizing ambit of the provision became wider by using the term ‘gross indecency’ instead of ‘carnal intercourse against the order of nature’ and also explicitly including women within the framework of the law.

Sri Lankan activists have had an unhappy engagement with the law. In another incident, when a complaint was filed by an activist against a letter published by a local newspaper asking “to let loose convicted rapists” among lesbians at a planned conference, the Sri Lankan Council replied by not only justifying the letter and noting that “Lesbianism was an ‘act of sadism’, and was an offence under the country’s penal code”⁷⁶. but also fining the activist who filed the complaint.⁷⁷ In spite of this run ins with the law, what is clear is that Sri Lanka has an activist culture which is constantly seeking to push the boundaries. It counts among those South Asian countries like Nepal and India in which activism is actively seeking to change the status quo.

However the everyday lives of Sri Lankan sexuality minorities remains difficult. The dilemmas faced by sexuality minorities, particularly in smaller towns is exemplified by the confusion and loneliness of Jay, a gay Sri Lankan who claims that he is probably the only gay in his hometown. His only outlet is a rare

⁷¹ http://www.sodomylaws.org/world/sri_lanka/slnews008.htm

⁷² “Morality laws in Sri Lanka are to be reviewed by a special government committee. A government statement did not mention homosexuality, but said it wanted to establish what was described as a firm policy on the portrayal of sex, violence and the abuse of alcohol”. From BBC Online Report, 9 September 1998, sourced from: <http://www.sodomylaws.org/world/sri_lanka/slnews011.htm>

⁷³ Activist groups like the Companions have long demanded the repeal of the archaic British-imposed sodomy law in the statute. Various strategies for the same have been employed, from individual lobbying to engaging the government in dialogues regarding reforms in the laws governing sexuality in the country. According to Sherman De Rose, the founder of Companions, the community also awaits positive developments in India with similar morality law, and a more visible sexuality minorities’ movement. He states, “What happens in India can have an impact on us. We could use the Indian example to strengthen our case. There is similar action in Bangladesh and Pakistan”. “Sri Lanka’s Gays Join South Asian Fight for Rights”, 9 July 2004, sourced from: <http://www.sodomylaws.org/world/sri_lanka/slnews011.htm>

⁷⁴ Further, according to De Rose, police harassments, blackmails and like employment discrimination are some of the most common hardships faced by the sexuality minorities in Sri Lanka. “Different Views and Experiences on Covering Homosexuality in Sri Lanka”, sourced from: <http://www.fo.hik.se/Sidor/FojoInter_CourseWebsites/wij98/wijp98/taboo/page5.html>

⁷⁵ Sri Lanka’s Gays Join South Asian Fight for Rights”, 9 July 2004, sourced from: <http://www.sodomylaws.org/world/sri_lanka/slnews011.htm>

⁷⁶ “Sri Lanka’s Press Council Attacks Lesbianism”, BBC Online, 2 June 2000, sourced from: <http://www.sodomylaws.org/world/sri_lanka/slnews011.htm>

⁷⁷ http://www.sodomylaws.org/world/sri_lanka/slnews006.htm

quickie “in a dark place for five minutes”, with the fear of police harassment at every step. So internalized is the homophobia even within Jay that he hesitates to refer to himself as ‘gay’. He says, “G-people have no choice. They are married and have kids to fit in – but it’s so stupid because then they ‘wander’ when they feel the urge. It’s a terrible situation”.⁷⁸

What emerges from Jay’s story is that there is simply no ‘choice’, at least in the lives of homosexuals belonging to smaller towns or rural areas of the country. However, the social position of male homosexuals in urban areas, and among the elite appears to be more accepted and the society takes a liberal view of same-sex relations.⁷⁹ Again, as in the other South Asian societies, lesbians are subjected to harsher and more rigid social norms, where marriage with a man becomes the only way of life.⁸⁰

However, a significant aspect of lesbian oppression in the country is that unlike in the other countries of the region where same-sex relations between women are not proscribed by law, in Sri Lanka, after the 1995 amendment which followed the decision of the Sri Lankan Press Council, there has been an extension of the legal prohibition against same-sex relation even among women in 2000. According to the Council, this acted on a derogatory report published in a newspaper; convicted rapists should be unleashed on lesbians.

In spite of the various complexities encountered by the sexuality minorities in the country, and the repression perpetrated as a direct result of a post colonial legal provision, the movement for rights of sexuality minorities is vibrant and has been quite visible even in the international arena. Thus for example in a document titled the Declaration of Human Rights on Behalf of Sri Lanka’s LGBTIQ, the sexuality minority community in Sri Lanka reaffirmed “Although often hidden due to social and judicial pressures, Lesbians, Gay men, Bisexuals, Transgenders, Intersex and Questioning persons are all around us. They are school teachers, doctors, nurses, lawyers, politicians, mothers, fathers, next door neighbours, boutique owners, businessmen and businesswomen, clergy; the list is endless. And they all have a right to live as persons with dignity, devoid of fear and stigmatization”.⁸¹

The Sri Lankan government has also acknowledged the existence of the need to work with highly vulnerable groups like MSM in its policy statement. However as for the NGOs, work of both local and international organizations in the area of HIV/AIDS prevention in Sri Lanka has been limited, unlike that of other neighboring countries, such as India, Bangladesh, and Nepal. The NGO work remains largely uncoordinated, and its program coverage of high-risk sub-populations is estimated to be less than 10 percent.⁸²

Maldives

Maldives is a small island nation, which is the smallest member of SAARC. Maldives has unlike most other South Asian nations not suffered a history of colonialism. Instead like Bhutan the Sultan of Maldives entered into a treaty with the British wherein he retained control over domestic affairs and ceded control over foreign affairs to the British in 1948. This move to become a British protectorate has to be seen in the context of the fear of Indian hegemony. Maldives formally became an independent country only in 1965. Since that time period Maldives has consistently tried to steer clear of great power rivalries by refusing to let either the US or the USSR use the Maldives for any military purpose. In political terms the most serious crisis faced by the Maldives was when in 1988 when a coup was attempted to overthrow the government of Maldives. The coup failed due to the intervention of Indian troops. The other crisis which Maldives faces is the possible complete disappearance of the entire landmass under the sea due to global warming and the rise in sea levels. In Maldives the crisis is particularly acute as most parts of the country are less than a meter above sea level.

⁷⁸ Interview with Jay in Richard Ammon, “Being Fearful and Boldly Gay in Sri Lanka”, January 1999, sourced from: <<http://www.globalgayz.com/g-srilanka.html>>

⁷⁹ For details refer to Ibid.

⁸⁰ According to De Rose, “The number of women will always remain low ... because Sri Lankan women are many times more unlikely than men to admit their homosexuality. It may be because women are governed more by traditional and cultural expectations”. He further states, “Often Sri Lankan homosexuals have committed suicide because they had no support from their families, from their community and from the state”. “Legal Survey: Sri Lanka”, sourced from: <http://www.ilga.info/Information/Legal_survey/Asia_Pacific/sri_lanka.htm>

⁸¹ “Equal Ground”, sourced from: <http://www.equal-ground.org/resources/dropbox/Human_Right-HR.pdf>

⁸² <http://www.youandaids.org/Asia%20Pacific%20at%20a%20Glance/SriLanka/index.asp>⁷⁶ “Sri Lanka’s Press Council Attacks

Originally Buddhist Maldivians were converted to Sunni Islam in the mid-12th century. There is a small Shia community that comprises about 5% of the country's Muslims. Islam is the official religion of the entire population, as adherence to it is required for citizenship.⁸³

Treatment of homosexuality

The Maldivian Penal Code is the same as the Indian Penal Code which makes sexual relations between men punishable by life or 10 years imprisonment. There is an effort underway to reform the Maldivian Penal law to bring it in line with the Sharia. This effort is being undertaken by the students of University of Pennsylvania Law School in a project sponsored by the UNDP. In the words of a student "Is there a way to convince people that there is an Islamic alternative that doesn't include all the unpleasant practices? I think so," he said. "The criminal code that we'd like to present will comply with human-rights norms. It will treat men and women equally. I don't think any of us would stand by and create a document that could be used for repression."⁸⁴

Unlike other South Asian countries, there are no available narratives from any person identified as a sexuality minority. Further HIV/AIDS has a low prevalence and even the Government efforts as such do not identify Men who have sex with men as a vulnerable group.⁸⁵

India

Socio-political context

India compared to most of the other countries in South Asia has had a relatively stable democracy. Politics in India in recent times has revolved around two fronts, one the National Democratic Alliance (NDA) headed by the BJP and the United Progressive Alliance (UPA) with the Congress (I) in the forefront. The key difference between the two fronts is that the BJP practices a fundamentalist politics with a clear majoritarian emphasis. The worst moments of BJP rule were when the BJP state government was complicit in the destruction of an ancient mosque the Babri Masjid in 1992 and again in 2002 when a BJP state government was complicit in a genocide perpetrated against the Muslim community. The Congress (I) by contrast is committed to a secular politics with no discrimination on the basis of religion. A key moment in the contemporary history of India was when the Congress headed coalition defeated the BJP in the 2004 elections and thereby lowering the communal temperature across the country. The other point to be noted is the conjuncture between stigmatizing sexuality minorities and the ascendancy of the right wing. This came to the fore around the protests around the film 'Fire'. 'Fire' portrayed a lesbian relationship between two women and excited strong protests from both the BJP and the right wing Shiv Sena. During the BJP rule, both sex and sexuality came into open controversy as BJP Minister, Sushma Swaraj disallowed condom ads on television as the portrayal was considered against Indian culture.

In India today, 'culture' remains an area of great controversy with any talk of non normative sexuality likely to be stigmatized as being against Indian culture. In this context one can note the recent remarks by southern film star Khushboo on the possibility of pre martial sex eliciting protests from groups on the grounds that what she said was against Tamil culture. In the context outlined above, in spite of an emerging activism, the position of sexuality minorities remains precarious.

Treatment of homosexuality

The overarching context within which homosexuality continues to be debated in India is provided by the archaic Sec 377 of the Indian Penal Code. The key role of the provision lies in stigmatizing homosexuality and in ensuring that same sex relations are viewed as illegal.

In India activism by a number of groups has succeeded in documenting the history of violence which this provision has lead to. The People's Union for Civil Liberties- Karnataka, PUCL- K for example has documented histories of sexual and physical abuse, extortion, illegal detention and outing by the police and goondas against sexuality minorities.⁸⁶ In a second report the PUCL-K has documented stories of shocking

⁸³ <http://en.wikipedia.org/wiki/Maldives>

⁸⁴ <http://www.sodomylaws.org/world/maldives/mlnews001.htm>

⁸⁵ <http://www.youandaids.org/Asia%20Pacific%20at%20a%20Glance/Maldives/index.asp>

⁸⁶ PUCL-K , Human Rights violations against sexuality minorities , 2001, <http://www.pucl.org/reports/Karnataka/2001/sexualminorities-pr.htm>

⁸⁷ <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html>

violence against the transgender community, particularly hijras and kothis.⁸⁷ Clearly the violence which is inflicted against sexuality minorities flows from a legal framework which makes it illegal to engage in homosexual acts.

Section 377 creates a background climate of illegality which enables violence against sexuality minorities. Sometime Section 377 is used directly by the state to target sexuality minorities and sexuality minority activism. The three contexts in which the sexuality minority community has had to grapple with the implications of Section 377 have been in the two arrests in Lucknow under Section 377 as well as with regard to the case filed challenging the constitutionality of Sec 377. We will briefly examine these three contexts in which Section 377 has become a part of the public discourse on sexuality.⁸⁸

a) The First Lucknow Case: Health interventions as promoting deviance

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

On July 7, 2001, the police, acting on a complaint by a person that he had been sodomized by someone in a park, raided the park that was frequented by hijras, kothis and others and arrested ten people. Among those arrested was an activist from Bharosa (an NGO working with the MSM community). Thereafter the police raided the offices of Naz Foundation International and Bharosa, two NGO's working on safer sex issues, seized safer sex material and registered a complaint under Section 377 (unnatural sexual offences), Section 120B (conspiracy to commit an offence), Section 109 (abetment) and Section 292 (sale, etc. of obscene material).

The arrest was followed by a media blitz with prurient headlines such as "Gay Club Supplied Boys to Politicians," "Gay Culture Started In UP In 1998 Itself," "Lucknow Police Raid Gay Clubs, Ten Arrested," and "Call Boy Racket Sends Shock Waves in Lucknow."^{89 90 91 92} Both the climate of homophobia generated by the arrests and the subsequent media coverage were sanctioned by state action. The Senior Superintendent of Police (SSP) of Lucknow, B.B. Buxi, claimed, "The two organizations, Naz and Bharosa, were running gay clubs in contrast to the Indian culture and ethics under the garb of educating the masses about AIDS and HIV."⁹³ As if to complement the rank prejudices exhibited by the police, the Magistrate who heard the case also noted that these men were to be denied bail, with the judge approvingly quoting the Public Prosecutor (who opposed the bail application) on the grounds that "they...are polluting the entire society by encouraging the young persons and abetting them for committing the offence of sodomy."⁹⁴ Finally, it took an appeal to the High Court for the accused to be released on bail after being in jail for almost one and a half months.⁹⁵

These arrests made one thing unmistakably clear: work around HIV/AIDS has become irrevocably linked to issues of deviant sexuality. The fact that the organizations were working on safer sex issues could not be divorced from the criminalizing force of Section 377. The targeting and the intimidation of organizations working on MSM issues was a direct outcome of the existence of Section 377 on the statute book. To the health worker community, the arrests plainly and forcefully demonstrated that health interventions could not (and still can not) exist outside the state politics criminalizing homosexual acts.

⁸⁸ The three contexts outlined below will rely on Arvind Narrain, *The articulation of rights around Sexuality and health: Subaltern queer cultures in India in the era of Hindutva*, Health and Human Rights Vol 7 No 2 2004 and the Preliminary Report on the preliminary report of the fact finding team on the arrest of four men in Lucknow under IPC 377. http://www.yawningbread.org/apdx_2006/imp-249.htm

⁸⁹ <http://sifyspecials.sify.com>.

⁹⁰ The Times of India, July 10, 2001.

⁹¹ The Hindustan Times, July 8, 2001.

⁹² The Times of India, July 9, 2001.

⁹³ Ibid.

⁹⁴ Criminal Misc. Case No. 2054/2001.

⁹⁵ T.K. Rajalakshmi, "Targeting NGOs", Frontline, September 1-14, 2001, <http://www.flonnet.com/fl1818/18181130.htm>.

⁹⁶ An elementary analysis of the relevant provisions on bail reveals that even in cases such as those under Sec 377 there have to be reasonable grounds for the withholding of bail. In the above case the bail was denied because of the completely unfounded belief for which no material was adduced by the prosecution, that, 'they...are polluting the entire society by encouraging the young persons and abetting them for committing the offence of sodomy' See supra n. xxxiv

The criminal and deviant aura surrounding this case was amply illustrated through the sheer difficulty of getting the accused released on bail.⁹⁶

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

10 people are kept in jail and all over the city malicious reports are being written about them. These 10 people are emotionally and physically tortured. Their reputation has gone down forever. What is one of the most important things for anyone? Food, money, empowerment etc., isn't it? Now, it would be next to impossible for these 10 people to go to any place in Lucknow where they can get a job... These people are compulsorily out as rapist MSM (conspirers of sodomy) not in the family but in the society and in the city too. That is not very good experience. Their sister[s] would not be getting married easily. Brothers would be looked down upon. Fathers and mothers would be commented on negatively.⁹⁷

It is painfully clear post-Lucknow that as long as Section 377 exists, there is no possibility of anyone approaching HIV from a health perspective alone. The formation of alliances and coalitions under a human rights framework - in which queer groups work along with feminist groups, civil liberties groups and groups working on HIV/AIDS to understand and address the ways health intersects with the state's need to regulate sexuality - has now, after the experiences and lesson of Lucknow, become a critical necessity.⁹⁸ The emergence of this alliance would of course depend upon the willingness of groups to take on board concerns which are not their 'core' concerns. Thus it would mean that sexuality based groups will have to take on board broader human rights concerns and vice versa.

b) The second Lucknow case: Policing homosexuality

On 4 January 2006 national and regional newspapers reported an incident wherein four homosexual men were caught allegedly having sex in public in Lucknow and arrested under Section 377 of the Indian Penal Code (IPC). As per an FIR lodged by the Lucknow police at Gudamba police station on 4 January 2006 at 12.40 am, they arrested 4 men, Nihal Naqvi, Pramit Bailey, Ashutosh Khanna and Pankaj Gupta, on charges of violation of Section 377 of the IPC. The four accused were allegedly having sex in a public park when they were arrested.

As per the information gathered by a Fact Finding Team constituted by the National Campaign for Sexuality Rights (NCSR), it was clear that none of the men involved were having public sex, much less present at the alleged spot of the crime. In fact what transpired was that the police under the supervision of the SSP arrested one of the men, Nihal, on the evening of 3 January 06 at his home. Thereafter names and mobile numbers of the other men mentioned in the FIR were forcibly obtained from him. He was then arrested at 11.30 pm. On the following day (4 January) at 10.30 am he was forced to call the other men and request them to meet him at Classic Restaurant, Mahanagar, Lucknow on pretexts such as ill health and the need to fix up a business appointment. It appears that two people responded to the call only because Nihal had had a heart attack earlier so they were worried that their friend was having another attack. It also came to the team's knowledge that one of the men left the house in a hurry wearing only his bathroom slippers without taking any warm clothing. The others were arrested by the police, on their arrival at the restaurant.⁹⁹

What the Fact Finding Team did find out was that the state was both simultaneously ignorant of the necessity for HIV/AIDS intervention among the MSM community as well as deeply homophobic. As the Fact Finding team noted, 'The interviews by the Fact Finding Team with the ADG (Crime) and the Home Secretary indicated the deep-rooted nature of homophobia within the state machinery and its fundamental resistance to treating all individuals, regardless of sexual orientation, as individuals with the basic right to live with dignity. The ADG Crime was even surprised that this was a human rights issue and asked the Team whether it approved of same-sex relationships. He further noted that he was only enforcing social norms by enforc-

⁹⁷ <http://groups.yahoo.com/group/khush-list/>.

⁹⁸ The criticality of the need for the alliance cannot be underestimated. Groups working on HIV/AIDS related MSM interventions have persisted with their work without building alliances with either feminist or civil liberties groups. The collective ability to respond to Lucknow in Lucknow would have been far stronger if there was an alliance between queer, feminist, HIV/AIDS's and civil liberties groups in place.

⁹⁹ See the Preliminary Report on the preliminary report of the fact finding team on the arrest of four men in Lucknow under IPC 377, http://www.yawningbread.org/apdx_2006/imp-249.htm

ing Section 377. The Home Secretary was of the opinion that the affected parties were urban middle class people and commented on the fact that NGO's focused on their alleged human rights violation instead of focusing on the rights of poor people. Both the ADG and the Home Secretary were unaware of the way this prosecution ran counter to the Government of India's policy with respect to providing an "enabling environment that reduces vulnerability of men having sex with men (MSM)." (National AIDS Control Policy(NACP 2 Para 7.5) By and large the state officials were clear that regardless of the AIDS crisis or the policy statement of NACO, the "on book" law was Section 377 and would take its course and that as far as the Police were concerned, they were just implementing the IPC impartially.¹⁰⁰

The Fact Finding Team concluded that; "The UP State authorities have to realize that implementing Section 377 in today's context is a fundamentally regressive step as;

- There is an all India movement to repeal Section 377, which is an unacceptable intrusion into the intimate lives of individuals. The movement is based on the Constitutional premise of the right to equality, dignity, liberty and expression and the country is beginning to understand that the state has no role in intervening in the lives of consenting adults.
- It is not illegal to be homosexual/bisexual in this country and the state should not play a role in moral policing.
- The position of the UP police is at dissonance with HIV/AIDS interventions wherein the government through its various AIDS interventions actually promotes the use of condoms for penetrative sex between consenting adult men.
- It showcases UP to a global audience as upholding fundamentally archaic positions at odds with well accepted human rights positions."¹⁰¹

c) Challenging the Constitutionality of Sec 377: Homosexuality as framed by Hindu nationalism

While the first Lucknow case is emblematic of how work on health issues with the MSM community has become caught up in a wider debate around homosexuality, and the second Lucknow case illustrates how homophobia is clearly woven into the state's response to the way it chooses to implement Section 377, the State response to the constitutional challenge to Section 377 illustrates how clearly Hindu nationalism is implicated in concerns around health. The concern with sexual health, post Lucknow has become a concern about homosexuality. The concern with homosexuality itself is a part of the wider nation building project of the Hindu Right as the previous BJP led Government response to the petition challenging Section 377 clearly illustrates.

In 1994 the AIDS Bhedbhav Virodhi Andolan (ABVA), a human rights group, filed public interest litigation, in the Delhi High Court. Their petition challenged the constitutional validity of Section 377, arguing that the section violated Articles 14-15 (right to protection against discrimination), Article 19 (right to freedom of speech and expression), and Article 21 (right to life and liberty, which encompasses the right to privacy) of the Constitution of India. The petition also advocated for the supply of condoms to jail inmates, with a plea to restrain the authorities from segregating or isolating prisoners with homosexual orientations or those suffering from HIV/AIDS.¹⁰²

This petition was filed in the wake of a report by a medical team that had visited Tihar Jail in Delhi and reported a high incidence of sodomy in the male wards. As there was a risk of HIV infection being transmitted to the jail inmates, the team recommended making provisions for condoms in the jail (as recommended by WHO guidelines). The jail authorities refused to do so because they felt that it would both encourage male sexual activity in prisons (which would be encouraging an offence under Section 377) and amount to a tacit admission that homosexual behaviour exists in prisons.¹⁰³ Unfortunately, the petitioner group

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Rajesh Dhir, "Men Who Have Sex With Men & The Law", <http://www.hri.ca/partners/lc/unit/homosexuality.shtml>.

¹⁰³ Kiran Bedi, the IG (Prisons), maintained that there were no HIV positive prisoners in Tihar Jail and that "[w]henver any such case is brought to the notice of the concerned authorities, the prisoners are separated." She further held that homosexual activity in Tihar was "not a problem" (i.e. did not exist) and that "there is no justification and legality for the supply of condoms in the prison. Supply of condoms will promote homosexuality." The ABVA's plea was taken by Bedi as an attempt to force 'western solutions' on 'Tihar Ashram'. A similar position was taken by Dr. Janak Raj Rai in his writ filed at the same time as the ABVA's, claiming that the supply of condoms would be tantamount to legalising sodomy. India Today, May 11, 1994; The Hindustan Times, September 13, 1994.

ceased to exist and the petition never came up for hearing.

It was only in 2001 that this legal strategy was revived as the Naz Foundation (India) Trust, an NGO working with HIV/AIDS related issues approached the Delhi High Court to read down Section 377 so as to remove all consensual sexual activities between adults if done in private from the ambit of the provision.¹⁰⁴ By reading down what was meant was that the petition instead of asking for a repeal of Sec 377, preferred to ask that the statute be read such that, consensual homosexual acts in private be removed from its criminalizing ambit. The reasoning articulated was that “Sec 377 is a major impediment to carrying out HIV/AIDS related work with the MSM community, as it drives high risk behaviour in terms of unprotected oral and anal sex underground and beyond the reach of safe sex interventions and it violates the fundamental right to privacy and equality to sexual minorities guaranteed to every citizen of India under its constitution.”¹⁰⁵ In effect, this petition asked for all consensual sexual intercourse between adults to be removed from the criminalizing force of Section 377, provided these sexual acts were done in private. Thus the provision itself would remain on the statute book but would be used to prosecute only cases of child sexual abuse as well as, disturbingly, cases of public sex. This is problematic, because most of the people who are harassed by Section 377 happen to be those who do not own any private space and hence are forced to engage in unsafe sexual encounters in parks etc.

The reason the group opted for this strategy is linked to the use of Section 377 by child rights groups to prosecute child sexual abuse, as there is no comprehensive alternative statute in this area. Rape law is limited by gender and applicable to women only and further is limited to cases of penile vaginal intercourse only. This leaves a huge gap in terms of protecting children both male and female from sexual abuse. The argument in the Naz petition is really a pragmatic compromise in the absence of a law on child sexual abuse.

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

Common to both the stillborn ABVA petition as well as the Naz petition is the attention paid to the issue of health in their challenges of Section 377. More specifically, in the case of Naz's petition the understanding is that work to prevent HIV/AIDS cannot be done satisfactorily within a political system that criminalizes same sex activity. From the standpoint of health work, it is significant that the approach in this petition was not based on the assertion of identities (such as gay and lesbian) but was rather based on the articulation of a health concern - MSM, a category recognized by the Government of India through the National AIDS Control Authority (NACO).

However the Government of India's response to the Naz petition shifted the terms of this discourse. The Government's affidavit questioned the locus standi of the petitioner, asserting that “Sec 377 applied to cases of assault, where bodily harm is intended or caused and deletion of the said section can well open flood gates of delinquent behaviour and be misconstrued as providing unbridled license to the same.” The affidavit denied that Section 377 violated the right to life, the right to equality, or the right to freedom of speech and expression. In fact, the Affidavit disingenuously made the case that Section 377 was applied to cases of child sexual abuse and rape of women and that it therefore actually fulfilled the constitutional mandate to protect women and children. It went on to observe that “while the Government cannot police morality, in a civil society criminal law has to express and reflect public morality and concerns about harm to the society at large.”¹⁰⁶

The Government's response essentially buries any hope that Section 377 could be read down with Governmental cooperation. In fact, the Government's response indicates a virulent homophobia and an unwill-

¹⁰⁴ “Indian Gay Suit Seeks to Decriminalize Gay Sex”, <http://www.sodomylaws.org/world/india/innews04.htm>.

¹⁰⁵ <http://www.lawyerscollective.org/lc-hiv-aids/index.htm>

¹⁰⁶ Naz Foundation vs Govt of Delhi and others, 2001.

ingness to provide any space for emerging queer articulations. The Government response indicates that it sees Section 377 as articulating and reflecting public morality, protecting women and children, and keeping closed the floodgates of delinquent behavior. In the face of these challenges, the protection and defense of Section 377 has emerged as a key state concern, and the state has significantly enhanced its public role as the guardian of societal morality.

Perhaps one should read this response by the state as being a part and parcel of the Hindu right's ideology, which is based on demonizing and stigmatizing difference, be it religious or sexual in nature. The Hindu Right already has a proven track record of hostility towards religious minorities such as Muslims and Christians. However the Hindu Right first publicly exhibited its deep and unremitting hostility to homosexuals/lesbians who it has defined as "aliens" and threats to Indian culture and values—through the violent protests around the release of the movie *Fire*.¹⁰⁷ The very expression of same sex desire between women was deemed to be against Indian culture and generated organized and violent protests by the Hindu Right.

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

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

In response to the complex matrix of forces under girding Section 377, HIV/AIDS activists, human rights groups, and queer activists need to actively contest the existing socio-political context, recognizing that a successful challenge to Section 377 would first need to confront the logic of the Hindu Right.

The opportunity to take forward the struggle against Section 377 has re-presented itself with the Supreme Court ordering the Delhi High Court to re-hear the Naz Foundation petition on merits. The political context had altered as well, with the defeat of the BJP and the coming to power of the secular, Congress led coalition. There were hopes that the Congress would take a different position from the BJP with respect to the constitutional validity of Section 377. However when the new government filed its response to the Section 377 affidavit, the government merely followed the lead of the BJP government in opposing its repeal. The overt homophobia of the BJP government affidavit was replaced by the subtle homophobia of the new dispensation.

Perhaps the learning from this saga of courtroom intervention is that in a context where the state and its various institutions have internalized a heterosexist bias, to expect a positive judgement might be a serious error of strategy. What is clearly required is to move from a narrow legal demand and build a political struggle that takes on board the concerns of the queer community, of HIV/AIDS activists and of those committed to safeguarding the pluralistic ethos of the Indian constitution.

¹⁰⁷ The Hindu Right's hostility to homosexuality first emerged to public view in the context of the protests around the screening of the film 'Fire'. The film *Fire* is about the relationship between two women, Sita and Radha, married to brothers. Set within the patriarchal framework of a middle-class Hindu family in Delhi, the film portrays both women as oppressed in their respective marriages. They turn to each other for tenderness and respect, moving into a sensuous and sexual relationship. They finally break out of the very patriarchal structures that threw them together, to form independent lives. Screenings of the film were disrupted and theatres vandalized. This was justified through references to protecting Indian culture from foreign influences. As Sushma Swaraj of the BJP put it, 'There can be no argument that lesbianism is unnatural and is regarded as such the world over.' See *Lesbian Emergence: Citizens Report*, 1999, Delhi, Gomathy and Bina, *Fire, sparks and smoldering ashes*, <http://www.isiswomen.org/wia/wia199/sex00005.html>

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

Conclusion

It is very difficult to provide any kind of overarching conclusion the diverse range of problems which sexuality minorities face in South Asia. Apart from taking up the rights of sexuality minorities within each national context, the other opportunity to push these rights emerges not a sub-regional level, due the weak sub regional mechanisms at the South Asian level but rather at the international level.

While the most important recent initiative to internationalize the concerns of sexuality minorities was the ill fated Brazil resolution what the resolution has revitalized is the attention being paid to the problem of how best we can advocate for the rights of sexuality minorities in an international context. To briefly outline some of these contexts

a) Advocacy within treaty bodies:

The five major human rights treaties all have treaty bodies established under them. One aspect of advocacy is to try and get the concerns of sexuality minorities recognized under each of these treaties.¹⁰⁸

Historically, perhaps the most successful example of such advocacy was the Human Rights Committee decision in the case of *Toonen v. Australia* (1994), where the court held that the sodomy statute of Tasmania violated the guarantees under ICCPR.

Another path-breaking judgment was passed in the case of *Young v. Australia* in which the Human Rights Committee held that in denying pension rights to same sex couples, the discrimination provisions of the ICCPR were violated. These individual decisions taken together clearly mark the first time that a U.N. body has expressly held sexual orientation discrimination to be “discrimination” under the most significant international human rights treaty. Further, by laying down that State Parties to the ICCPR have now an obligation under international law to ensure non-discrimination based on sexual orientation, and also by requiring discussion of the same in the State Party Reports to the Committee, it has firmly established a trend in the recognition of rights of sexuality minorities.

One part of international advocacy on behalf of sexuality minorities can be to get the various treaty bodies to recognize concerns of sexuality minorities under their mandate.

b) Advocacy under the Human Rights Council

The other emerging key institution at the international level for the advocacy of the rights of sexuality minorities is the Human Rights Council. The Human Rights Council has replaced the Commission on Human Rights.

Under the previous Human Rights Commission, the work of the Special Rapporteurs was especially significant in addressing the concerns of sexuality minorities. In 2001, a letter was circulated by the office of the High Commissioner for Human Rights indicating that six Special Rapporteurs appointed by the UN Commission on Human Rights “were interested in receiving information on sexual minority issues falling within their respective mandates...” Following this letter the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir, the Special Rapporteur on freedom of expression, the Special Rapporteur on torture and the Special Rapporteur on health have all raised concerns with respect to the violation of the rights of sexuality minorities.

If the mandates of the Special Rapporteurs are strengthened under the new Human Rights Council, it will provide an opportunity for continuing advocacy on behalf of sexuality minorities.

While the international arena remains a key area for advocating the rights of sexuality minorities, it is vital that we also try and arrive at some cross cutting themes in South Asia concerning work around rights of sexuality minorities. If one were to broadly divide the South Asian region on the basis of activism on issues pertaining to sexuality minorities, there would be two broad groupings.

¹⁰⁸ The Convention on Rights of the Child, The International Convention on Civil and Political Rights, International Convention on Social, Economic and Cultural Rights, Convention on Elimination of All Forms of Discrimination Against Women, Convention Against Torture

Firstly there would be the nations of Nepal, Bangladesh, India and Sri Lanka where there is a degree of activism around these issues. In these countries the key problems have been identified which impede sexuality minorities from enjoying their rights. The process of challenging these structures of violence; be it the law or arbitrary state action has already begun. Secondly, there are the nations of Pakistan, Afghanistan, Maldives and Bhutan in which the process of publicly articulating the problems which sexuality minorities face has not yet begun. In these countries the challenge is still for sexuality minorities to begin to put together a history of violation and hence begin the process of addressing the same.

Some of the rights concerns which will have to be addressed head on, if any progress is to be made in addressing concerns with respect to MSM and HIV/AIDS would be:

- 1) Decriminalization of homosexual relations throughout South Asia.
- 2) Addressing the issue of police violence and private violence by grassroots level interventions.
- 3) Building a strong documentation of instances of human rights violations by the state.
- 4) Building support for alternative non fundamentalist interpretations of religion based on respect for human diversity.
- 5) HIV/AIDS groups will have to build connections with other human rights groups so that they don't remain isolated targets of state repression.

