



Human Rights, Sexuality and the Indian Legal System

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A few quotes that came along the way:

Human beings are not really that different from each other. Many however feel that it's their difference from others that make them unique. So they so they keep focusing on the difference and not on their similarities. However if one stops this and starts looking for similarities, all conflict would just vanish

R P Singh [my Hindi teacher in fifth grade]



A few quotes that came along the way:

Human Rights are important because they
belong to all human beings and are in-
alienable

===-Kofi Anan===-

The study of diversity cannot be to establish
any one group as better than another. It's
purpose is to establish how unique and
wonderful they all are.

===-Arundhati Roy===-



So what is it all about:

- Sexualities, the way identities are constructed, and cultures makes us different
- But our humanity, our existence as human beings make us similar

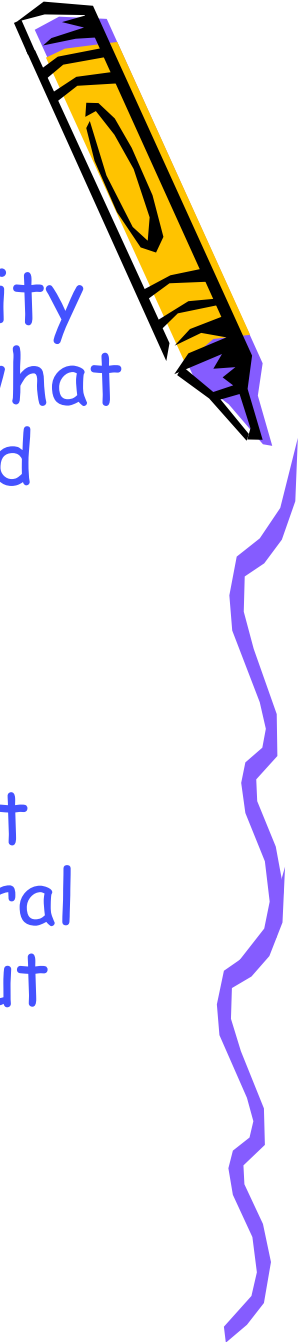
The trick is to respect the difference and work with the similarity. Human rights forms a good basis for that.



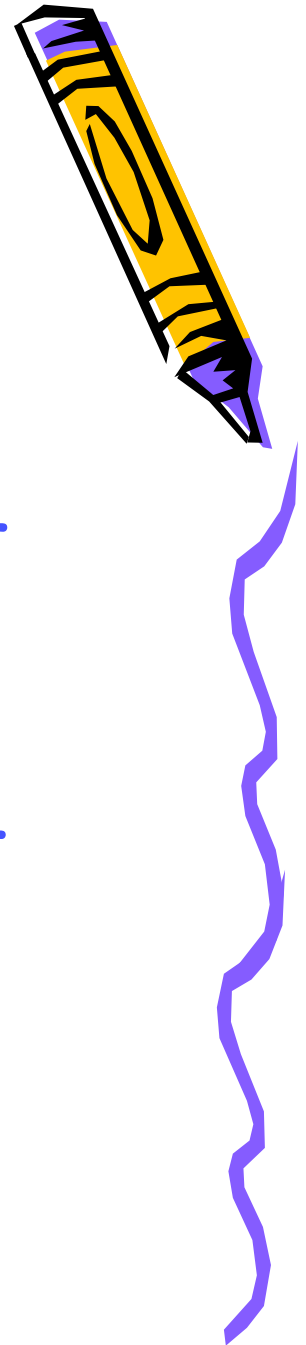
So what is it all about:

This talk shall be about what is the reality back home from where I come, about what makes the situation there unique, and being situated there, about my own relevance to it all

But it shall also be about what makes it different vis-à-vis you and your cultural reality, and being situated here, about your relevance to it all

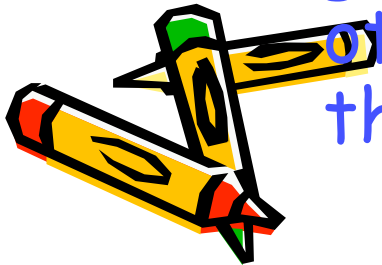


But most importantly, it shall be about our similarities, and our common concern for human rights, about all those things that are right and/or wrong in our systems and that can be corrected with our collective effort. Effectively about how important and relevant we are to each other in making a better more beautiful world.



One of the differences:

- The orient is a shame based culture, as opposed to the occident that is a more guilt based culture
- Please note:
 - The orient/occident is not necessarily a geographic term, but a term that describes a collective cultural mindset
 - describing a culture as either shame or guilt based does not mean that the other [guilt/shame] has no influence on the culture.



Shame /

- Is a product of societies that are "tribal" / "Clannish".
- The importance of the individual is subverted to the collective
- It is OK to do nearly anything, as long as that action does not shame the family, the clan, the tribe etc.



guilt

- It may have its roots in the Semitic tradition of atonement for one's actions before god
- Its always the individual who atones and is therefore responsible to atone
- The emphasis being on the individual, gives him/her a greater degree of autonomy, but also takes away a lot of 'Impunity'



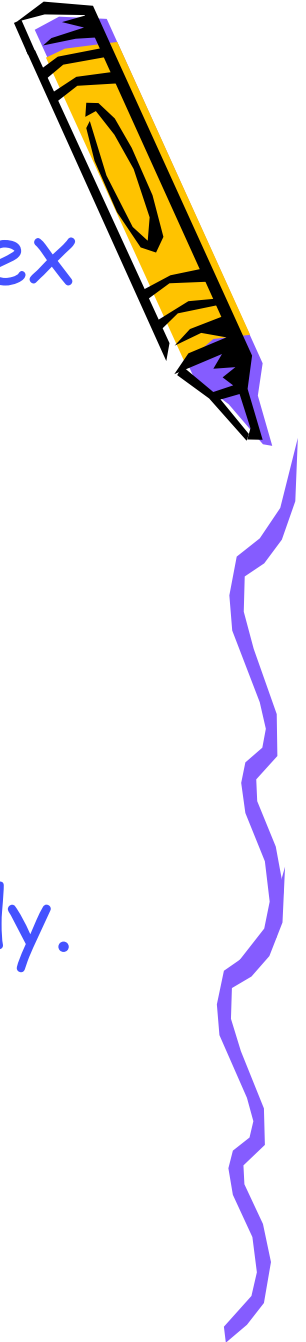
South Asia being shame based means:

- You do not have to try and justify your actions [to yourself - no guilt!!] including about your sexual actions:
- So you do not have to adopt notions of identity or of sexuality to justify any sexual activity.
- You just have to ensure that what you do does not bring shame upon your family/ tribe /clan



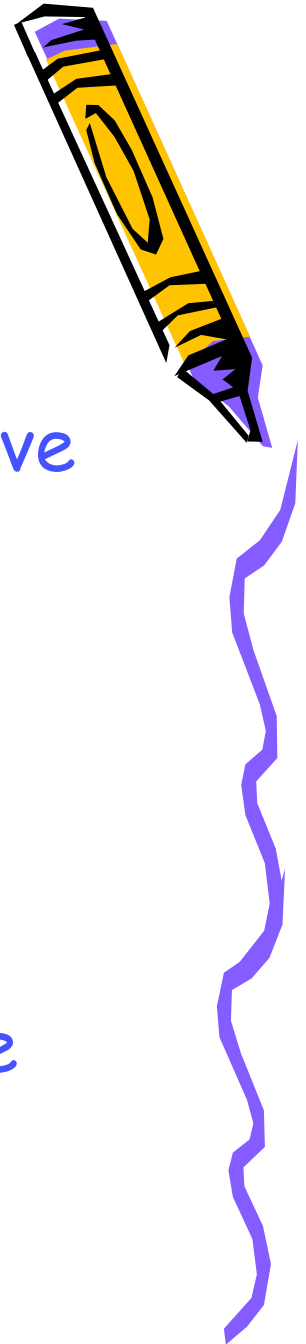
South Asia being shame based means:

- Therefore one can have as much sex as one wants, in any variation that one wants, as long as one does not talk of it.
- The lack of discourse means that whenever there is a denial of any right, or any injustice, then shame prevents the seeking of any remedy.
- The perpetrator has no notion of guilt - leading to impunity unless opposed/protested.



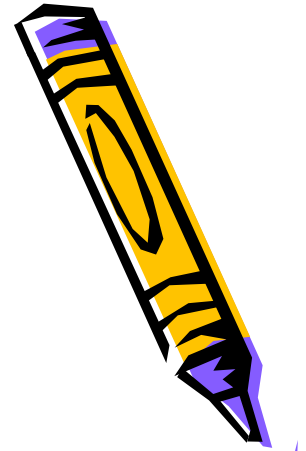
South Asia being shame based means:

- The perpetrator of violence/injustice often do not personalise the effect of their actions, making remedial/corrective justice difficult
- The common law tradition is not in consonance with the cultural reality of shame, making reformation of the perpetrator difficult
- Judges often come from this cultural reality too, but have to dispense justice from another reality



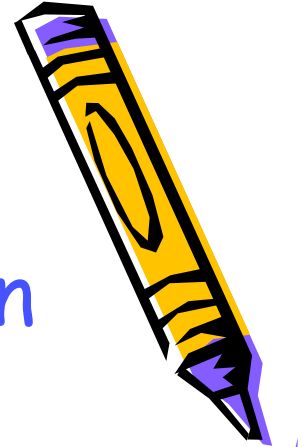
South Asia being shame based means:

- Historically punishment involved shaming, which acted as deterrent
- Currently justice involves 'punishment', that does not necessarily shame the person, leading often to notions of 'revenge', and continuation of the violent action or injustice by the person
- Revenge is often to bring back the good name of the family/clan



The reality of Gender Role:

- The traditional distinction between 'man' and 'woman' in what is essentially a hetero-patriarchist society, attributes roles to each that often get reinforced as stereotypes.
- This also finds manifestation in the way same sex desire is structured and practiced.



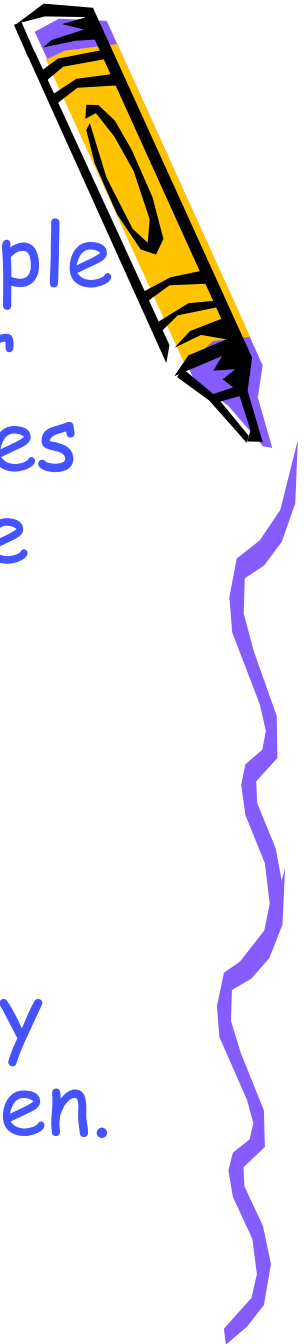
The reality of Gender Role:

- The stereotype of the man, which defines the notions of masculinity extends also to sexual acts and roles
- This definition ascribes the role of 'penetration' in the sexual act to the man, and the role of being 'penetrated' is the sexual act to the woman.
- Same sex desire in south Asia have not been able to break away from this stereotypification.



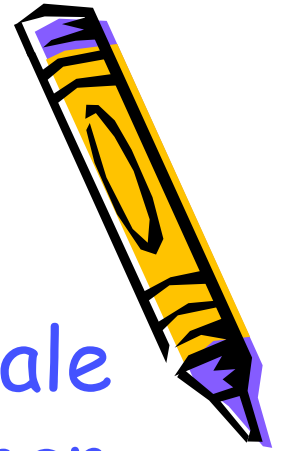
The reality of Gender Role:

- Therefore the vast number of people who desire and have sex with their same sex either think of themselves as 'MEN' and do what men do in the sexual act, namely fuck; or as 'WOMEN' and do what women do, namely be fucked.
- The cultural disempowerment of women is therefore also imbibed by those who take on the role of women.



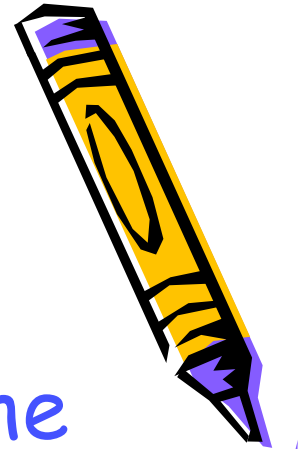
The reality of Gender Role:

But most importantly, a biological male who is penetrated, becomes 'not man enough'; therefore 'less than a man'; therefore 'like a woman'; AND for 'real men', such penetrated men can be targeted with all the abuse and violence that a hetero-patriarchist society reserves for its women folks.



The reality of Gender Role:

The reverse is also true where the penetrated man does not perceive himself as a man, and internalises a stereotypical, often highly caricaturized image of the woman, and looks upon victimization and/or violence as his 'station in life'.



The reality of Gender Role:

- Same sex relationship therefore play out in a heterosexual model
- The "relationship of equals" idealised in the 'gay' model does not exist in the vast majority of same sex attracted persons.
- In this scheme of things, the violation of the rights of the disempowered '(wo)man' becomes much easier



Gender & Construction of Identity

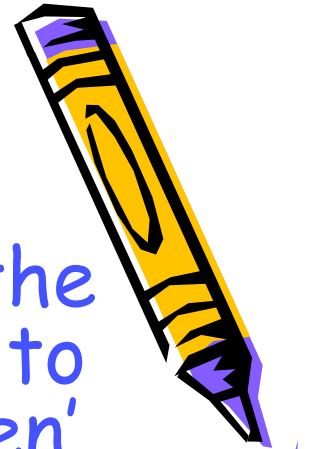
- The 'man' is the 'man', he is having sex with someone who's not a man. He by 'penetrating' is doing what men are supposed to do. He is therefore not a homosexual
- The '(wo)man' is the '(wo)man'. He is having sex with a 'man'. He is getting penetrated just like women. He too is therefore not a homosexual



Gender & Construction of Identity

It is therefore understandable that the gay identity, which is closely linked to egalitarian relationship between 'men' does not find a very strong footing in South Asia.

Identity for a vast number of South Asians depend not on their (homo)sexuality but on their gender perception, gender identification, and gender orientation, and gender role play in the sex act



Gender & Construction of Identity

- The men are men, they do not need any other identity, no matter how or with who they have sex. They can dissolve into the mainstream and are therefore hard to reach, making things like HIV intervention with them more difficult.
- The (wo)men adopt many different gender based identities like 'Hijras' and 'Kothis', and also ascribe identities to their 'men/husbands' like 'Giriayas' and 'Panthis'.



Kothi/Hijra Identity

- Feminised males with a feminine demeanor and identification with the stereotype of 'woman'.
- The adoption of the feminine identity is often an amplification of what women are and therefore enacted in ways that are often boisterous and loud.
- Extremely visible in a shame based world that values invisibility



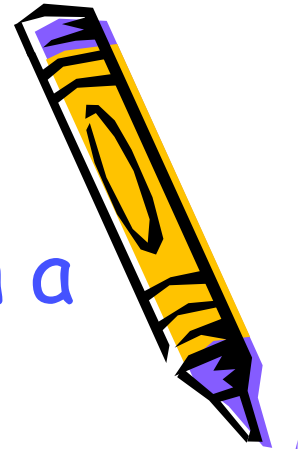
Kothi/Hijra Identity

A placard held by a hijra at the World Social Forum in Mumbai, January 2004



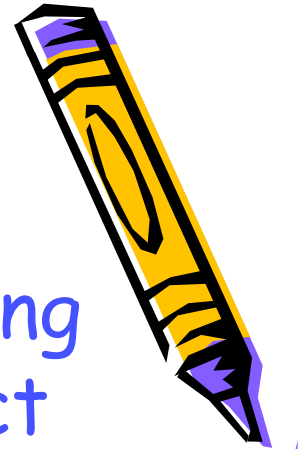
Kothi/Hijra Identity and violence/abuse

- The male child is very important in a patriarchist society.
- A male child who does not perform the duties of marriage and procreation is looked down upon.
- A male child that does not 'protect his masculinity' and gets penetrated is a shame to the family/clan
- The shame is amplified if the male child is visibly unmanly



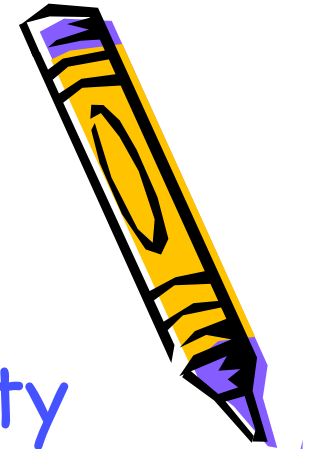
Kothi/Hijra Identity and violence/abuse

- Shame is often dealt with by 'regaining honor', which can be manifested in act like 'honor killing' or severe violence against the one that brings dishonor.
- Kothis and Hijras satisfy all the cultural reasons of shaming the family.
- The culture therefore opens them to abuse and violence and sanctions the same.



Kothi/Hijra Identity and violence/abuse

- It is important to note that in clannish societies, often the society as a whole acts 'vicariously' for the family/clan to regain lost honor.
- This often means that the society in general and not just the family/clan target kothis and Hijras with abuse and violence - mostly unprovoked



Kothi/Hijra Identity and violence/abuse

Often the keepers of social order [read: the constabulary] takes on this role of moral policing and are the biggest violators of the basic human and constitutionally guaranteed fundamental rights of same sex attracted persons, mostly kothis and Hijras as they are the most visible. We see examples of this pattern across South Asia.



Kothi/Hijra Identity and violence/abuse

The abuse at the hands of the police includes rape [often gang rape], extortion, blackmail, beatings, extra-judicial killing, imprisonment [often on false charge], harassment in public cruising areas

Judges are insensitive and culturally not adept at understanding the gravity of this, so cases seldom proceed to conviction

The state actively colludes or refuses to act when cases like these are actually reported



Kothi/Hijra Identity and violence/abuse: One recent incident



Kothi/Hijra Identity and violence/abuse: One recent incident

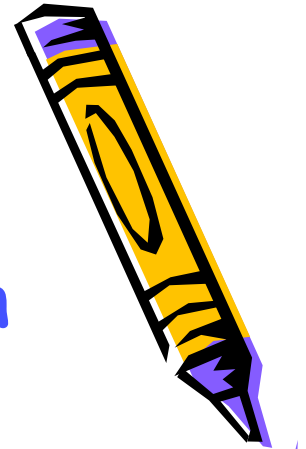


Kothi/Hijra Identity and violence/abuse: One recent incident



The situation in India:

- Kothi/Hijra concerns are not a consideration in mainstream politics in India:
- We have more than 500 constituencies, each electing a member to the parliament.
- Kothi population is scattered amongst all these constituencies, in any one constituency they are not significant to affect the outcome of the vote.
- So the political parties and the candidates do not have any incentive in addressing the concerns of Kothis/Hijras.



The situation in India:

By contrast in presidential forms of governments, [Ex. USA], the whole country votes for the one office of the president. Even a 1 % swing can affect the results and can decide who rules.

Pit this information against the fact that even conservative estimates puts population of same sex attracted males at about 10% of adult male populations.



The situation in India:

The result is that most positive policy initiatives concerning same sex attracted people are not actualised in practice:

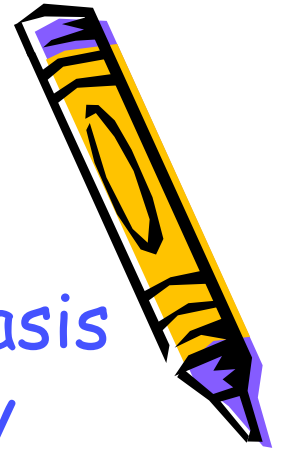
The positive initiatives have been necessitated by the fact that India is a democracy and therefore justifiably has a reputation to preserve internationally

They are also necessitated by the presence of the Fundamental Rights guaranteed to all citizens and diligently protected by a largely vigilant Judiciary



Some Positive Policy Initiatives/Statements

- National AIDS Control Policy, its emphasis on targeted intervention and community involvement, including MSM
- India's statement/vote at the UNGASS on IGLHRC's Participation.
- Recommendation of the National Law Commission [172nd Report]
- Position expressed by the National Human Rights Commission



However actual practice falls short of the expressed intentions

- Section 377 of Indian Penal Code continues to exist
- Outreach and other Intervention activities of MSM NGOs/CBOs continue to be targeted by the Police Departments.
- There is a clear mismatch in the Home department's and the health department's understanding of homosexuality



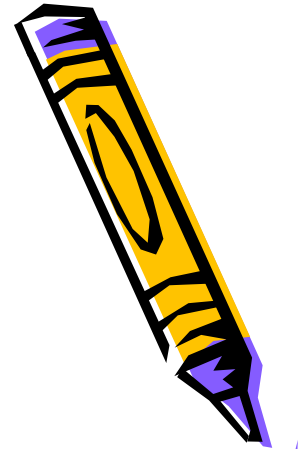
SECTION 377 IPC

- Technically does not criminalise homosexuality, speaks of "*Unnatural Sexual Intercourse*"
- Technically is equally applicable to heterosexual as well as homosexual anal intercourse.
- However has been disproportionately used only to target homosexual sex
- Judicial pronouncement have increased the scope of 377 to cover all possible forms of sexual expression between males



SECTION 377 IPC

- field staffs of NGOs and CBOs face harassment from police every day
- public spaces used for social interaction/cruising are not safe
- Gives impunity to police to beat, blackmail, extort, threaten, and sometimes even sexually assault and/or rape MSM
- Takes away legal recourse, for consensual sex is also criminalised and victims of rape can be thus targeted by the law with criminalisation



The adverse impact of Section 377 IPC



Example that can be taken are the incidents in Lucknow in July 2001

- Outreach workers and staff of NFI and Bharosa were arrested, BCC materials/condoms confiscated and termed pornography, Dildo used for condom demonstration called a sex toy, all intervention activity suspended for more than 5 months, and the organisations were termed gay sex clubs/rackets, their HIV prevention activity was termed as promoting homosexuality against Indian Culture.



LUCKNOW Contd:

- The arrested workers were kept in captivity for more than 45 days, charged with 377
- They were beaten, denied food, forced to drink sewer water, abused regularly, and refused treatment when they got sick
- During the entire incident, the state AIDS Control Society and the other governmental bodies which were aware of the HIV work being done by the Organisations did not publicly state the same, thus perpetuating police impunity



Lucknow highlighted the other impacts of 377

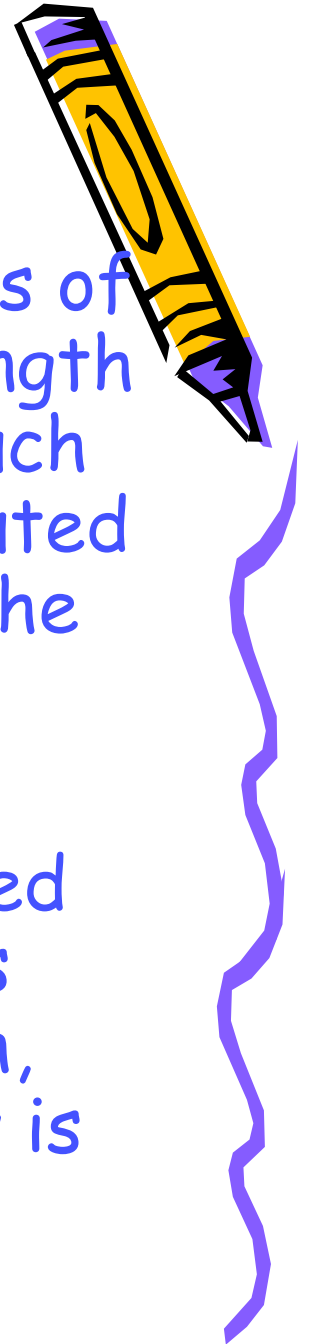
- Basic Fundamental rights could be suspended with impunity, like right to legal recourse
- Lawyers were threatened by the police for taking on the case on behalf of the arrested
- Attitude of the judiciary came to light, bringing out the need for sensitising the judiciary
- Most importantly, it demonstrated clearly that health and home ministries often work at cross purposes.



Impact of 377

NFI partner agencies have reported cases of rape of kothis and Hijras across the length of India, often by police personnel. Such incidents are almost always not prosecuted as 377 effectively criminalises even the victim - *adds to impunity*

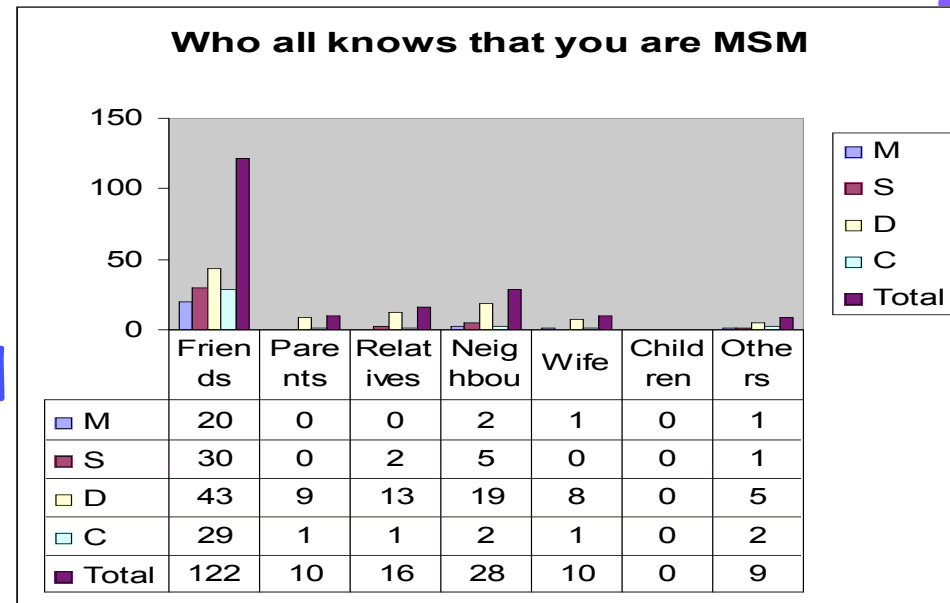
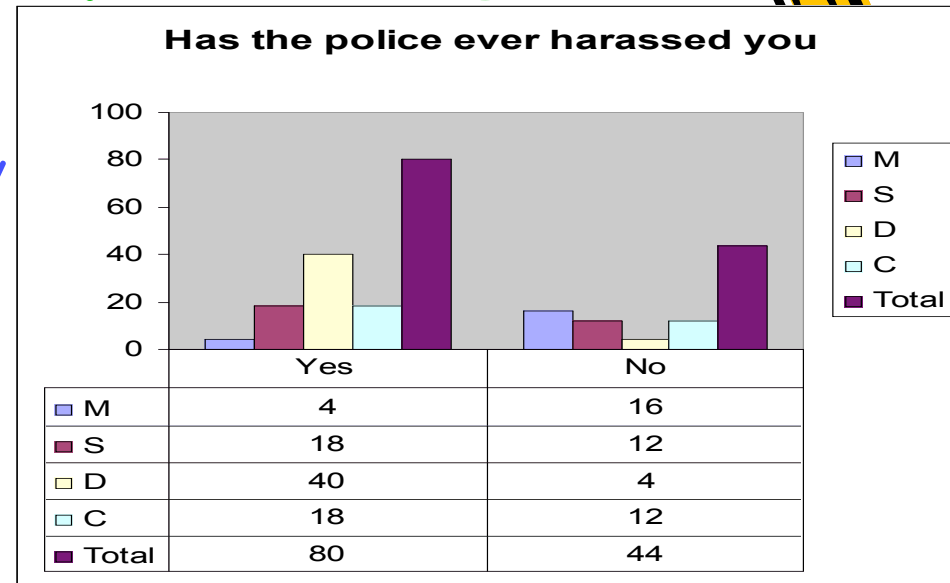
Indicative data for India can be obtained from a study of social justice issues conducted in for cities in Bangladesh, where the social dynamics and the law is exactly the same:



Bangladesh Study [Findings]



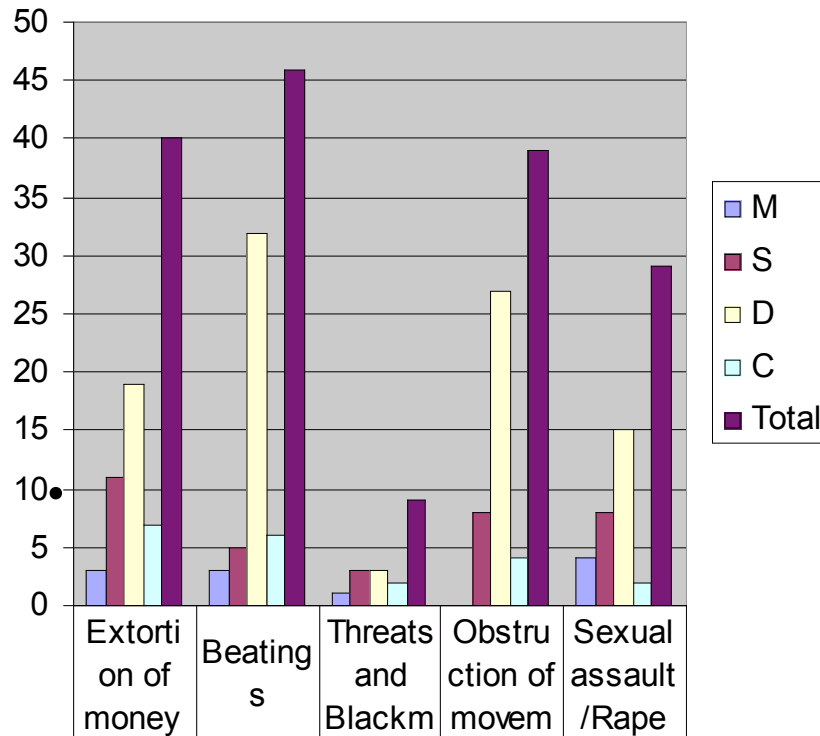
- A total of 124 respondents participated in the study from Chittagong, Dhaka, Mymensingh and Syhlet
- 64% of the total respondents reported facing harassment of one kind or the other at the hands of the police
- In response to the question as to who all were aware that the respondent had male-to-male sex, 98% reported that their friends knew. Yet almost a third [33%] of the respondents also said that they were sexually assaulted and/or raped by friends.



Bangladesh Study [*Findings*]



How has the police harassed you



■ M	3	3	1	0	4
■ S	11	5	3	8	8
■ D	19	32	3	27	15
■ C	7	6	2	4	2
■ Total	40	46	9	39	29

- Mymensingh, Dhaka, and Sylhet reported gang rape by policemen, where *kothis* were rounded up and taken either to police barracks or the police post and raped by groups of policemen. Such forced sex is always unsafe and often results in serious physical injury like ruptured rectum, internal hemorrhage etc.
- 29 of 124 respondents reported that they have been sexually assaulted or raped by policemen
- 55 of 124 respondents have reported that they have been sexually assaulted or raped by *mastaans*



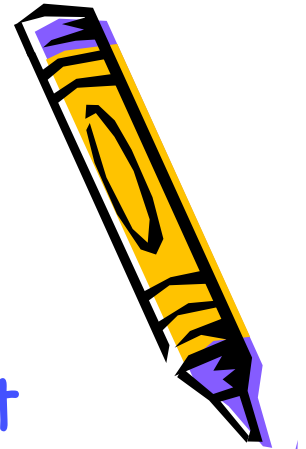
Bangladesh Study [*Findings*]

- Other than sexual assault, rape, and gang rape, the other harassment that respondents reported facing at the hands of police range from, extortion on the threat of imprisonment, prolonged blackmail, beatings, restriction of movement in public places, and disclosure of sexual practices to *mastaans* and family etc.
- 71% of the total respondents stated that they had faced some or the other form of harassment from *mastaans*. Other than rape, these are, extortion [38%], beatings [45%], threats and blackmail [31%]



Bangladesh Study [*Findings*]

- FGDs and Interviews revealed that *mastaans* are often in cohorts with the local policemen. *Kothis* therefore do not receive any protection from the police when any harassment or assaults by the *mastaans* are actually reported
- 87% of the respondents stated that they had been subjected to sexual assault or rape simply because they were effeminate. This is an indication of how feminisation of males and gender attracts violence, and is also indicative of the high percentage of MSM who suffer sexual assault and rape



Bangladesh Study [*Findings*]

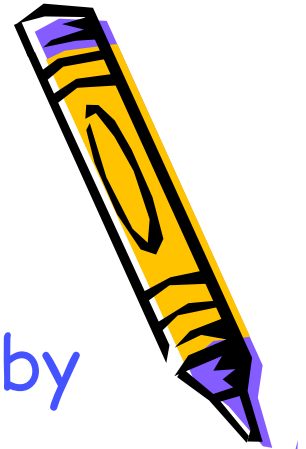


Not a single case of
rape of a Kothi or
Hijra has ever been
prosecuted



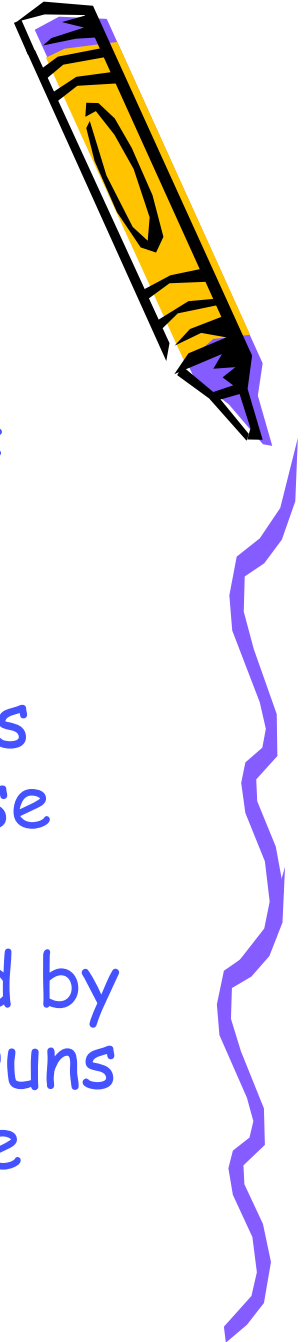
Indian Parallels:

- At present NFI is conducting a similar study in five cities of India, supported by the British Foreign and Commonwealth Office.
- The first phase [qualitative] has been completed.
- The results are very similar to the findings of the Bangladesh Study.
- There is an epidemic of violence against Kothis and Hijras then is never addressed



Indian Parallels:

- Similar incidents of rape by police and goons that cannot be prosecuted
- Silence of AIDS Prevention officials of the government in addressing police harassment
- Extortion from kothi/Hijras/Gay Men is lucrative enough for the police to oppose any change in 377
- The culture argument is often repeated by governmental officials, even though it runs contrary to their own policies otherwise



Some Indian Findings

- As part of study on MSW, 57 out of 135 respondents in one cruising site in Delhi, accessed over 3 days reported a total extortion by beat cops of more than Rupees sixteen thousand.
- Averages to about Rupees thirty thousand a week.
- There are at least seven cruising sites of similar size in Delhi [approx: Rs 210,000 per week]

Cops can extort because 377 gives them impunity

377 is as much a corruption issue as anything else



Today the issue of Section 377 is even broader than the health, life, legal status, dignity or human rights of same sex attracted persons.

It involves the health of the State:

it is a question of corruption, simply because it is one of the most lucrative

and easy sources of supplemental income for a venal police



Some Indian Findings: Effect of Violence

- As part of the same study, 48 out of 50 MSW reported knowledge of HIV and prevention methods.
- 32 out of 50 MSW have faced violence and/or rape at the hands of police/goons
- Only 2 out of 50 practice consistent safer sex

FGDs and Interviews reveal extremely low self worth. Everyone who faced violence did not practice safer sex. Life was not important for them.

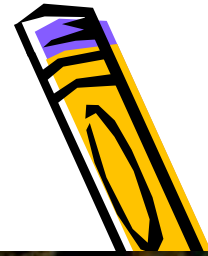


Urgent Needs:

- Urgent need to repeal Section 377 IPC.
- Harmonise HIV/AIDS prevention policies with the laws that impede intervention efforts including 377 IPC
- Change in the IMA guidelines to ensure that mal/mis-treatment of Same sex attracted persons [including wrong use of aversion therapy] is checked.
- Policies that incorporate sensitisation of the judiciary/police at all levels gender issues
- Policy changes that ensure the prosecution of extortionists and rapist, including guilty police personnel, without simultaneously exposing the victim to criminalisation.



A movement is happening in India And other parts of South Asia



END QUOTE:

The real test of conviction for human rights lie in extending those rights to those whom you find most disagreeable to extend it to. Therein lies the absoluteness of human rights. It is easy to extend these rights to women or to dalits, for nobody disputes that these rights need to be given them. But by extending it to gays and lesbians, to MSM, no matter how abhorrent you find homosexuality, can you demonstrate your convictions for human rights.

-Justice Michael Kerby



WILL INDIA PASS THIS TEST..??