

# “Empowered Criminals and Global Subjects”: Transnational Norms and Sexual Minorities in India

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**Abstract** In this paper, I comparatively examine the influence of transnational advocacy on legal struggles around sex work and homosexuality in contemporary India. While transnational scholars of sexuality understand globalization as a contradictory and uneven process, there has been little attention to how this unevenness is manifest in the realm of sexual rights and law. Based on qualitative research, I show how transnational discourses on health—in particular, HIV/AIDS interventions—and on human rights interact unevenly with national discourses on sexuality. Whereas discourses regarding HIV/AIDS enable sex workers to mobilize at the national level, global anti-trafficking discourses effectively reduce sex workers to “victims.” For Indian LGBTQ groups, discourses regarding the HIV/AIDS epidemic and global human rights enable these groups to problematize the anti-sodomy law in national politics. However, national legal discourses effectively reduce LGBTQ individuals to “criminals,” and legal advancements in this arena are uneven. Focusing on this unevenness produced by transnational advocacy this paper highlights how sexual rights are articulated in context of asymmetric and uneven globalizations.

**Keywords** Transnational · Sexuality · Sexual minorities · Sex work · Anti-sodomy Laws

## Introduction

In 2005, the Indian Women and Child Development Ministry (WCD) proposed “progressive” reforms to the Immoral Traffic Prevention Act (ITPA). In response to increasing global pressure on the Indian state to curtail trafficking, these reforms, if passed, would have criminalized clients to reduce demand for sex work for the first time in Indian legal history. Yet Indian sex workers protested the amendment as detrimental to their rights and livelihoods, ultimately preventing the amendment from passing in the Indian Parliament. Eight years later

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in 2013, in another significant development for sexual minorities, the Indian Supreme Court upheld India's anti-sodomy law (section 377), reversing a progressive 2009 judgment by the New Delhi High Court to decriminalize adult consensual homosexuality. The regressive 2013 judgment was rendered despite a strong national and transnational campaign to abolish the anti-sodomy law.

These two developments around law, while seemingly unrelated, are connected as these legal contestations emerge in a shared transnational space that draw sex workers and gay men into a broader response to the HIV/AIDS epidemic. In addition, these two cases represent the impact of transnational advocacy on sexual minorities in India as the legal struggles around sex work and homosexuality emerged in the mid 1990s, for the first time in the Indian political arena.

In this paper using qualitative and ethnographic data, I examine how transnational advocacy and norms impact legal demands of sexual minorities in India.<sup>1</sup> In particular, I show how transnational health and human rights discourses generate demands around sexual rights and citizenship for sexual minorities. In the case of Indian sex workers, transnational HIV/AIDS intervention programs provided a platform for sex workers to demand inclusion and recognition of their work, but, at the same time, the contradictory global projects of anti-trafficking undercut sex workers' advocacy by situating them as "victims" of trafficking. In the case of homosexuality, transnational health and human rights discourses galvanized a national social movement challenging the anti-sodomy law and even shifted the Indian state interest in homosexuality. Yet, consensual adult homosexual acts remains criminal and the legal gains of activists struggling against the law have been uneven. I show that this uneven impact shapes sexual minorities as "empowered criminals and global subjects." That is, sex workers and LGBTQ groups are empowered to make claims on the Indian state and on transnational civil society based on their shared role in managing the HIV/AIDS epidemic, yet under the law, they still remain criminal. Emphasizing unevenness produced by transnational advocacy, I show how the transnational sphere selectively emboldens the assertions of sexual rights.

While there has been scholarly attention towards sexual rights and sexual minorities in India, especially on the legal mobilization around the anti-sodomy law (Goodman 2001; Gupta 2006; Khanna 2013; Menon 2007; Narrian and Bhan 2005; Puri 2016; Sheikh 2013) and on sex workers' social and legal marginalization (D'Cunha 1992; Kotiswaran 2001; Shah 2014) my study is among the first to adopt a comparative approach to examine these seemingly discreet struggles. Even though there is significant overlap these issues have not been studied together. Sex workers and gay men (including Men who have Sex with Men) have been targeted as high-risk groups for the HIV/AIDS epidemic, which has provided a ground for mobilization for both these groups. And the debates over legal and state regulating sex work and homosexuality become more pronounced since the mid-1990s. There are also significant differences in the way in which transnational advocacy positions these groups and the access they have over the transnational civil society (which I will elaborate in the course of the paper). The comparative analysis will help illuminate dimensions of transnational norms as well as the interactions between transnational norms and national mobilizations, which are missed when these cases are studied separately.

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<sup>1</sup> I use the term sexual minorities here to designate marginalization of non-heteronormative sex and I include paid sex in this definition. While sex work is not a sexual identity category, the stigma attached to sex work places sex workers in a marginalized position vis-à-vis law and state policy.

In the following sections, I first outline my framework on globalization of sex and then discuss the transnational normative frames in relation to the two empirical cases I examine. In the analysis section I will focus on the impact of transnational advocacy on sexual minority struggles on law and legal change.

## Globalization, Transnational Advocacy and Sexuality

The term “globalization” generally used to refer to a range of cultural, economic, and political changes, including the prevalence of multinational corporations, growing international flows of finance and investment, the emergence of a global civil society, and the spread of cultural homogeneity (Fiss and Hirsch 2005). But the concept also refers to the flow of discourses, ideas and images across national boundaries, and as a process of linkage and interdependence between territories and of “in here-out there” connectivities (Amin 1997; Appadurai 1996; Kellner 2002). To avoid technological and economic deterministic arguments and one-sided understanding of globalization—as either dominant or liberating—these scholars theorize globalization as contradictory, ambiguous and as a highly complex phenomena (Kellner 2002).

Transnational sexuality scholars (Blackwood 2005; Boellstorff 2005; Kim and Puri 2005; Manalansan 2003; Wilson 2002) also note that the central problem of global interactions is the tension between cultural homogenization and cultural heterogenization. Transnational approaches to sex (Blackwood 2005; Grewal and Kaplan 2001; Kim and Puri 2005; Povinelli and Chauncey 1999) would treat globalization as contradictory and ambiguous and as a multidirectional flow of practices and ideas among countries that are not internally homogeneous. Even when supposedly Western identities such as LGBTQ travel to the non-Western context these identities undergo hybridization and reinvention in the local settings. While transnational sexuality scholars pay attention to different ways in global identities travel or translate (Boellstorff 2005) in the local/national setting, much less attention has been paid to how the global and national interactions may produce aspirations and demands for legal and political citizenship for sexual minorities. My work thus expands transnational sexuality scholarship by mapping the unevenness and contradictions produced through interactions between global rights discourses and national legal regimes in the times of HIV/AIDS. By focusing on how transnational rights discourses are mobilized and reworked in the national context, my work also speaks to the body of literature that looks into the connections between transnational civil society and social movements.

Critical scholars of globalization also draw attention to the importance of examining “globalization from below” as a way to understand how globalization can be contested and reconfigured through resistance practices. Arguing that globalization does not only consolidate capitalism on the global scale but also strengthens transnational civil society, which is seen as moving globalization in a progressive direction (Batliwala and Brown 2006). Considering transnational civil society as important for creating transnational solidarity networks, sociological work on transnational civil society and social movements (Keck and Sikkink 1998; Khagram et al. 2002; Tarrow 2001) emphasizes the connections between transnational civil societal norms and domestic struggles. In a globalized world, they argue, transnational civil societal norms interact dynamically with domestic opportunity structures to propel change (Keck and Sikkink 1998). According to this framework, transnational civil societal norms can open up political opportunity structures for activists to make demands for “domestic” reform. This literature acknowledges that the interactions between transnational and domestic political

opportunity structures are dynamic, but tends to portray the outcome of such interactions as generally positive. However, in the case of sexual minorities, not all transnational advocacy is progressive in nature. In addition, what characterizes “progressive” legal reform may vary across context and be open to contestation.

In contrast to this more positive view towards transnational civil society, transnational feminist and queer scholars argue that sexuality rights projects originating from the West can also risk reproducing global, national and regional power inequalities. They argue that transnational civil society can be problematic when it privileges the West as a site for sexual liberation and uncritically adopt Eurocentric assumptions about “sexual progress” and development (Grewal and Kaplan 2001; Puar 2007) as an agenda that should be emulated globally (Puar 2007). While these scholars challenge the global/local binary they also unwittingly retain this binary, insofar as national/local is always seen as working against or in resistance to the global (Grewal and Kaplan 2001). In this scheme global serves as an oppressive and dominant structure and the national/local is seen as an oppositional space generating resistance to global forces and processes. More particularly there is a tendency in this scholarship to relegate sexual identity politics to the West and think of the non-West as a site for “indigenous” expressions of sexuality (Dave 2012). Such a perspective doesn’t take into account local actors who are interested in using transnational resources or draw on global identity categories despite the fact that sometimes they may be limiting. It is hence important not to conflate transnational activism with conventional Western rights discourses.

By focusing on the public political formation of non-normative sexualities in India, my work confronts these binaries by showing that Indians who fight against anti-sodomy laws and repressive trafficking laws do not simply imitate Western rights but actively participate in the transnational human rights campaigns and reframe these discourse to make claims on the Indian state. In this sense, then, it is not just a story of global influence but is also a story of local and national groups using political resources that transnational civil society creates to accomplish their own objectives. Hence instead of asking whether sexual rights are good or bad,<sup>2</sup> I study “how sexual rights projects have been generated, channeled, and resisted in relation to globalization” (Wilson 2002, 264).

Indian debates around the anti-sodomy law and the ITPA (Immoral Traffic Prevention Act) defy these dichotomies as what appear local legal frames were already shaped by earlier global interactions. These laws are a product of colonial intervention and have been incorporated into the postcolonial nation-state’s agendas. Indians who fight the anti-sodomy law therefore fight a law that is colonial in nature using the resources available to them through the transnational civil society.

## Transnational HIV and Human Rights Frames and Sexual Minorities

Globalization of sexuality is often linked to the HIV/AIDS epidemic (Altman 1986). As HIV/AIDS is linked to globalization through the development of international responses to the epidemic and of international agreements and regulations surrounding the patent and

<sup>2</sup> I understand sexual rights to include rights pertaining to sexual orientation, gender identity, erotic practices, reproduction, intimate relations, bodily integrity, autonomy, and the potential for pleasure. “It also includes the right to seek, receive, and pass on information in relation to sexuality and the right to sexual education” (Corrêa et al. 2008, 4).

manufacture of life saving drugs. Globalization also resulted in the emergence of transnational solidarity networks that mobilize support for affected persons and groups across national boundaries, cultures, and lines of social stratification (Corrêa et al. 2008, 26). These transnational connections shape the direction of national responses to the epidemic. In addition, human rights violations of people with HIV/AIDS through stigmatization, discrimination, and violence are increasingly considered a central problem in the global fight against HIV/AIDS (Corrêa et al. 2008). HIV/AIDS advocacy is a key part of the emerging transnational sexual rights discourse (Corrêa et al. 2008).<sup>3</sup> Patton also points to how “the intransigent associated with sexual deviance” allowed the acceleration of gay politics in many contexts (Patton 2002). In India it is also acknowledged that the response to the HIV/AIDS epidemic brought questions of marginalized sexualities into the public visibility and brought questions around non-normative sex into the public debate (Boyce 2007; Dave 2012; Menon 2007; Narrian and Bhan 2005; Puri 2016).

Transnational norms for sex workers are situated in the multiple and contradictory transnational fields that create the context in which these norms are unevenly experienced. Within the transnational realm feminist debates around sex work are polarized and divided, with the feminist abolitionist position on sex work being the predominant transnational norm. This position defines sex work as quintessential alienation of women from their bodies and claims that under conditions of patriarchy sex work can never really be voluntary. In the “global” fight against trafficking, transnational advocates propose unilateral approaches on sex work and trafficking at the local level as a strategy to combat human rights abuses and propose stringent laws to curb demand on sex work. Critical feminist scholarship in this area (Bernstein 2012, 2010; Parrenas 2011) notes that the increased “moral panic” around trafficking and sex work is rooted in anxieties around migration and cross-border movement of people (Agustin 2007; Jordan 2002; Kapur 2005; Kempadoo and Doezema 1998; Parrenas 2011). That sex workers’ rights movements “have been undercut by a bevy of new federal, state, and international laws that equate all prostitution with the crime of ‘human trafficking’ and which imposes harsh criminal penalties against traffickers and prostitutes customers” (Bernstein 2012, 242). Feminist abolitionist positions that focus on carceral responses to sex work stand in opposition to sex workers’ rights movements, which seek to decriminalize and destigmatize women’s sexual labor. This tendency to collapse sex work, prostitution, and trafficking is also reflected in the transnational communities “concern” over India’s standing in the TIPS (Trafficking in Person) report and in the pressure put on the Indian state to reform its trafficking laws (Kotiswaran 2012).<sup>4</sup> The WCD’s (Women and Child Development Ministry) proposed amendments in 2005 emerged in this context of increasing carceral responses and global pressure, especially from the US, to clean up India’s record on trafficking.

In contrast to the divided and contradictory transnational advocacy and norms for sex workers, the transnational approach to LGBT human rights, at a first glance, seems uniform. Transnational civil society actors are well aware that social and criminal sanctions against

<sup>3</sup> Sexual rights projects are not only rooted in HIV/AIDS advocacy but also in feminist reproductive health campaigns that make bodily integrity and rights important aspects of personhood. This is reflected in the Cairo and Beijing platforms and the galvanization of women’s movements, gay and lesbian movements, HIV/AIDS interventions around new human rights discourses regarding bodily need’s for security, health, and pleasure that emerged in the transnational sphere in the 1990s.

<sup>4</sup> Until recently, India was placed on the Tier Two Watch List of the TIP Report, indicating that the nation was not making a significant effort to combat trafficking. This placed India at risk of placement in Tier Three, which would cause it to lose non-humanitarian, non-trade-related foreign assistance from the US. For more on this, see Kotiswaran 2012.

homosexuality suppress HIV/AIDS education and prevention programs designed for MSM (men who have sex with men) and other persons of diverse sexual orientations or gender identities (O’Flaherty and Fisher 2008). Gay men mobilized strongly in the wake of AIDS deaths in the 1980s to fight stigma and discrimination by seeking civil and political rights. And the links between HIV/AIDS and gay men’s sexual rights are established in the process of fighting stigma and discrimination. The emerging understanding is that anti-sodomy laws infringe on LGBTQ civil rights and that repealing these laws is a first step towards achieving other citizenship rights (economic, political, and cultural) for sexual minorities.

In addition, a growing transnational jurisprudence establishes rights for diverse sexual orientations. The landmark ruling by the United Nations Human Rights Committee in *Tonen v. Australia* in 1994 (Corrêa et al. 2008; Waites 2009) is one of the earliest developments in this area. There is also growing transnational legal precedence for the repeal of anti-sodomy laws from various countries around the world (including but not limited to the UK, the US, Canada, South Africa, Nepal, Brazil). Furthermore, human rights principles around diverse sexual orientations are also disseminated through various United Nations treaties and bodies including the UNESCO, UN High Commission for Refugees and UNAIDS. Most recently, the 2007 enactment of the Yogyakarta Principles (Corrêa et al. 2008) has brought sexuality rights and orientation into the transnational human rights arena.

## Methods and Research Setting

This paper is based on a larger project that examines the impact of globalization on sexuality politics in postcolonial India. The research for this paper involved 18 months of fieldwork in India in several stages between 2007 and 2015. My primary research site was New Delhi, the national capital where the 2005 protests of sex workers took place. New Delhi has also been the center for anti-sodomy law struggles and legal petitions where organizations such as Naz Foundation India and Voices Against 377 coalition are located. Both Naz Foundation and Voices coalition have been key in the legal struggles in New Delhi. In addition, I have interacted and had conversations with other LGBTQ and MSM groups in New Delhi such as the Delhi Queer Pride Committee and Nigah,<sup>5</sup> Mitra Trust and Pahal. I also had the opportunity to meet representatives of national and international NGOs that worked on HIV/AIDS prevention and anti-trafficking work and lawyers who represented Naz Foundation and Voices at various stages of the legal process. I also conducted three months of participant observation of Naz Foundation’s weekly support group meetings for MSM and interacted with peer educators and community members.

In addition to my research in New Delhi, I travelled to other parts of India to attend national and regional level meetings, and I conducted interviews with members of local groups. I spent two months in Rajahmundry, a southern state in India, where I closely observed and participated in daily activities and meetings at an organization for sex workers. I made research visits

<sup>5</sup> I use the terms homosexual, MSM, and LGBT as they were deployed in the legal debates, acknowledging that the terms do not adequately capture the experiences of people who don’t identify in identity terms or whose sexuality doesn’t fall under the neat binary identities homo/hetero. In 2014, the Indian Supreme Court recognized transgender rights in response to a petition filed by NALSA (National Legal Services Authority). This is a very positive move for transgender people as the court recognized gender identity as an important aspect of a person’s self-expression. But the presence of Section 377 continued to mark transpeople as criminal and deviant as their sexual acts remain criminalized.

to meet with both sex workers and MSM and LGBTQ groups in Kolkata, Bangaluru, Mumbai and Lucknow.

My data include semi-structured interviews and ethnographic observations. In this paper, I draw on 45 semi-structured interviews with peer educators, outreach workers, members of sex workers' collectives, individual sex workers, representatives of MSM and LGBTQ groups, public health experts, lawyers, Indian state representatives, NACO (National AIDS Control Organization) representatives, national and international NGO representatives, and representatives of women's groups. This paper also draws on observations from national consultations held on the ITPA (Immoral Traffic Prevention Act) and on workshops and meetings organized by sex workers groups, LGBT groups, and health advocacy groups. I also draw on ethnographic field notes from my participation in the Queer Pride March and meetings organized in New Delhi by the Delhi Queer Pride and Voices against 377. Finally, I also conducted discourse analysis of legal petitions, affidavits, and campaign documents produced in relation to ITPA and Section 377 and material generated by HIV/AIDS agencies such as NACO and UNAIDS.

## HIV/AIDS Globalizations and Sexual Minorities in India

The discovery of HIV/AIDS in a sex worker in the 1980s made sex workers scapegoats for the epidemic in India (Kotiswaran 2001). The initial response of the Indian State to the epidemic was denial and erasure, resulting in the forceful confinement of sex workers suspected of having HIV/AIDS. Due to pressure from domestic and transnational organizations, the Indian state shifted its policy focus from suppression of the epidemic to prevention of the epidemic. And the Indian government created an autonomous body—the National AIDS Control Organization (NACO)—to work closely with transnational NGOs, donors and national NGOs to develop effective responses to the epidemic.<sup>6</sup> AIDS funding in India comes from the World Bank and international donors such as the Global Fund and the Bill & Melinda Gates Foundation. These groups work closely with the Indian state to provide a comprehensive national approach toward HIV/AIDS prevention.

According to 2008 estimates, approximately 2.4 million people live with HIV in India. HIV/AIDS brings transnational money and transnational donor agencies into the country. HIV/AIDS interventions in India are primarily preventive, reaching out to high-risk groups for condom distribution, STI treatment, and behavioral changes. During the initial stages of the epidemic it was primarily seen as driven by commercial heterosexual sex, and hence sex workers have been targeted for these programs as high-risk groups. Subsequently MSM and gay men (Men who have Sex with Men) were also identified as an important high-risk group. And high-risk groups have become integral to the targeted intervention program of NACO, whose goal is to reach out to 100 % of the targeted communities for condom use and treatment of sexually transmitted infection (STI).

HIV/AIDS projects and funding are by no means always progressive, and the impact of these programs on high-risk groups is by no means uniform. Moreover, the programmatic

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<sup>6</sup> NACO's first phase of HIV/AIDS prevention (1992–1999) focused on information dissemination and condom distribution; the second phase (1999–2006) focused on behavior change; the third phase (2006–2011) focused on targeted interventions with high-risk groups. The current phase (2012–17) provides services and outreach to vulnerable groups.

agendas of HIV/AIDS have shifted significantly in the past three decades. Right-based approaches and the promotion of community-based organizations have become integral to HIV/AIDS interventions in India since the third phase (2006–2011) of NACO. In particular the *Pehchan* project funded by the Global Fund is currently implementing a program in 17 Indian states called the TI + (Targeted Intervention plus) that builds capacity of 200 community-based organizations (CBOs) to provide effective, inclusive and sustainable HIV/Prevention, indicating a shift from targeted approaches to community based interventions.

### **HIV/AIDS Opens Opportunity: Sex Workers' Mobilization through HIV/AIDS Projects**

In this section, I will show how sex workers in India are situated in between transnational HIV/AIDS prevention programs and global feminist advocacy against trafficking. While these projects are not intrinsically contradictory, in the Indian case sex workers were able to use the discourse of HIV/AIDS advocacy to push back against global trafficking agendas that positioned them as victims in need of rescue from what is conceived of as a “dangerous” sector for women.

Transnational funding for HIV/AIDS work in India targeted sex workers to manage the epidemic. Early work in this area was marked by problematic assumptions around sex workers as vectors of disease. Initially, outreach efforts to sex workers simply targeted them for condom distribution. In response, sex workers in certain parts of India mobilized to demand participation in HIV/AIDS intervention programs not as targets but as agents who have an important role in managing the epidemic. As one of the sex workers told me, “If doctors go to the sex worker and say, ‘You are a sex worker. Do you use condom for safe sex?’ Will they listen to them? No, they will not listen to them; sex workers will only listen to sex workers.” Public health experts who came in close contact with sex workers soon realized that it was not possible to work with sex workers without making them partners in these intervention programs. Sex workers’ role in intervention becomes even more pertinent in a context where criminalization and stigmatization push the community underground, making them unreachable. With sex workers’ participation in these programs and their demands to be included—not as passive targets but as a community that needs to be included in the decision making process—the sex workers’ role in the HIV/AIDS intervention programs changed from that of passive recipients of condoms to partners and even managers of the programs.

HIV/AIDS advocacy had a positive impact on sex workers’ identities and on their mobilization. Because of this, one public health expert who was a long-time associate of a sex workers’ collective startled me when they told me in a workshop, “Most sex workers would say, ‘*HIV is our friend.*’” (emphasis added). They would say, “Without HIV you wouldn’t be here, you wouldn’t even talk to us.” So HIV is the first pretext, first excuse, where sex workers could claim to be part of the development discourse. [Until HIV/AIDS] interventions, they were merely policed and cleansed and rescued and rehabilitated.”

As sex workers’ collective initiatives in places like Kolkata proved successful, they were cited as best practices and replicated nationally and internationally. Overall, sex workers were able to transform a health discourse that was based on the assumption that sex workers were passive, both as receivers of programs and as vectors of the disease. One member of the sex worker’s collective Pedamma from South India said to me, “We are doing good work in society. We are telling people who are not aware of safe sex about safe sex. *So they also see that we are doing good for society, that even if they are prostitutes they are useful to other people in society*”



(emphasis added). Comments like these indicate sex workers' demands to be recognized as a community and illustrate their assertions of social value through HIV/AIDS prevention work.

During an interview with members of a sex worker collective from south India, the sex workers described how their relationship with the police and other state agencies had shifted since they started forming collectives. As Kumari explained: "Previously, when we used to go to the police station we used to be very scared, and would stand meekly in a corner and cover our faces because of shame. Now it is not like that. We go with our head high, and they ask us to take a seat. If we go to the collector's office they are asking us to sit, MLA is asking us to sit, a corporator is asking us to sit." A collector, an MLA (Member of Legislative Assembly), and a corporator refer to the county-level bureaucrats and political representatives that sex worker collectives approach when they find local police unresponsive to incidents of violence against fellow sex workers, face arbitrary arrests, or want to access state welfare programs. Kumari's comment does not indicate that police violence against individual sex workers has ended, or that harassment and threats from others have gone away. Instead, the quote indicates a political consciousness of sex workers as community organizers that enables them to access the state and civil societal spaces as organizers of and valued participants in programs. While this access may be limited to the sites in which sex workers are collectively mobilized, I found evidence of a more general shift in sex workers' relationships with the police. Sex workers in south Delhi indicated to me that they have stopped paying bribes to the police due to the strength of their interactions with the NGOs active in HIV/AIDS work. In addition, as members of the HIV/AIDS prevention programs and women's collectives, sex workers share platforms with state bureaucrats and political leaders while launching or expanding projects and are invited to other public events to generate awareness about HIV, hence shifting their status from merely being outcast to health workers and community mobilizers.

HIV/AIDS advocacy also represented a political opportunity for the collective mobilization of sex workers to make even broader political claims through which sex workers demanded legal and social changes that not only destigmatize their labor but also challenged the discourse on women's sexuality. In India, sex workers have mobilized under the HIV/AIDS platform since 1995, when the first sex workers collective was formed in Kolkata West Bengal. Subsequently the National Network of Sex Workers (NNSW) was created in 1997, and as of 2009, the network reported a membership of 200,000 sex workers. These national networks were used to further build common platforms for action and networks to lobby against criminalization, and as cultural and political platforms to raise awareness about sex work and sex workers' rights. Since 1997, sex workers have also organized annual all-India conferences and meetings that have been critical for mobilizing the community. By 2005 sex workers in Sonagachi had also started to manage the HIV/AIDS programs by themselves. It is in this mobilized climate that the Women and Child Welfare Department (WCD) introduced the new amendments to the Immoral Traffic Prevention Act (ITPA).<sup>7</sup>

### **Legal in Illegal Occupations: Empowered Criminals**

In 2005, the WCD introduced a bill in the Indian parliament recommending amending the existing trafficking and prostitution laws in accordance with the Swedish model that focuses

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<sup>7</sup> The legislative and legal framework that regulates trafficking and sex work in India is contained in the Immoral Traffic Prevention Act (ITPA), 1956. ITPA does not claim to abolish prostitution per se but to criminalize its visible and public forms. ITPA prohibits brothels and makes soliciting in public a crime.

on ending demand for sex work. This bill was the first in India to introduce a clause criminalizing clients who visited brothels for the purpose of exploitation. In addition, the bill enhanced penalties for managing brothels and added a new Section 5A to the penal code to criminalize human trafficking for the purposes of sex work. This section takes the language from the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, which is a supplement to the UN Convention against Transnational Organized crime. However, while the international instrument also covers human trafficking for non-sex work situations, Section 5A is restricted to trafficking for prostitution only. Thus it continues to conflate sex work and trafficking.

Along with these proposals, the WCD minister also recommended decriminalizing soliciting through Section (5C), a change demanded by sex workers since the mid-1990s. These amendments to ITPA were proposed as progressive gender reforms that would remove the sexual double standard of punishing sex workers rather than clients. Thus, it fit the carceral feminist agendas of enforcing gendered and sexual rights through a criminal justice approach. In my interview with the former WCD minister Renuka Chowdhury (who introduced the amendments in the parliament in 2005) in 2009, I asked her what had motivated her to propose the amendments, and she said, “You have to target the demand side, if you only target the supply side nothing is going to happen. Because the supply side is going on for centuries and as long as there is demand there is going to be supply.” Chowdhury’s remarks reflect a growing transnational discourse of sex workers as victims of exploitation as well as the move to push criminalization of clients as an appropriate carceral agenda to abolish sex work. But these amendments were rejected by sex workers who protested that they were introduced without their consultation, and vociferously argued that legal reform pertaining to sex work should only be undertaken with proper consultation and involvement of the community. Sex worker groups were alerted (by empathetic lawyers) about the amendments only when they were about to be discussed in the Indian parliament. They launched a powerful critique of the amendment as an affront on their livelihood. In one sex workers voice, “Previously they used to stab us in our stomach now they are stabbing us in our back.” This statement indicated how hasty legal reforms are actually harmful for sex workers who would lose their only resource for livelihood.

Sex workers objected to the amendments and argued that if they passed parliament, the amendments would significantly damage their ability to make a living and drive prostitution further underground, increasing their risk for human rights abuses and for HIV/AIDS transmission. To protest, approximately 4000 sex workers from throughout the country marched to the Indian parliament in 2006. In their protests and subsequent petitions they argued:

The entire attempt in the process of amending the ITPA seems to us to be a backdoor method of abolishing prostitution. We want you to understand that sex workers have become more visible, more aware of HIV and its prevention modes and have taken the responsibility to decrease the transmission rates of the virus. If such amendments are allowed to be passed as a law, it will only help push the entire industry underground, bringing untold misery to *women who have become empowered and have started owning up to their responsibilities* through a process of breaking all structural barriers. *The proposed amendments will reverse the entire process and make us invisible once again* (emphasis added).<sup>8</sup>

<sup>8</sup> Letter to the Parliamentary Standing Committee on Human Resource Development by Ashodaya Sex Workers Collective, Mangalore, 2006.

These protests clearly articulated sex work as a means of securing one's livelihood and sex workers as an important group responsible for HIV prevention. Yielding to the workers' protests, the Indian government set up a parliamentary committee for a broad-based consultation around the law. Even though the parliamentary committee viewed the clause criminalizing clients as weak and unenforceable, it was still rumored that the WCD was going to go ahead with the bill in parliament. Sex workers actively participated in the deliberations and lobbied against the bill in New Delhi, meeting ministers and civil societal groups. Moreover, they used their role in the HIV/AIDS programs to garner support from the NACO and the Ministry of Health. Due to their lobbying and advocacy they were able to generate substantial disagreement around the bill within two branches of the Indian state—the Ministry of Health and the WCD ministry—debating the bill. These disagreements became a point of contention and eventually a committee constituting a group of ministers was constituted to resolve the disagreement between these two ministries around the bill. Due to these disagreements as well as the delay in representing the bill in the parliament, the bill subsequently lapsed. Thus, sex workers and their supporters, including some human rights groups and HIV/AIDS organizations, were able to temporarily stall the amendments to ITPA. Yet even as they were able to push back against the law, it appears that their success may be only temporary. Sex workers still fear that these amendments will be re-introduced. And sex workers continue to lobby against amendments to criminalize clients drawing on discourses related to their role in HIV/AIDS prevention.

During the 2009 phase of my fieldwork in India, I finally got a chance to interview the then WCD minister who had proposed these amendments after a two-month wait. We primarily discussed the amendments she proposed in 2005 as well as the ministry's approach toward trafficking and prostitution. She attributed the stalled amendments to a political conflict between her and her male colleagues in the health ministry. She did not mention the sex workers' protest in front of the Indian Parliament nor their petitions against her amendment. When I asked her about sex workers' opposition to the bill, she acknowledged that several sex workers came to her with petitions and stated that she had given personal interviews to members of sex workers collectives without discussing the protest. Through this interview and others, it became clear to me that members of the National Women's Commission and other state officials saw sex workers' demands for recognition of their work as coming not from the sex workers themselves, but from brothel owners. This discredited the collective assertions of sex workers, making them look like the result of the self-interest of a few in the sex industry rather than collective political actions. It seems that sex workers themselves are not seen as capable of making any political claims in the prevailing carceral climate. Sex workers refuted these arguments by showing their strengths in the collectives as well as through their political statement that countered the idea that sex work is the most exploitative sector for women. In fact, in the same interview with the former minister, she mentioned that women sex workers who came to speak with her also talked about being sexually exploited in other informal sector jobs and felt that sex work at least gave them the control over their bodies that they didn't have before. I also heard similar arguments in various forums held by sex workers, where sex workers presented powerful critiques of patriarchy and claimed that it is stigma and criminalization that in fact make sex work dangerous, not the sex work itself.

Concern about trafficking and HIV/AIDS prevention produced two competing global demands regarding sex work: global carceral feminist agendas of trafficking and penal regimes contradicted with sex workers' demands for recognition of their sexual labor. In fact, the carceral framework elided sex workers' call for recognition of sexual labor and their powerful critique of the Indian family, reducing justice to Swedish-style policies to curb demand for sex

work. Further more, sex workers also demanded the right not be rescued as part of the anti-trafficking agendas and coined the slogan “save us from saviors.” They critiqued the carceral agendas that puts emphasis on “rescuing women,” and argued that the anti-trafficking agendas that simply focus on rescuing women violate their human rights:

Although sex workers were able to temporarily stall the amendment through lobbying and through support from some HIV/AIDS organizations, they currently must operate under policies that criminalize the labor sector they rely on for their livelihood. Sex worker advocates’ consistent efforts to develop a broader dialogue on ITPA are undermined by global anti-trafficking efforts, including anti-prostitution pledges (that include restrictions for HIV/AIDS funding for organizations promoting sex work as labor) and rescue and raid operations. Yet, sex workers have at least been successful in holding legal action at a standstill, indicating the ability of these marginalized women to advocate for themselves. I argue that this makes them “empowered criminals” who are able to voice their political marginality but unable to gain the legal status they demand for sex work. Even as they are effective advocates, they remain part of a sector of the economy that is primarily defined as criminal.

In the next section, I turn to the debates around the anti-sodomy law to show how globalization and transnational advocacy generates yet another demand for sexual rights through the demands for amendments to Section 377 of the Indian Penal Code. As they did for sex workers, the discourses of HIV/AIDS intervention and transnational human rights generate opportunities for MSM and gay groups in India to fight against criminalization and marginalization. In the next section, I describe how the Indian LGBTQ and MSM groups mobilized transnational civil society to change the Indian state’s position on Section 377. Despite these transformations, MSM and gay men remain criminal under the law, and the legal progress around Section 377 has been uneven.

## **Transnational Health and Human Rights and Problematization of Section 377**

The legal exclusion of homosexuality in India is defined by Section 377 of the Indian Penal Code. Section 377 was introduced in the 1860s by the British colonial state. It defines “unnatural” sexual acts (carnal intercourse against the order of nature with any man, woman or animal) as punishable with life imprisonment. Throughout the 160 years that the law has existed, it has been applied very rarely. Most prosecutions under the law in fact applied to non-consensual sex and cases of the rape of minors that do not fall under the purview of definitions of rape under Indian rape laws. Since the 1990s, activists and NGOs working with MSM and gay men on HIV/AIDS prevention have problematized Section 377 and highlighted the informal ways in which it is cited by the police to blackmail and extort sexual minorities. HIV/AIDS advocates argued that criminalization of sodomy undermine their ability to reach high-risk and vulnerable populations. In 2001, four NGO workers were arrested in the Northern city of Lucknow under Section 377 in a case that became controversial both nationally and internationally.<sup>9</sup> Soon after this incident, Naz Foundation India (a Delhi-

<sup>9</sup> On July 7, 2001, the staff members of Bharosa Trust, an NGO serving MSM groups, and NFI in Lucknow were arrested by the police on the pretext that they were having public sex and were spreading homosexuality. In their official report, the police claimed that the four arrested staff members were picked up from a park while having public sex, but the NGOs reported that they were arrested at their office and that some educational materials, including televisions and video cassettes, were confiscated during the police raid.

based NGO working on HIV/AIDS prevention among MSM) filed public interest litigation in the New Delhi High Court. Anjali Gopalan, the director of Naz Foundation, shared with me during an interview in 2007 that the organization decided to file the petition because their staff were tired of going to police stations to get their outreach workers and peer educators out of police detention. She commented, “It was really getting difficult to continue doing the work we were doing.” Anand Grover, the lawyer who argued on behalf of Naz foundation India further expressed that there was “already international legal precedence [for] the repeal of the anti-sodomy law.” This international legal precedence was drawing on the Lawrence v. Texas case from the United States and on UN human rights treaties. With increased public awareness of police harassment and violence against MSM and gay men in India, this transnational legal precedence presented an opportunity to hold the state accountable for hostility and repression toward NGOs working with MSM and gay men on HIV/AIDS prevention. National groups thus took advantage of the opportunity to challenge the anti-sodomy law and demand that the Indian state be accountable for the commitment it made at various international forums to fight HIV/AIDS.

In particular the Naz Foundation’s petition to amend Section 377 relied on the Indian state’s proclaimed duty to address the HIV/AIDS epidemic and its collaboration with international NGOs in HIV/AIDS prevention work, stating:

Indeed, SACS [State AIDS Control Societies] sponsor many NGOs in order to increase MSM and gay male awareness of HIV, its risk of transmission, the need for condom use and other safe sex practices. These SACS realize that it is imperative that the MSM and gay communities have *the ability to be safely visible so that HIV/AIDS prevention may be successfully conducted*. Clearly, the major stumbling block for the implementation of such programs is that the sexual practices of the MSM and gay community are “hidden” because they are subject to criminal sanction.<sup>10</sup> (emphasis added)

As the above quote reveals, the petitioner argued that the accurate identification of sex and sexual behavior for the purposes of public health initiatives were tied to the state’s existing interests and were hampered by the continued existence of the Section 377. The Naz Foundation’s petition further argued that Section 377 not only imposed criminal sanctions on MSM and gay men but also exacerbated social stigma and discrimination against sexual minorities, making an effective response to the epidemic difficult. This argument described Section 377 as an assault on the Indian state’s ability to protect public health.

The argument that the Indian state has a shared responsibility in public health couldn’t be refuted by the state as the Indian Health Ministry and NACO were committed to addressing the HIV/AIDS epidemic as a public health issue since the 1990s. As part of this commitment, Indian state representatives participated in various transnational forums and declarations. As early as 1995, the Delhi Declaration urged the need for a global response to effectively tackle the epidemic and to reduce stigma and discrimination against high-risk groups. In 2006, the Indian Federal Minister for Health at the International HIV/AIDS Conference in Toronto assured the international community that “Section 377 IPC was to be amended” as part of the government’s measures to prevent HIV/AIDS. In 2014, I interviewed lawyer and activist Aditya Bandopadhyay, who shared with me the interaction that led to this assurance:

<sup>10</sup> Naz Foundation v. NCT of Delhi, WP (C). 2009. No. 7455/2001. High Court of Delhi at New Delhi. <http://www.lawyerscollective.org/files/Naz%20Foundation%20Judgement.pdf>

I went to the Toronto AIDS conference that Dr. Anbumani Ramdoss [then Federal Minister of Health] was also attending. I stood up there and I said “Okay, enough beating around the bush. You tell us [Indian activists] what is your position on the law. Are you for or against 377? Don’t beat around the bush! You are here and I am asking you for a response. You are an intelligent person and a doctor yourself, you tell me what your position is!” That was my question to him. And he blinked twice and said, “I don’t know about the government of India, but the Health Minister and the ministry is for decriminalization of homosexuality.” Within four hours of his admissions it became news across all of India.

Bandopadhyay’s questions to the minister were based on years of activism, and his opportunity to ask them was provided by transnational civil society actors who brought together activists and state representatives on a shared platform to discuss HIV/AIDS interventions. Moreover, pressure on the Indian state to reform the law has come not only from national groups but also from transnational civil society after internationally renowned Indian citizens such as Amartya Sen, Vikram Seth, Shyam Benegal, Nitin Desai (former UN Under-Secretary-General) and many prominent academic and cultural figures sent an Open Letter to the Indian government in 2005 and the members of the judiciary petitioning that the cruel and discriminatory law be struck down.<sup>11</sup> Moreover, transnational human rights organizations such as Human Rights Watch have been speaking against the anti-sodomy law since early the 2000s. Further lobbying and advocacy by activist groups against Section 377 also helped produce the 2006 position taken by the National AIDS Control Organization (NACO) in the New Delhi High Court when NACO filed its response to Naz petition. In their response, NACO unequivocally stated that a large sector of MSM and gay men were invisible and unreachable by HIV/AIDS programs due to the prevailing legal environment:

[T]he enforcement of Section 377 of IPC can adversely contribute to pushing the [HIV] infection underground, making risky sexual practices go unnoticed and unaddressed. The fear of harassment by law enforcement agencies leads to sex being hurried, leaving partners without the option to consider or negotiate safer sex practices. As MSM groups lack [a] “safe place” and utilize public places such as railway stations, etc. They become vulnerable to harassment and abuse by the police. The hidden nature of MSM groups further leads to poor access to condoms, healthcare services and safe sex information. This constantly inhibits/impedes interventions under the National AIDS Control Program aimed at preventing [the] spread of HIV/AIDS by promoting safe sexual practices by using condoms or abstaining from multi-partner.<sup>12</sup>

NACO’s submission further stated, “[I]t is essential that there should be an enabling environment where the people involved in risky behavior may be encouraged not to conceal information so that they are provided total access to the services of the National AIDS Control Program” (NACO 2006, 3). This “enabling environment” includes changing the legal context in which HIV/AIDS policies are implemented. NACO’s stated goal of 100 % outreach to high-risk groups could be achieved only when the affected “communities” are able to take

<sup>11</sup> A statement in Support of the Open Letter by Vikram Seth and Others, 2006. [http://www.nytimes.com/packages/pdf/international/open\\_letter.pdf](http://www.nytimes.com/packages/pdf/international/open_letter.pdf). Accessed 15 March 2015.

<sup>12</sup> Naz Foundation v. Govt. of N.C.T. and others, 2006. Reply Affidavit on behalf of NACO High Court of Delhi at New Delhi. 3. <http://www.lawyerscollective.org/files/NACO's%20Affidavit.pdf>

ownership of prevention work, which NACO argued was not possible if consensual adult homosexual acts continue to be penalized.

But NACO's position was not supported by other state agencies, such as the Ministry of Health. Since 2005, the Indian Home Ministry has argued that homosexuality is foreign and alien to India and that amendment to Section 377 would open "the flood gates of delinquency." These responses revealed contradictions in the state's position, wherein different branches of the Indian state took very different positions on the law. These disagreements within the Indian state were also noticed by the judges of the New Delhi High Court, who noted these contradictions as a peculiar feature of the case:

There are two arguments that you [the state] have put forward. One is on public morality and the other is on public health and safety. All of the literature including the NACO affidavit points to the contrary of what you are [home ministry] suggesting in terms of the second argument [public health]. *NACO is telling us that continued criminalization will result in the denial of the right to health of this group.*<sup>13</sup> (emphasis added)

These comments bring to light the inherent contradictions generated for the state interest in homosexuality in light of the global HIV/AIDS epidemic. Whereas one wing of the state works with MSM and gay men to change their "at-risk" behavior and protect their health, the other wing continues to criminalize their sexual acts as "unnatural." Indeed, the Indian state's need to regulate and manage homosexuality in the light of the epidemic was not lost in this legal battle. In delivering their judgment in 2009, the New Delhi High Court justices who delivered their verdict urged the Indian state to follow global trends in its approach to the epidemic and declared that the compelling state interest was not in upholding Section 377 but in decriminalizing adult homosexuality so as to better identify and reach out to these populations:

[That] Section 377 IPC has generally been used in cases of sexual abuse or child abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that the criminalization of adult same-sex conduct does not serve any public interest. *The compelling state interest instead demands that public health measures should be strengthened by decriminalization of such activity, so that they [MSM] can be identified and better focused upon.*<sup>14</sup>

The Court's declaration of Section 377 as unconstitutional was celebrated in India and throughout the world as a monumental judgment. Though the Indian state was divided on the issue early on, soon after the High Court's verdict indicated that it had no intention of challenging the law in the higher courts and that it would abide by the judgment, stated that there was no legal error in the Court's judgment.<sup>15</sup> Subsequent challenges to the 2009 judgment came from private religious organizations and individuals, but not the Indian state. The landmark judgment and the global attention it garnered further compelled the Indian state to stick to its supportive stance. Yet, despite their position to support the judgment, this public support didn't easily materialize in the Supreme Court when the case came up for hearing. But

<sup>13</sup> Naz Foundation v. NCT of Delhi, WP (C). 2009. No. 7455/2001. 17

<sup>14</sup> Naz Foundation v. NCT of Delhi, WP (C). 2009. No. 7455/2001. 72–3

<sup>15</sup> In the Supreme Court case Suresh Kumar Koushal and Others v. Naz Foundation and Others, the individuals and groups who challenged the Delhi High Court's judgment include Hindu rights wings groups, Christian groups, the All India Muslim Personal Law Board and individuals claiming to protect Indian culture. Ironically, religious groups that otherwise seem to find little common came together on this issue.

alert activists and the media made the representatives of the Indian state accountable for their position. In the words of Aditya Bandopadhyay:

When the matter came before the Supreme Court the Additional Solicitor General (ASG) representing the case did not care to look at the revised position of the government. He just repeated everything he said in the High Court and kept saying that amending Section 377 will open the floodgates of delinquency. Even as he started speaking the media and people present there started tweeting and it was picked up immediately and became international news. It was flashed everywhere that the government of India was going back on its promise to support the New Delhi High Court Judgment. The government tried its best to do what you call... a rescue act or like, you know, a face saving act or whatever they had to do. So they replaced the ASG and the new ASG presented before the court the current position of the Indian government that is they support the High Court Judgment.

These developments demonstrate activists' victory in holding the state accountable for its commitments and further indicate transformations in the Indian state's position generated by transnational and national pressure that emerged from the transnational HIV/AIDS and human rights advocacy.

Despite such a positively overwhelming response nationally and globally towards the 2009 New Delhi High Court Judgment, on December 13, 2013, after four years of deliberation, the Supreme Court rendered a verdict reversing the gains made in the New Delhi High Court. The two-judge bench of the Indian Supreme Court felt that the High Court was hasty in declaring Section 377 unconstitutional and argued that there was no substantive evidence to show that Section 377 persecuted homosexuals as a class. Rather, the bench held that the law regulates sexual conduct regardless of gender identity and orientation.<sup>16</sup> This judgment was a major blow to activists who celebrated the 2009 judgment as a landmark victory. They responded by filing a curative petition appealing to the Supreme Court to reexamine its decision. The petition is still pending in the Supreme Court, and activists are uncertain as to what the outcome will be. In the meantime, Section 377 continues to be in the statute.

### **“No Going Back”: Mobilizing against the Continuing Criminalization**

The reversal of the Delhi High Court judgment was a significant setback for the LGBTQ community in India. In response, communities across the world protested the Supreme Court's decision by observing a global day of rage in 36 cities across India and 14 countries. This large-scale protest indicates that in the context of globalization, a national law reform had become a global issue. Protesters raised the slogan “No Going Back” that drew on the idea that the court's decision took India back to the 1860s when the British colonial state first introduced the law.

In July 2014, despite the Supreme Court's recent unfavorable decision, the Delhi Queer Pride Committee decided to use the occasion to organize a gathering to mark the Delhi High Court's decision on July 2nd, 2009 as a day of victory for the LGBTQ community. The decision coincided with the BJP's (right wing political party) political ascendancy at the national level, and LGBT activists were uncertain as to how the new government would

<sup>16</sup> Suresh Kumar Koushal and another v. Naz Foundation and others. 2013. Civil Appeal No. 10,972. Supreme Court of India. 78. <http://orinam.net/377/wp-content/uploads/2013/12/Naz-judgement-SC.pdf>



respond to Section 377. During the planning meeting held before the event, I heard fear and apprehension expressed by activists present at the meeting, as there was no real way for them to gauge the newly formed government's position on Section 377 because it has been silent on the issue. Despite this uncertain climate and a fear of backlash the handful of activist present that day at the planning meeting decided to go ahead with the event, turning it into a celebration rather than a defeat.

A few days later, on July 2, 2014, despite the oppressive New Delhi heat, people gathered under the banner of Delhi Queer Pride Committee at *Jantar Mantar*, the official designated area in central Delhi to hold public gatherings and protests. While the gathering that day seemed sparse (less than hundred people were present), when compared to it to the first queer pride march I witnessed in 2009, it symbolized the space and the conversations generated by the social movements mobilization against Section 377. This space was significant as it not only drew gay men, but also drew members of broader LGBTQ community including queer women and trans men, in spite of their marginality in the legal discourse. The atmosphere was informal and lively despite the sense of fear and apprehension expressed about the current political climate in the preparatory meeting a few days earlier. The event was marked by short speeches made by activists, lawyers, community members, and feminist activists and movement songs. Some of the activists present read out passages from the 2009 judgment, passages that referred to Indian constitutional values of diversity and respect; in this way, the judgment became almost a manifesto for LGBTQ advocacy. One of the speakers at the meeting articulated the empowerment felt by LGBTQ groups after the Delhi High Court judgment:

The [Supreme Court] judges thought that they were going to put us down by reinstating such regressive of a law that we would shut up, but the good thing is that our voices have grown louder. We have learned to speak against the state and we have learned to speak against all those institutions that control our bodies and our sexualities, institutions that control who we sleep with, who we want to love, and what dresses we wear, and where we go.

This voice reflects transformations in the conversations around Section 377 and LGBTQ rights that occurred in India over the course of a decade and half. In our conversations, activists and community members shared that the public visibility of the fight against Section 377 in the courts opened an opportunity for them to speak to their families about their sexual orientation or that their excitement and/or rage over the legal developments subsequently “outed” them to their families and communities. Since 2001, organizations like Voices Against 377 have been active in raising public awareness around the law and in expanding the discussion beyond gay men's health to discrimination against sexual minorities. Discussions around Section 377 thus pushed the debate around homosexuality beyond health of gay men and MSM to broader human rights for sexual minorities. In addition, there has also been active involvement of feminist and human rights groups in the campaign since the formation of Voices Against 377 coalition. From the time it was formed in 2004 one of the goals of Voices Against 377 was to expand the discussion of the anti-sodomy law beyond the courtrooms, by taking up public campaigns and having active conversations with other social movements on these issues. One of the firsts things the coalition did was to issue a report called “Rights For All: Ending Discrimination Against Queer Desire Under Section 377,” in which they captured different voices of sexual minorities, and articulated opposition to the law from human rights, women's rights and child rights perspective.

In India, lesbians and bisexual women are organizing and demanding visibility and social recognition of their relationships, demanding an end to harassment and violence. Ironically, the current marginalization in law is also seen by some to be advantageous, since female-female sex is not specifically criminalized. Section 377 has nevertheless been used to harass lesbian women and compel them into heterosexual marriages. More and more lesbian women's suicides are coming to light, evidence of the need for social recognition and decriminalization of non-heterosexual sexuality. (Voices Against 377 2004, 21)

This articulation focuses on the ideological function of the law. Section 377 is not only seen as targeting male same-sex desire, but as performing a broader symbolic function of regulating non-heterosexual sex and desire. The Indian social movements, in light of legal campaigns, have, thus, transformed the discussion on Section 377 from a campaign that challenged the harassment of gay and MSM to a broader and symbolic campaign that challenged discrimination and human rights violations for a broad spectrum of LGBTQ communities.

This sentiment is also reflected in the voice of speaker at the same demonstration, “July [2nd] gives us hope that the gain will not be for the nationalist and patriarchal forces but for the *hijras, kothis*,<sup>17</sup> lesbian and bisexual women, for women's movement and for the gay people. The victory is not going to be for them [conservatives], but it is going to be our victory!” Broad based articulation against Section 377 could also be heard from other parts of the country. Reflecting on the campaigns after the Supreme Court's Judgment, Gowthaman, a lawyer from Alternative Lawyer's Forum, Bangalore had the following to say when I asked him about the no going back campaign:

It is also important to say that when the “no going back campaign” happened there were thousands of people on the street. January 15th 2013, we had a protest in Bangalore and it was phenomenal. The only good thing that happened because of this travesty [the negative judgment] is that it reignited the people to fight. And within a few days the pride march has happened, the Bangalore queer festival has happened. Nothing stopped.

This sense that the legal process has mobilized broader LGBTQ groups even though the desired legal outcome hasn't been achieved was also made evident in the conversation I had with Anjali Gopalan from Naz Foundation. During our conversation in July 2015 about Naz Foundation's role in the litigation process, she mentioned that when they decided to file the petition in the New Delhi High Court in 2001 there were only a handful of LGBTQ groups in India, but that over the decade and a half-long legal battle, these numbers had increased tremendously. Despite the uneven legal developments in the fight to repeal Section 377, it seems that the fight against 377 is not lost. It is evident that it has helped generate a broader social movement around sexuality and rights and brought issues of marginalized sexualities into the national attention. In this sense, then, LGBTQ and MSM groups have become empowered to make political claims on their sexual identity but remain criminal as their sexual acts continue to be criminalized.

<sup>17</sup> *Kothis* are one of the most visible group in the MSM category in India. They are defined both by the role they play in the sex act (as passive partners) as well as their feminine dressing. *Kothi* is both their gender and sexual self-identity. *Hijras* are biological males who reject their 'masculine' identity to identify either as women, or “not men,” or “in-between man and woman,” or “neither man nor woman.”

## Conclusion: Intersections of Transnational Advocacy and Local Mobilizations

The discourses of transnational health, trafficking, and gay rights are crosscutting and sometimes contradictory. HIV/AIDS interventions empowered sex workers to articulate their economic and political marginality and to demand rights and recognition for their sexual labor from the state and transnational civil society. Yet, in feminist anti-trafficking discourse, these sex workers are effectively reduced to gendered victims. They face opposition from the anti-trafficking camp, who define sex work as quintessentially oppressive. For sex workers, legal change remains stalled—neither improving through decriminalization nor worsening through amendments to criminalize demand. They have been empowered to claim rights on the basis of sharing the state's responsibility for public health, but in practice they remain criminalized and as second-class citizens.

Despite hostility from transnational civil society, sex workers have leveraged their role in HIV/AIDS intervention to resist the conflation of sex work and trafficking. Access to transnational civil society for sex workers is limited in comparison to LGBTQ groups. Whereas LGBTQ groups were able to access various transnational civil societal spaces—such as the ones I described earlier—and successfully organized protests across the world after the 2013 Supreme Court judgment, for sex workers, this access is limited, perhaps even non-existent. This limited access to transnational civil society was strikingly evident when sex workers from Kolkata protested against the U.S. state's sanctions against travel for sex workers, which impeded their ability to attend the global AIDS conferences in Washington DC in 2012.

By contrast, global HIV/AIDS work and transnational advocacy on gay rights provided an opportunity to highlight the on-the-ground implications of Section 377 and mobilize gay men to fight back against abuse and repression. It helped build a national social campaign that mobilized the LGBTQ community against Section 377 and even shifted the state's interest towards amending Section 377. Nonetheless, even with transnational support and a strong national campaign, the legal gains are mixed and unpredictable at this stage. In the case of Section 377 it is clear that transnational norms and legal precedence align well with national demands for reform. It is the alignment of transnational and domestic interests and pressure that has brought global attention to the law that may eventually lead to its final repeal. But transnational support and national mobilization alone are not enough to amend Section 377; the LGBTQ advocacy must confront and engage national civil society to achieve its goals.

For sex workers, transnational norms of anti-trafficking advocacy did not align with campaigns for decriminalization. The transnational legal precedence that was brought to bear to amend the law regarding sex work, instead, worked against the interest of sex workers. The collision between different transnational interests (in anti-trafficking and in HIV/AIDS intervention) and between transnational and domestic interests placed sex workers in a paradoxical situation within transnational civil society, where the support they are offered is not necessarily what they want or need to become autonomous sexual citizens. Critical feminist scholars (Desai 2007) emphasize the fraught relationship between feminism and globalization, and the protests of Indian sex workers around the ITPA reinforce the critique that carceral feminist projects muffle sex workers' demands for the recognition of their labor.

Despite these limitations and the differences in access to resources, it should also be noted that sex workers have been more successful in stalling the impending amendments because of the effectiveness in mobilizing sheer numbers through the HIV/AIDS platform. Whereas

MSM and gay men were also mobilized through the HIV/AIDS platform, their politicization under HIV/AIDS is not the same as for sex workers, as the broader LGBT community has class fault lines. The middle-class LGBTQ groups tend to distance themselves from HIV/AIDS related mobilization as it is seen as a form of state incorporation. The class and identity differences within the LGBTQ community means that strategies for mobilization have to be pitched at multiple levels. This may be both a limitation as well as an advantage, in the sense that LGBTQ communities in India have broadened the debate around Section 377 beyond health/HIV/AIDS to also include discrimination and human rights abuse, and have been able to broaden the conversation around sexuality.

My focus on HIV/AIDS and the associated shifts does not mean that I understand the transnational HIV/AIDS projects as necessarily progressive, nor do I think the impact of these projects are always positive on sexual minorities. In fact, there is a wide criticism of the medicalization of sexuality and the language of risk that places sex workers and MSM under the active surveillance of the state. There is also criticism that some of the programmatic agendas have reduced health interventions to numerical and quantifiable number-chasing mechanisms. While acknowledging this important criticism, my study, instead of valorizing HIV/AIDS platforms, looks at the HIV/AIDS as a discursive terrain that the state, transnational actors and advocates for national legal struggles participate in. In this sense, then, the state's investment in high-risk groups is an important shift that HIV/AIDS brings about as evident in both these cases. Furthermore, the comparison also indicates the need to develop an analysis that takes power structures and asymmetries as the conditions of possibility for new demand for rights and recognition. It is important to highlight that sexual minority groups such as sex workers, LGBTQ and MSM are not just produced by social movements or political identities, but also through various institutional processes that shape their subjectivities and identities.

The comparison also reveals that, unlike the suspicion of critical transnational sexuality scholars towards the transnational sphere as inherently Western and hegemonic, it can be partially useful as a resource for national actors. This is evident in the fact that sex workers have been able to make the transnational HIV/AIDS projects more responsive to them because of their mobilization and their collective power, and used this mobilization to challenge another form of transnational advocacy, i.e. the anti-trafficking agendas. Moreover, it is also important to take note that much of the funding for sexuality driven projects in India is channeled through the transnational HIV/AIDS funding. Through conversations with various sexuality groups in India I found that there are very few funding opportunities for mobilization outside the framework of risk and disease prevention. Moreover, in recent times the Indian government has also cut HIV/AIDS budgets significantly, and there is a fear among HIV/AIDS groups that this will substantially impact the services they provide to the communities at-risk as well as impact the conversations on sexuality and rights. Even with these limitations it is important to note that these seemingly innocuous projects have taken political overtones with demands for legal and political citizenship, as we saw through these two cases.

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