

It is indeed an honour to be invited to deliver this Audrey Ducroux Memorial Lecture for which I would like to thank Mr. Longrigg, the President of the International Academy of Family Lawyers and Mrs. Pinky Anand, Additional Solicitor General for India. I would also like to thank all of you for waking at an unearthly hour on a saturday to hear me speak.

Introduction

Written constitutions are usually drafted in the tumultuous times of the birth of a nation. They are often guided by the existing ethos of the people but also contain the aspirations of a particular society. These values, I believe, contain the virtually immutable constitutional morality as distinct from the more transient public morality. Yet even constitutional morality needs to be expounded and clarified. This task falls to the judges of the Constitutional Court. In practice, though perhaps not in the strictest sense of the law, the Constitutional morality is what the judges say it is. In India, and in particular to gay rights, there is an almost schizophrenic conception of that constitutional morality. The Supreme Court has taken, almost simultaneously, an extremely liberal as well as an extremely conservative view of that constitutional morality. But I believe this schizophrenic approach mirrors the same approach held by society at large.

Normally discussion of issues in relation to homosexuality is rooted in the moral ethos of the Abrahamic religions. This might be because of the clear proscriptions contained in the holy texts of those religions. In the Indian context, the position is quite different. I believe there is an almost unique approach to

homosexuality in Indian Culture. There is a tension between a societal acceptance of gender fluidity on the one hand and criminalization and ostracization of homosexuality on the other. This strange position is probably the result of how homosexuality was originally viewed in Indian culture and how Victorian moral values were superimposed on these.

Today I propose to briefly discuss homosexuality in ancient India and thereafter the incorporation of S.377 into the Indian Penal Code during the British Raj. The endeavour will be to try to understand how homosexuality is regarded in India today and how that ties up with the view that the court takes.

At the outset I wish to reiterate that this lecture will not be exhaustive on the topic and I welcome any clarifications or queries that may follow.

Section 1: Ancient India

In India some people believe that homosexuality is an import from other civilizations such as Muslim or European conquerors or through American capitalism¹. In fact *even though* ancient temples like Konarak, Khajurao are replete with evidence of the existence of homosexuality, Prime Minister Nehru once told the first scholarly translator of the Kamasutra that homosexuality was an aberration introduced into India during the colonial period². This could not be farther from the truth.

¹ Page xxxv in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

² page 268 in *Gandhi's Tiger and Sita's Smile:Essays on Gender, Sexuality and Culture* by Ruth Vanita.

The Kamasutra³, which historian Romila Thapar dates back to somewhere between 700 AD to 300 AD, clearly mentions the acts of love between members of the same sex. The word Kama is indicative of all types of desire. The Kamasutra is supposed to be compilation of texts regarding erotic science. While other works regarding sex revolve around procreation, the Kamasutra states that 'kama finds a finality in itself'⁴, i.e., pleasure or desire for the sake of pleasure only. The Kamasutra attempts to categorize sexual behavior and those who adhere to particular kinds of behavior⁵. However it is never punitive and no sanctions are pronounced for sexual deviations.

The Kamasutra mentions the sexual acts between members of the same sex in Sutra 35 and Sutra 36. Sutra 35 mentions the presence of young male servants wearing earrings and flowers in their hair who performed oral sex on men⁶. Sutra 36 mentions a same sex act (i.e., oral sex) between males in connection with the word '*sadharana*', which means 'ordinary'. This indicates that sex between males was considered ordinary rather than a form of deviance. Certain feminist scholars have retorted that the Kamasutra was not a symbol of sexual liberation and that same - sex relations were "accommodated rather than authorized"⁷.

³ the two most famous translations of the Kamasutra are 1) *The Kamasutra by Vatsyanana* by Richard Burton in 188 and 2) *The Complete Kamasutra of Vatsyanana: the complete translation from the original* by S.C Upadhyay in 1961.

⁴ Page 54 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

⁵ Page 55 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

⁶ Page 60 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

⁷ Puri, J., (2002), 'Concerning Kamasutra: Challenging narratives of History and Sexuality', *Signs*, 27(3), page 619

However, whatever the differing interpretations of the Kamasutra may be, it cannot be denied that Part 5 of the text clearly mentions same sex relations⁸ and that Sutra 36 considered certain sex acts between men to be acceptable or ordinary. The very written codification or 'accommodation' of same sex relations, in the Kamasutra, is clear evidence of authorization, tacit, if not explicit.

The Kamasutra, is not the only written work where same sex relations are mentioned. The 14th century text, the *Krittivasa Ramayana*⁹, narrates the story of a blessed child, Bhagiratha, born out of the union of the widows of King Dilipa. The birth of Bhagiratha is very relevant as it allows the royal lineage of the sacred kingdom of Ayodhya to continue until Rama, the greatest of all the gods in the pantheons of the Hindu Religion, is born.

Of more interest may be the Matsya Purana, where King Ila is cursed by Shiva, and turned into a woman. During his time as a woman, Ila falls in love with the Buddha. Similarly, in the Mahabharata, Amba, is reborn as Sikhandi, a male warrior in order to kill Bhishma, because Bhishma will not attack a woman.

Jain thinkers categorized men who desired men as 'women' on the basis of their desire but considered them to be 'women' in terms of gender. The presence of iconography of Ardhnarishwar, an androgynous God comprising of the male

⁸ (While it was argued by Puri that the tone of the Kamasutra only condones such acts in particular cases, it may be mentioned here that translations, by virtue of the words that they adopt, literally allow for a re-interpretation of texts. Puri herself has conceded to the powerful role played by translations re interpretation in her paper "Concerning Kamasutra: Challenging narratives of History and Sexuality", which was published in the 'Signs' journal in 2002.

⁹ the most popular version of the story of Ram, (in Bengal).

Shiva and his female consort Parvati - dating back to the 1st century AD- in temples dedicated to Shiva indicate the acknowledgement of the synergy between masculinity and femininity. It symbolizes that the male and female are inseparable. According to legend, Parvati owing to her love for Shiva merges with him to form Ardhanishwar. Such terminology and iconography is relevant because it indicates that sexuality in Ancient India was acknowledged for its synthesis and fluidity. It should be kept in mind that categories or tropes such as 'homosexual' and 'heterosexual' came to exist as recently as the 19th century¹⁰.

It is thus clear that aside from the Kamasutra a number of ancient texts acknowledged the existence of homosexuality. This consistent portrayal of homosexuality in Ancient India indicates that homosexuality was not just acknowledged but it was accommodated and thus accepted by implicit if not explicit recognition. Scholars have repeatedly that their research indicates that homosexuality was not actively persecuted in ancient India¹¹. They further opine that the homophobic voice in society was in the minority and it was this voice that became dominant with the colonization of India by the British¹².

Section 2: British India

The advent of the British led to the compilation of laws for defining and meting out punitive action. This compilation primarily took the form of the Indian Penal

¹⁰ This has been argued by Foucault, Lillian Faderman and David Halperin (mentioned on page xxxi of *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai)

¹¹ Page xxviii

¹² *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai page 217

Code and the Criminal Procedure Code. Thomas Macaulay was charged with the task of drafting the Indian Penal Code, His extreme homophobia was expressed in the Introductory Report regarding Clause 361. Clause 361 was the predecessor of the Section 377 of the IPC. In the introductory Report Macaulay stated :

“Clause 361 and 362 relate to an odious class of offences respecting which is it desirable that as little as possible should be said. [.we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measure framed with the greatest precision.”

Macaulay’s opinionated homophobia led to a blanket refusal to phrase the law with precision for fear that it may lead to a discussion in society¹³. Mere discussion appeared to be an abomination in the mind of this esteemed law maker.

The provisions of the Section provide that “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.” What is

¹³ the extract of this is given in Gupta A, ‘Section 377 and the Dignity of Indian Homosexuals’ in *Economic and Political Weekly* 41(46), page. 4815.

therefore almost amusing is that a law targeted against homosexuals cannot even bring itself to use the words homosexual or sodomy.

While what is now known as Section 377 does not explicitly target homosexuals, associations were made linking certain kinds of persons to certain kinds of acts. Even though it may not have led to a conviction, this section was used for the persecution of homosexual activity¹⁴.

Of note would be the decision given in *Government v. Bapoji Bhatt*¹⁵, wherein the case was dismissed because accused was charged with oral sex with a minor which did not lead to an allegation of sodomy. Forty years later in *Khanu v. Emperor*¹⁶ [a minor was forced to commit oral sex on an older man], the interpretation of Section 377 was widened beyond the act of sodomy. The explanation that was given for the widening of the interpretation of this provision was that, 'the sin of Gomorrah is not less carnal intercourse than the sin of Sodom'. This preoccupation with the act of sodomy and the kingdom of Sodom and Gomorrah clearly indicates that this provision was to apply to homosexuality first and perhaps other issues as an afterthought.

¹⁴ *Noshirwan v. Emperor* [a neighbor intruded on the privacy of two men by peeping into the house and reporting them for attempting to commit sodomy] AIR 1934 Sind 206, *D.P Minwalla v. Emperor* AIR 1935 Sind 78 [facts: two men were caught in oral activity at the back of a truck in semi public space]

¹⁵ 1884 (7) Mysore LR 280

¹⁶ AIR 1925 Sind 286

It thus appears that homosexuality, which was earlier accepted and accommodated, was abruptly stamped down upon by the Victorian values that the British Raj brought with it. The complete dislike of the legislator(s) on this subject, resulted into the formulation of Clause 361, i.e., Section 377 and also expressed in the subsequent application of this provision. Of course, this was done in the absence of any discussion with or feedback from Indian society at the time of formulation.

Section 3: Contemporary India

3(1)'Fire' the movie by Deepa Mehta.

From the colonial times to relatively modern times there were relatively few prosecutions under the Section. Equally, there was no real public discussion about homosexuality. The issue, so to say, had gone underground. One thing that brought it back to the public eye was something that often energises Indians – Bollywood.

'Fire' is a movie by Deepa Mehta that depicts two women - who are sisters'-in-law – who enter into an intimate relationship with each other. This film was released in India in 1999. While this film cleared the draconian Censor Board without any cuts, mobs disrupted the screenings in Bombay, Delhi, Meerut and Pune.

The reactions to this film were diametrically opposite to one another. On the one hand extremist factions took it upon themselves to become the custodians of India's culture and they argued that this film was an assault on 'cultural values'. On the other side of the spectrum, this denial of the existence of homosexuality in India was negated by the emergence of lesbian groups. These groups denied that homosexuality was alien to Indian culture and that lesbians did not exist in India.

However, this was possibly the first time that the issue of homosexuality was dealt with in a major bollywood production. This was, so to say, an outing of the issue on cinema. While this wasn't the first film dealing with issue of homosexuality, it possibly was the first film which received considerable publicity.

Fire was viewed as a film that mirrored reality because most homosexual people in India are married at some point of time in their lives¹⁷. Such people are indistinguishable from other people. Interestingly the homophobia to the film took a very sexist twist with a political party's women's wing declaring that if women fulfill each other's physical needs then the institution of marriage will collapse and the reproduction of human beings will stop¹⁸!. In the women's magazine, Manushi, the journalist Madhu Kishwar, insinuates that women's relations should not be depicted as explicitly sexual but as ambiguous¹⁹.

¹⁷ Page 244 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

¹⁸ Page 245 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

¹⁹ Page 245 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

According to her the explicit depiction of lesbian sex will inhibit Indian women from expressing physical fondness for fear of being branded as lesbians²⁰.

3(II) Section 377

The battles surrounding Section 377 were being waged not just in cinema but also in the Courts. In 1994 a group of physicians recommended that condoms be distributed in Tihar jail due to the high reportage of homosexuality. The prison authorities refused to allow condoms to be distributed because it would have amounted to an explicit recognition and condonation of homosexual acts and this would be in contravention of S. 377, IPC. This led to the, an NGO, the AIDS Bhedbhawe Virodhi Andolan or the (ABVA) filing a Public Interest Litigation before the Delhi High Court calling for the repeal of S.377 on the grounds that it violated right to privacy²¹. The petition came up for hearing in 2001 and by then the movement had lost some of its momentum. Since the ABVA is run by unpaid volunteers and since it did not have a full time paid lawyer, when the matter finally came up, it failed to appear. The case was, therefore, unfortunately, dismissed.

In 2001, the Naz Foundation India Trust in Delhi petitioned the Delhi High Court (DHC) to read down S.377, IPC to exclude private consensual sexual activities between adults. The rationale behind this was that there was no other provision in the Indian Penal code which could deal with minors being sexually abused or

²⁰ Page 245 in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai

²¹ Mentioned by Geetanjali Misra in her (2009) paper titled, 'Decriminalizing homosexuality in India', *Reproductive Health Matters* 17(34) page 22.

for non-penile sexual abuse of non-consenting adults. The petition was initially dismissed due to absence of a *locus standi*, i.e., the issue did not personally aggrieve the petitioner. Subsequently a Special Leave Petition was preferred to the Supreme Court (SC). The SC held ordered that the grounds for dismissal were not valid and the DHC had to hear the case.

In 2009 the DHC held that Section 377 denied a person his/her dignity and thus violated Article 21 of the Constitution. The Court held that the section denied a gay person a right to full personhood, which is implicit in notion of life under Article 21 of the Constitution²². The court took note of the 172nd report of the Law Commission of India, which focused on the need to review the sexual offences in light of increased incidents of custodial rape and sexual abuse against youngsters²³. The Commission had in its report recommended the deletion of S.377 from the Indian Penal Code. This deletion was to be made in tandem with certain amendments which eventually were incorporated into Sections 375 to S.376E, IPC that revolved around rape. The decision of the High Court held that while S.377 appeared to be facially neutral, in its operation it ended up unfairly targeting a particular community since the targeted or criminalized sexual acts are associated more closely with homosexuals²⁴. The court thus held, inter alia, that S.377, in so far as it criminalises consensual sexual acts of adults in private, is violative of Articles 21,14 and 15 of the Constitution.

²² Naz Foundation v. Govt. of NCT, DHC decision, para 48.

²³ Naz Foundation v. Govt. of NCT, DHC decision, para 83

²⁴ ²⁴ Naz Foundation v. Govt. of NCT, DHC decision, para 94

The soundness of this decision owes its consideration of voluminous data that was presented confirming the harassment of homosexuals and its acknowledgment of foreign jurisprudence on similar matters.

Unfortunately, this victory was short-lived. On 11 December 2013, the Supreme Court overturned the decision of the Delhi High Court and held that Section 377 did not suffer from constitutional infirmity and that it was the responsibility of the legislature to delete or amend S.377²⁵. The Court, while acknowledging the power of the Superior Courts to strike down a provision to the extent of inconsistency with the Constitution, held that self-restraint must be exercised and the presumption of Constitutionality should prevail²⁶. The Court observed that Parliament, which was the representative body of the people of India had not thought it fit to delete the provision and that this action or inaction by the Parliament should guide the Court²⁷.

Such a stand by the Court implies that democracy is more populist rather than truly representative. This approach to democracy is reinforced with the Court holding that homosexuals constitute a 'miniscule fraction' of the country's population and that less than 200 people have been prosecuted under S.377²⁸. In doing so, the Court abdicated its constitutional responsibility as being a guardian of the fundamental rights of the minority. It is rather obvious that majorities would rarely be subjected to legislative oppression. It is the minorities which need protection precisely because the legislature is unwilling to act on their

²⁵ Suresh Kumar Koushal and anr. v. Naz Foundation and ors., SC decision, para 56

²⁶ SC decision page para 32

²⁷ SC decision para 32

²⁸ SC decision para 43

behalf. This elementary principle of law seems to have been consciously or unconsciously forgotten by the Court.

The Court subsequently conceded that while S.377 was usually applied in cases of 'non consensual and markedly coercive situations'²⁹, and that it was 'apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults'³⁰. The Court further went on to declare that 'it would be difficult to prepare a list of acts which would be covered by the section'³¹. The Supreme Court then held that S.377 does not target any particular **people or identity or orientation** and that it merely 'identifies' certain **acts** that would constitute an offence if they were committed³².

The Court emphasized that only certain sexual acts came under the ambit of S.377 but no such acts were explicitly mentioned. The vagueness on the part of the Court clearly indicates that it is not known what or which acts will be punished and this allows for the threat of arbitrary actions to loom in the horizon.

What particularly puzzles me about this decision is the Court's finding that the details that were furnished before it were 'wholly insufficient' for recording a finding that homosexuals were subjected to discriminatory treatment either by the State or its agencies in society³³. The Court clearly

²⁹ SC decision para 38

³⁰ SC decision para 38

³¹ SC Decision para 38

³² SC decision para 32

³³ SC Decision para 40.

discarded the voluminous data that had been dealt with by the High Court and that was also presented before it. This kind of reasoning shows the reverse engineering in the judgment. Having reached a desire to overturn the decision of the Delhi High Court, a false and misplaced deference was shown to the legislature. Equally, all material which would have pushed the Court into affirming the decision of the Delhi High Court was ignored. There is a distinct note of contempt towards the homosexual community when Court holds that In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions.

The effect of such a decision by the Supreme Court are wide ranging: homosexuals live under the fear of the threat of harassment and persecution; there is a complete breach of privacy regarding intimate relations between persons; the police and other authorities have a free reign to manipulate S.377 to blackmail homosexuals; the ability of the LGBT community to unite and/or make their voices heard regarding pressing social issues, such as, spreading awareness regarding HIV, will be splintered and dithering.

3(III) NALSA

Whilst the Supreme Court delivered this rather regressive judgment, it gave cause of hope in another judgment relating to transgenders.

While they were undoubtedly revered in ancient India, the status of the transgender community today is downright abominable. A catalyst for this degradation was probably in the form of the Criminal Tribes Act 1871. The British passed this Act which criminalized the transgender community by treating the transgenders as innate criminals who were addicted to the systematic commission of non-bailable offences. S.377, IPC was abused, in the British Raj, to arrest and prosecute transgenders. A UNDP study found that the transgendered community in India suffers from societal oppression and discrimination in areas such as healthcare, education and employment. This oppression has placed the transgender community at a high risk from HIV and Sexually Transmitted Infections (STI). This is because India so far had viewed gender only in terms of only male and female.

Thus, 2014 in the *National Legal Services Authority of India v. Union of India* (NALSA), the Supreme Court held that transgender people were a 'third' gender who were entitled to fundamental rights under the Constitution³⁴. The Court acknowledged that non-recognition of the identity of the transgender community has denied them equal protection of the law³⁵. This has in turn left them vulnerable to discrimination, harassment and violence³⁶. It was held that Article 15 and 16 of the Constitution that sought to prohibit discrimination on

³⁴ NALSA decision para 80; para 111-112, 128-129, 135

³⁵ NALSA decision para 61-62

³⁶ *ibid*

the basis of sex, also included the prohibition of discrimination on the basis of gender identity³⁷. The State was made bound to take affirmative action to provide representation to transgender in public services³⁸. Similarly the Court held that Article 19(1)(a) also included the right of transgenders to express their self identified gender themselves via dress, words, behavior and action³⁹. It was also held that Article 21 which guaranteed the right to life and personal autonomy, would include the self-determination of gender as an integral aspect of personal autonomy⁴⁰.

Another development in transgender rights was the passing of the Right of Transgender Persons Bill, 2014. This bill was formulated to ensure protection and development of the transgender community. The provisions of this bill envisage the development of steps such as reservation for transgender children in primary, secondary and higher education institutions; compulsory child care or foster care to transgender children and penalties in the event of violation of the provisions of the Bill/Act. The bill was introduced as a private members bill in the Rajya Sabha. While this Bill was initially contested, it was unanimously passed by the Rajya Sabha on 24 April 2015. This was the first private members bill to be passed by the Rajya Sabha in 45 years and the first private members bill to be passed in either house since 30 years.

There is, therefore, a clear contradiction between the judgments in the Naz Foundation case and the NALSA case. Though the Court has upheld the

³⁷ NALSA decision para 66

³⁸ NALSA decision para 67

³⁹ NALSA decision para 69, 71

⁴⁰ NALSA decision para 75

fundamental rights of transgenders, it has simultaneously upheld the criminalization of their intimate sexual acts.

3(IV) Approach to Homosexuality in Contemporary Indian society

All these developments have generated some very mixed reactions in Indian society. Certain factions claim that homosexuality doesn't exist in India. Alarmingly this idea appears to enjoy a robust and healthy existence in the medical profession in India⁴¹. India's past encapsulated in its numerous ancient texts does not appear to have been acknowledged at all. Any mention about the existence of homosexuality is met with staunch aggression.

Yet as early as 1977 the willingness of priests to marry same sex lovers was recorded. Srinivasa Raghavachariar, a priest of the major Vaishnava temple at Sri Ramgam in South India himself happily married same-sex lovers. The basis of this is the that a socially unacceptable relationship only occurs because it was predestined, i.e., that the protagonists or individuals were cross-sex or heterosexual lovers in a previous life⁴². Furthermore it is believed that marriage is between individuals and not specifically between a man and a woman.

Ethnographic Studies

⁴¹ See observations made by, Balaji Ramachandran and Vikhas Dhikav in papers titled, 'India: No homosexuals here' and 'Homosexuality is punishable in India' published in the Economic and Political Weekly in 204 and 2005 respectively,

⁴² cited from Ruth Vanita's "Wedding of Two Souls': Same Sex Marriage and Hindu Traditions", page 126. This was echoed in *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai, on page 34

An 18-month ethnographic study⁴³, from May 2000 to October 2001, by Paul Boyce, in Calcutta and Delhi, indicated the presence of ambivalent attitudes as well as ambiguous moral censure towards male-to-male sexuality. This is because of the repressive attitudes in society towards **explicit** identification with homosexuality. On the other hand social latitude is given towards those who express ambiguity in sexual orientation. One way of depicting this sexual ambiguity was by avoiding identifying with the term 'gay' while another was to involve a woman when proposing intimacy with another man in order to be 'behaviourally bisexual'. This label of i.e., 'behaviourally bisexual' was coined by Peter Aggleton in 1996. Aggleton acknowledged this term allowed for attention to be deflected away from the male-to-male encounters in the subject's conceptualization of the self. This was echoed by Indian researchers who wrote that that a same sex relationship will be approved so long as it masquerades as non-sexual friendship and does not conflict with marriage and parenthood⁴⁴. Research also found that the term 'gay' is sometimes viewed with some apprehension as it is considered to be equated with western ideas and is viewed as western import. Many men who have sexual relations with men do not identify with being gay.

However, for some young men the term 'gay' allows for a form of self-identification to those who may be grasping for an identity. This may be

⁴³ this study was titled , 'Moral ambivalence and Irregular Practices: Contextualizing Male-to-Male Sexualities in Calcutta/India' and it was published in 2006 in the *Feminist Review*, issue no.83 in the issue regarding Sexual Moralities.

⁴⁴ *Same Sex Love in India* by Ruth Vanita and Saleem Kidwai, on page 226

explained by the fact that for the more literate sections of Indian society, English has come to be considered an Indian language⁴⁵.

Another essay based on a study⁴⁶ found that many homosexuals marry under social pressure and then continue to have interludes with members of the same sex. For many of them their sexual orientation is less important and their role as the provider of a household carries more weightage⁴⁷. Such men as well as men who frequently sleep with men strongly object to being identified as 'homosexuals' or 'gay'⁴⁸. In their mind a homosexual is a western idea or definition. However, non-identification with homosexuality certainly does not mean that there are no homosexuals in India. Sadly, this self-identification (or lack thereof) wrecks havoc with identifying those who may be potentially more vulnerable to HIV.

Anthropologists, Sheena Asthana and Robert Oostvogels in 2001⁴⁹, conducted an ethnographic study of MSMs (Men who have sex with Men) in Madras. This study attempted to understand MSM activity and how it differs from the sexual activity and identification practiced by homosexuals in the West. It was found that the idea of being 'man' revolves more around family and status in society and less in

⁴⁵ Ruth Vanita (2010), *Gandhi's Tiger and Sita's Smile: Essays on Gender Sexuality and Culture*, page 65

⁴⁶ Shivananda Khan's, 'Culture, Sexualities and Identities: Men who have Sex with Men in India', in *Gay and Lesbian Asia: Culture, Identity and Community*, page 99-116

⁴⁷ Shivananda Khan's, 'Culture, Sexualities and Identities: Men who have Sex with Men in India', in *Gay and Lesbian Asia: Culture, Identity and Community*, page 106

⁴⁸ also noted in Asthana and Oostvogel's 2001 paper, on page 710-711

⁴⁹ link:

https://www.researchgate.net/publication/12113543_The_social_construction_of_male_'homosexuality'_in_India_Implications_for_HIV_transmission_and_prevention

terms of physical acts⁵⁰. To be a husband and a father is to be a man. Thus Indian culture can be construed to have a broader conception of masculinity since a man may engage in homosexual activity without compromising on his masculinity i.e., so long as he marries and procreates.

In order for homosexuals to protect themselves from exposure a sub-language is used within the Tamil language and is known as 'danga slang'. Rather than identifying themselves as gay or homosexual, men identified themselves in terms of being (1) 'real men' i.e., men who maintain a distance from the cruising places and are usually the clients in commercial transactions; and (2) those who identify themselves as men preferring sex with men i.e., the panthi (the man who views himself as primarily heterosexual but gives pleasure), double decker (the man who does both give and receive and they are clearly inclined towards other men and identify themselves as such) and the danga (men with distinct female characteristics and traits)⁵¹. The word 'homo' is used within the sub-culture that comprises of the panthi, double decker and danga groups⁵². 'Homo' here is used to refer to all biological men who have a strong desire for the same sex.⁵³ The madras youth were considered likely to use the term homo as a way of doing rather than as a state of being. For example, saying things like I'm not homo but that 'I like homosex'⁵⁴

⁵⁰ Asthana and Oostvogel's paper page 711-713

⁵¹ Asthana and Oostvogel's paper page 715

⁵² Asthana and Oostvogel's paper page 715

⁵³ Asthana and Oostvogel's paper page 715

⁵⁴ Asthana and Oostvogel's paper page 714

Homosexual men in India, while staying away from the term 'gay' have thus been categorized as 'men-who-have-sex-with-men' or MSM. This terminology has arisen from HIV prevention programs.

Ratna Kapur has astutely observed that it appears that there are two ideas of culture. The first is that culture is unchanging and stable. It is this view that is advocated by extremist factions to promote an essentialist cultural identity in selective ignorance of India's past. The second view is of culture is that it culture possesses a certain hybridity, i.e., it is a fluid and shifting concept that cannot be contained. The presence of the homosexual community coming out to defend films such as 'Fire' and for the reading down of S.377 is a reflection of the hybridity of culture and fluidity of cultural identity.

The absence of a unified LGBT movement in India should be noted and emphasized. Groups only come together for causes that they can empathize with. An overall umbrella organization that can act holistically is absent. The heightened fear of persecution owing to the criminalization of homosexuality via the existing form S.377, of the IPC is a reason for this. However, perhaps the manner in which multiculturalism was utilized in America to promote homosexuals as a specific ethnic minority⁵⁵, could be similarly adopted within India's inclusive democratic and multicultural kaleidoscope of ethnicities and minorities.

Conclusion

⁵⁵ Asthana and Oostvogels 2001 paper, page 709

We therefore find that in contemporary times, homosexuality has been both an anathema as well as the recipient of societal laxity (so long as it does not disrupt the social construct of family and procreation). The movie 'Fire' led to reactions across the spectrum – from extremists sloganeering that lesbians do not exist in India and harping that the very foundations of marriage were being destroyed; to lesbians coming out in society and making themselves heard. Similarly, the aforementioned decisions that were delivered regarding S.377, IPC and the status of the transgender community in India, has also led to mixed reactions. While the sexual minorities bemoaned the decision in the former and welcomed the decision in the latter, what is more evident is the confusion within the judiciary on how to tackle such matters. Approaches regarding the expressions of homosexuality and its acceptance or denial is indicative of the mass confusion in society that has been created by colonial ideals. Such a confusion, in many cases is expressed in terms of social latitude and moral ambivalence that allows homosexuality to exist so long as individuals do not explicitly identify with being gay and they do not prioritize their physical needs over family and procreation. This has led to the creation of the category of 'MSM' or 'men-who-have-sex-with-men' and to the creation of dual lifestyles whereby in certain situations a man is homosexual (eg. When he is attracted to another man) and in other situations the man is heterosexual (when he is around his family and when he procreates with his wife).

As is evident from the texts referred to earlier in the lecture, India in its ancient past was accommodating if not accepting of homosexual relations. This

completely negates the proposition that homosexuality doesn't exist in Indian society.

India's colonization by the British led to Victorian values being super-imposed on what appeared to be a far more liberal and progressive society than Victorian Britain was at that time. The emphasis on considering homosexuality a blight along with the desire to be positively identified by the British rulers led to the expression of homosexuality becoming subdued in Indian society. This has led to a post-independent sub-continent that archetypally does not abhor homosexuality but has been indoctrinated to do so in the recent century or so. In Indian society the unique solution to this conundrum appears to be to tacitly allow homosexual relations to flourish so long as explicit acceptance is not demanded. In this way, India's liberality regarding homosexuality appears to be a mixed bag. India therefore is in the unique position of being homophobic but not being intolerant either. Perhaps, as of now, we have adopted a 'middle path' of our own.