

Open Letters Against Sec 377

These two open letters bring together the voices of many of the most eminent and respected Indians, collectively saying that on the grounds of fundamental human rights Section 377 of the Indian Penal Code, a British-era law that criminalizes same-sex love between adults, should be struck down immediately.

The eminent signatories to these letters are asking our government, our courts, and the people of this country to join their voices against this archaic and oppressive law, and to put India in line with other progressive countries that are striving to realize the foundational goal of the Universal Declaration of Human Rights that “All persons are born free and equal in dignity and rights.”

They have come together to defend the rights and freedom not just of sexual minorities in India but to uphold the dignity and vigour of Indian democracy itself.

Navigating Through This Press Kit

This kit contains, in order,

- i. A statement by Amartya Sen, Nobel Laureate
- ii. The text of the main Open Letter
- iii. The list of Signatories
- iv. Sexual minorities in India - Frequently Asked Questions and Clarifications
- v. A summary of laws concerning the rights and situation of sexual minorities globally
- vi. Contact Information for further information/interviews

**Strictly embargoed until 16th September 2006
Not for distribution or publication without
prior permission of the main signatories. All legal rights
reserved worldwide.**

In Support

Cambridge 20 August 2006

A Statement in Support of the Open Letter by Vikram Seth and Others

I have read with much interest and agreement the open letter of Vikram Seth and others on the need to overturn section 377 of the Indian Penal Code. Even though I do not, as a general rule, sign joint letters, I would like, in this case, to add my voice to those of Vikram Seth and his cosignatories. The criminalization of gay behaviour goes not only against fundamental human rights, as the open letter points out, but it also works sharply against the enhancement of human freedoms in terms of which the progress of human civilization can be judged.

There is a further consideration to which I would like to draw attention. Gay behaviour is, of course, much more widespread than the cases that are brought to trial. It is some times argued that this indicates that Section 377 does not do as much harm as we, the protesters, tend to think. What has to be borne in mind is that whenever any behaviour is identified as a penalizable crime, it gives the police and other law enforcement officers huge power to harass and victimize some people. The harm done by an unjust law like this can, therefore, be far larger than would be indicated by cases of actual prosecution.

It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861. That, as it happens, was the year in which the American Civil War began, which would ultimately abolish the unfreedom of slavery in America. Today, 145 years later, we surely have urgent reason to abolish in India, with our commitment to democracy and human rights, the unfreedom of arbitrary and unjust criminalization.

Amartya Sen

To the Government of India, Members of the Judiciary, and All Citizens,

To build a truly democratic and plural India, we must collectively fight against laws and policies that abuse human rights and limit fundamental freedoms.

This is why we, concerned Indian citizens and people of Indian origin, support the overturning of Section 377 of the Indian Penal Code, a colonial-era law dating to 1861, which punitively criminalizes romantic love and private, consensual sexual acts between adults of the same sex.

In independent India, as earlier, this archaic and brutal law has served no good purpose. It has been used to systematically persecute, blackmail, arrest and terrorize sexual minorities. It has spawned public intolerance and abuse, forcing tens of millions of gay and bisexual men and women to live in fear and secrecy, at tragic cost to themselves and their families.

It is especially disgraceful that Section 377 has on several recent occasions been used by homophobic officials to suppress the work of legitimate HIV-prevention groups, leaving gay and bisexual men in India even more defenceless against HIV infection.

Such human rights abuses would be cause for shame anywhere in the modern world, but they are especially so in India, which was founded on a vision of fundamental rights applying equally to all, without discrimination on any grounds. By presumptively treating as criminals those who love people of the same sex, Section 377 violates fundamental human rights, particularly the rights to equality and privacy that are enshrined in our Constitution as well as in the binding international laws that we have embraced, including the International Covenant on Civil and Political Rights.

Let us always remember the indisputable truth expressed in the opening articles of the Universal Declaration of Human Rights that “All persons are born free and equal in dignity and rights...Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”

We will move many steps closer to our goal of achieving a just, pluralistic and democratic society by the ending of Section 377, which is currently under challenge before the Delhi High Court. There should be no discrimination in India on the grounds of sexual orientation. In the name of humanity and of our Constitution, this cruel and discriminatory law should be struck down.

Sincerely,
Vikram Seth, author. Swami Agnivesh. Soli Sorabjee, former Attorney-General. Aditi Desai, sociologist, and Nitin Desai, former UN Under-Secretary-General. Captain Lakshmi Sahgal, freedom fighter, Padma Vibhushan. Siddharth Dube, author.
And

Rukun Advani, Author/Publisher

MJ Akbar, Editor-in-Chief, Asian Age & Deccan Chronicle

Ashok Alexander, Director, Avahan, Bill and Melinda Gates Foundation

Subashni Ali, President, All India Democratic Women's Association

Arjun Appadurai, Provost and Senior Vice President for Academic Affairs; John Dewey Professor in the Social Sciences. University of Chicago

Kanti Bajpai, Headmaster, The Doon School

Runa Banerjee, CEO, SEWA Lucknow

Kaushik Basu, Professor of Economics, Cornell University

Upendra Baxi, Professor of Law, University of Warwick

Pooja Bedi, Actress

Shyam Benegal, internationally-acclaimed film director and Member of Parliament, Rajya Sabha

Amitava Bhaskar, Associate Professor, Institute of Economic Growth

Prashant Bhushan, advocate, Supreme Court, and civil rights activist

Urvashi Butalia, author, publisher and activist

Uma Chakravarty, Vedic Scholar and Feminist Historian

Geeta Chandran, Founder President, Natya Vriksha

Purnendu Chatterjee, Chairman, Chatterjee Group

Gerson Da Cunha, Trustee, AGNI (Action for Good Governance and Networking in India)

Maja Daruwala, human rights activist

Nandita Das, award-winning actress and activist

Veena Das, Professor, Johns Hopkins University
PR Dasgupta, former secretary education and social welfare, first head of the National AIDS programme
Mahesh Dattani, playwright, Sahitya Akademi Award 1998
Devika Daulet-Singh, photographer
John Dayal, Member, National Integration Council, Govt of India
Shobhaa De, best-selling author and columnist
Astad Deboo, choreographer & dancer
Armaity Desai, Former Director, Tata Inst. of Social Sciences & Former Chairman, University Grants Commission
Anil Divan, Senior Advocate
Darryl D'Monte, environmental journalist & author
Dilip D'Souza, author and journalist
JB D'Souza, former Maharashtra Chief Secretary and Bombay Municipal Commissioner (IAS retd)
Neela D'Souza, writer
Bharat Dube, Counsel, Richemont Group S.A.
Barkha Dutt, Managing Editor, NDTV
Mallika Dutt, Breakthrough, National Citizen's Award 2001
Rajiv Dutta, President, Skype
Rehaan Engineer, actor
Naresh Fernandes, Editor, Time Out Mumbai
Meenakshi Ganguly, Human Rights Watch
Amitav Ghosh, author, Sahitya Akademi Award 1990
Sagarika Ghosh, author, and CNN-IBN
Shohini Ghosh, Filmmaker and Lecturer, Jamia Millia Islamia
Anand Grover, Human Rights Lawyer
Ramachandra Guha, Social Anthropologist, Historian
Satish Gujral, Artist, Sculptor
Ruchira Gupta, activist and Emmy-winning journalist
Syeda Hameed, Member of the Planning Commission
Zoya Hasan, Professor of Political Science, Jawaharlal Nehru University
Tanuja Desai Hidier, author and musician
Indira Jaising, Human Rights Lawyer
Ashok Jethanandani, editor, India Currents
Ruchir Joshi, writer
Sudhir Kakar, psychoanalyst and author
Mira Kamdar, author, Senior Fellow, World Policy Institute
Coomi Kapoor, Indian Express
Sanjay Kapoor, Vice President, Raytheon Integrated Defense Systems
Bachi Karkaria, Author and Columnist, Times of India
Girish Karnad, Playright, Actor
Sujata Keshavan, Graphic Designer
Soha Ali Khan, actor
Sunil Khilnani, Director of South Asian Studies, Johns Hopkins
Shanno Khurana, Classical vocalist, Padmabhushan, Fellow (Ratna Sadasya) Sangeet Natak Akademi
Saleem Kidwai, Historian and Co-editor, *Same-Sex Love in India*
Amitava Kumar, writer, Professor of English, Vassar College
Radha Kumar, author and professor Jamia Millia Islamia
Jhumpa Lahiri, author, Pulitzer Prize 2000
Ruby Lal, Assistant Professor of South Asian Civilizations, Emory University
Rama Mani, Geneva Centre for Security Policy
Sonal Mansingh, eminent dancer, Padma Vibhushan
Ajay K. Mehra, Director, Centre for Public Affairs
Suketu Mehta, author, Kiriyaama Prize 2005
Nivedita Menon, Department of Political Science, Delhi University
Aziz Mirza, Filmmaker
Saeed Mirza, Filmmaker
Shomit Mitter, author

Sophie Moochala, businesswoman
Shubha Mudgal, vocalist, Padmashree Award 2000
Mira Nair, internationally acclaimed film director
Ashish Nandy, political psychologist and sociologist
Kuldip Nayar, author and columnist
Derek O'Brien, author and television quiz master
Onir, film director, My Brother Nikhil
Pankaj Pachauri, Senior Editor, NDTV
Dileep Padgaonkar, former Chief Editor, Times of India, member of the Minorities Commission
Latika Padgaonkar, art and cine expert
Amol Palekar, Filmmaker
Gopika Pant, Partner, DSK Legal
Gyanendra Pandey, Distinguished Professor of Arts and Sciences, Emory University
Kirit Parikh, Member, Planning Commission
Vibha Parthasarathi, ex-Chairperson, National Commission for Women
Vibhuti Patel, journalist
Pradip Prabhu, Activist, Kasthakari Sangathan
Sanjay Pradhan, Director, Public Sector Governance, The World Bank
Rajeswari Sunder Rajan, Global Distinguished Professor (Elect), New York University
Rahul Ram, Indian Ocean band
Raka Ray, Professor of South Asian Studies, Univ of California, Berkeley
Debraj Ray, Julius Silver Professor of Economics, New York University
Aruna Roy, Mazdoor Kisan Shakti Sangathan, Ramon Magsaysay Award 2000
Arundhati Roy, Activist and Author. Booker Prize 1997
Sandip Roy, Editor, New America Media and Trikone Magazine
Sanjoy Roy, managing director, Teamwork Films
Sarika, Actress
Siddharth Dhanvant Sanghvi, Author
Mallika Sarabhai, dancer
Mrinalini V. Sarabhai, dancer and choreographer, Padma Shree 1965, Padma Bhushan 1992
Rajdeep Sardesai, editor-in-chief CNN-IBN
Madhu Sarin, psychoanalyst
Sumit Sarkar, social historian
Tanika Sarkar, historian and Professor, Jawaharlal Nehru University
Vir Sanghvi, Anchor, Writer, and Editorial Director, Hindustan Times
NC Saxena, former Secretary Planning Commission and Rural Development, and Director, LBS National Academy of Administration
Aparna Sen, acclaimed director and actor
Atul Setalvad, Senior Advocate
Teesta Setalvad, Communalism Combat
Konkana Sen Sharma, actress
Malvika Singh, Publisher, Seminar
Dayanita Singh, photographer
Kirti Singh, Advocate and Women's Rights Activist
Sreenath Sreenivasan, Professor, Columbia Graduate School of Journalism
Sonal Man Singh, acclaimed danseuse and Padma Vibhushan
Seema Sirohi, columnist
Sreenath Sreenivasan, Professor, Columbia Graduate School of Journalism
Vidya Subrahmaniam, Deputy Editor, The Hindu
Nandini Sundar, Professor, Delhi School of Economics
Admiral (Rtd.) R.H. Tahiliani, former Chief of the Indian Navy and Governor of Sikkim; Chairman, Transparency International India
Tarun Tahiliani and Sal Tahiliani, designers
Tarun Tejpal, editor and founder of Tehelka
Dolly Thakore, theatre personality
Tilotamma Tharoor, Humanities Professor, New York University
Laila Tyabji, Chairperson, DASTKAR
Nilita Vachani, documentary-maker, President's Award 1992

Ruth Vanita, author and professor, U of Montana

Siddharth Varadarajan, Deputy Editor, The Hindu

B.G.Vergheese, former editor of several national papers, and human rights and development activist

Jafar Zaheer, Air Vice Marshal (retd, Param Vishist Seva Medal), and Mrs Rafath Zaheer

Shama Zaidi, script writer and film maker

(Listing of institutional affiliations does not imply that these organizations necessarily endorse this statement)

For a complete and most updated list, please see www.openletter377.com

Sexual Minorities in India: FAQs

What is Sec 377 IPC?

Sec 377 of the Indian Penal Code states:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described.”

Passed in 1860, the law criminalizes sexual activity between consenting adults in private, thereby violating the fundamental and human rights of thousands of Indian citizens and legitimizing, in the eyes of the law and society, discrimination, violence, and social prejudice against gay, lesbian, bisexual, hijra communities, and other sexual minorities.

What impact does Sec 377 have on the lives of sexual minorities in India?

Sec 377 has become the sword that hangs over the lives of all sexual minorities in this country. It not only prevents sexual minorities from being able to access justice, but has been used as a weapon to harass, extort, blackmail and threaten gay men and women. It further casts a shadow of illegality on the personal lives of thousands, making them unable to live openly and with dignity, because even their families and well wishers point to the existence of the law to justify their prejudice and concerns. It prevents adequate health services and especially HIV/AIDS prevention efforts within sexual minority communities.

Documented evidence shows that Sec 377 is used in several types of cases, for eg:

- In 2001, police raided the offices of the Bharosa Trust in Lucknow, accusing them of running a “gay racket” and charging them with Sec 377 (120B) as “**conspiracy to promote homosexuality**” because the NGO worked on promoting safe sex practices with men who have sex with men.
- In 2005, police **arrested four men** under Sec 377 for allegedly meeting other gay men and engaging in sodomy. Fact-finding teams later established that the police had no evidence or eye witnesses and had simply arrested the men for being gay.
- Given two years of drugs and **electroshock therapy** at the AIIMS in order to “cure” him of his sexuality, when a man tried to approach the National Human Rights Commission, his complaint was not admitted because of Sec 377.
- Hijras are subject to brutal **police violence, sexual abuse and assault**, and extortion at the hands of the public as well as the police, as has been documented extensively by the members of the **People’s Union for Civil Liberties, Karnataka**. They cannot complain against this abuse and are subject to it in the first place due to Sec 377. The report can be found at www.pucl.org.
- People belonging to sexual minority communities often face the threat of **blackmail, extortion and disclosure** - things they must fear because of the environment of homophobia that Sec 377 fosters and legitimizes.
- Families, health professionals and others often cannot accept people’s sexual preference precisely because of the law.
- Same-sex partnerships have **no legal protection or recognition within the law** due to Sec 377. Discrimination in employment, benefits, inheritance, the right to visit one’s partner in hospital, legal guardianship and entitlement – all of which would be automatically granted to opposite-sex couples – do not exist for same-sex couples who must live their lives in an agonising uncertainty.

What is the Public Interest Litigation (PIL) petition that has been filed against Sec 377?

In 2001, the Naz Foundation filed a PIL in the Delhi High Court arguing that Sec 377 violated the constitutional rights of sexual minorities in India and also interfered with the provision of HIV/AIDS prevention services. The petition asks for a reading down of Sec 377, which would de-criminalise consensual sex between adults of the same sex. The High Court had dismissed the petition on a technicality in 2005, arguing that Naz had no locus standi, i.e., Since no FIR had been filed, no PIL could be filed. Lawyers Collective, representing the Naz Foundation, filed a special leave petition challenging the dismissal in the Supreme Court which, in Feb 2006, ordered the High Court to hear the case on merits. The case is currently, therefore, once again pending a hearing in the Delhi High Court, still waiting to be heard on its merits.

Will changing Sec 377 affect the court's ability to prosecute child sexual abuse?

An incorrect yet oft made comparison pits legislation against child sexual abuse against human rights protections for sexual minorities.. There is no substance to this dichotomy whatsoever. Due to the absence of any law that protects young boys from sexual abuse, Sec 377 is used to prosecute child sexual abuse (CSA) against underage boys in India. Child rights groups have been demanding a comprehensive CSA law for years, and constantly say that Sec 377 is inadequate for this purpose.

The current PIL that is challenging the constitutional validity of Sec 377 in the Delhi High Court does not as for a full repeal of Sec 377 for precisely this purpose. It only asks for a reading down of the law that would de-criminalise consensual sex between adults of the same-sex. The law, therefore, will still be able to be used to prosecute cases of child sexual abuse against young boys until a new and comprehensive CSA law comes into place.

The Global Scenario

Sexual Minorities and the Law around the World

A minority of countries in the world continue to criminalise same-sex relations. India remains one of them. See map on facing page. Increasingly countries around the world are beginning, at the very least, to de-criminalise homosexuality and further ban discrimination on the basis of sexual orientation and gender identity. Many countries now guarantee sexual minorities full and equal civil rights, including marriage rights. Canada, Netherlands, Belgium, Spain, and the US state of Massachusetts allow full civil marriages on par with opposite-sex marriages. A brief summary of recent developments around the world:

Europe

- Nine other countries in Europe, including Germany, France, UK, Denmark, Norway, Finland, Iceland allow same-sex domestic partnerships and civil unions.
- The European Union requires all member States to prohibit discrimination based on sexual orientation in employment.

The Americas

- Ecuador prohibits discrimination based on sexual orientation in its Constitution. Several states and city governments in Brazil prohibit discrimination on the basis of sexual orientation. Mexico in 2003 passed comprehensive legislation prohibiting discrimination based on sexual orientation.

Pacific

- Australia and New Zealand both prohibit anti-gay discrimination by law.
- Since 1998, Fiji has banned discrimination based on sexual orientation in its Constitution.

South Africa

- The South African constitution prohibits discrimination on the basis of sexual orientation and protects the rights of same-sex couples. In Dec 2005, it declared that it was unconstitutional not to allow gay people to marry.

Asia

- In 2003, the government of Taiwan announced plans to legalise same-sex marriage, which would make them the first Asian nation to do so.
- In 1980, Hong Kong overturned its anti-sodomy law, one very similar to Sec 377.
- In 2002, The Department of Mental Health in Thailand removed homosexuality from its list of mental illnesses.

Homosexuality and Mental Health

- The World Health Organisation, whose guidelines are followed by the Indian Psychiatric Association, removed homosexuality from its list of mental illnesses as far back as 1981.
- The American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM), the benchmark of psychiatry practice across the world as far back as 1974. Most psychiatric associations in the world follow DSM guidelines, as do most practising psychiatrists in India.

Official and Institutional Declarations - India

Many government and official bodies in India have begun to speak out against Sec 377. In recent years alone, there are three prominent examples for a call to remove Sec 377 from our law books.

- The 172nd report of the Law Commission of India recommends that Sec 377 be deleted.
- In the recommendations for the 11th Five Year Plan, the Planning Commission of India proposed the deletion of Sec 377.
- In its draft bill reforming laws on sexual assault, the National Commission for Women has also recommended de-criminalising consensual same-sex sexual activity.

The Global Scenario

International Declarations and Covenants

Many precedents within the United Nations system establish that sexual orientation is a fundamental human rights issue. These are grounded in the **Universal Declaration of Human Rights (UDHR)**(1948), which proclaims that “All persons are born free and equal in dignity and rights” (Article 1), and are sustained by the UDHR principle that human rights are indivisible. The universality of human rights is fulfilled by addressing the most concealed abuses and by protecting the most vulnerable groups.

In a landmark decision, the **United Nations Human Rights Committee (HRC)** ruled in *Toonen v. Australia* (1994) that laws prohibiting sexual contact between consenting adults were a violation of the fundamental human rights to privacy (Article 17) and non-discrimination (Article 2) enshrined in international law, namely the International Covenant on Civil and Political Rights (ICCPR). It ruled that the protected category of 'sex' in 2 of the ICCPR “is to be taken as including sexual orientation.” Since *Toonen*, the HRC has consistently called for the repeal of sodomy laws. However, in *Quilter v. New Zealand* (1994) the HRC ruled that New Zealand's marriage law that discriminates against same-sex couples is admissible.

The **United Nations Special Rapporteurs** on Extrajudicial, Summary or Arbitrary Executions, Violence Against Women, and the Special Representative of the Secretary General on Human Rights Defenders have reported on human rights violations because of sexual orientation. In a historic move, the Special Rapporteurs on Torture, the Independence of Judges and Lawyers, and Freedom of Opinion and Expression joined these offices in directly calling for more information about human rights violations based on sexual orientation and gender identity.

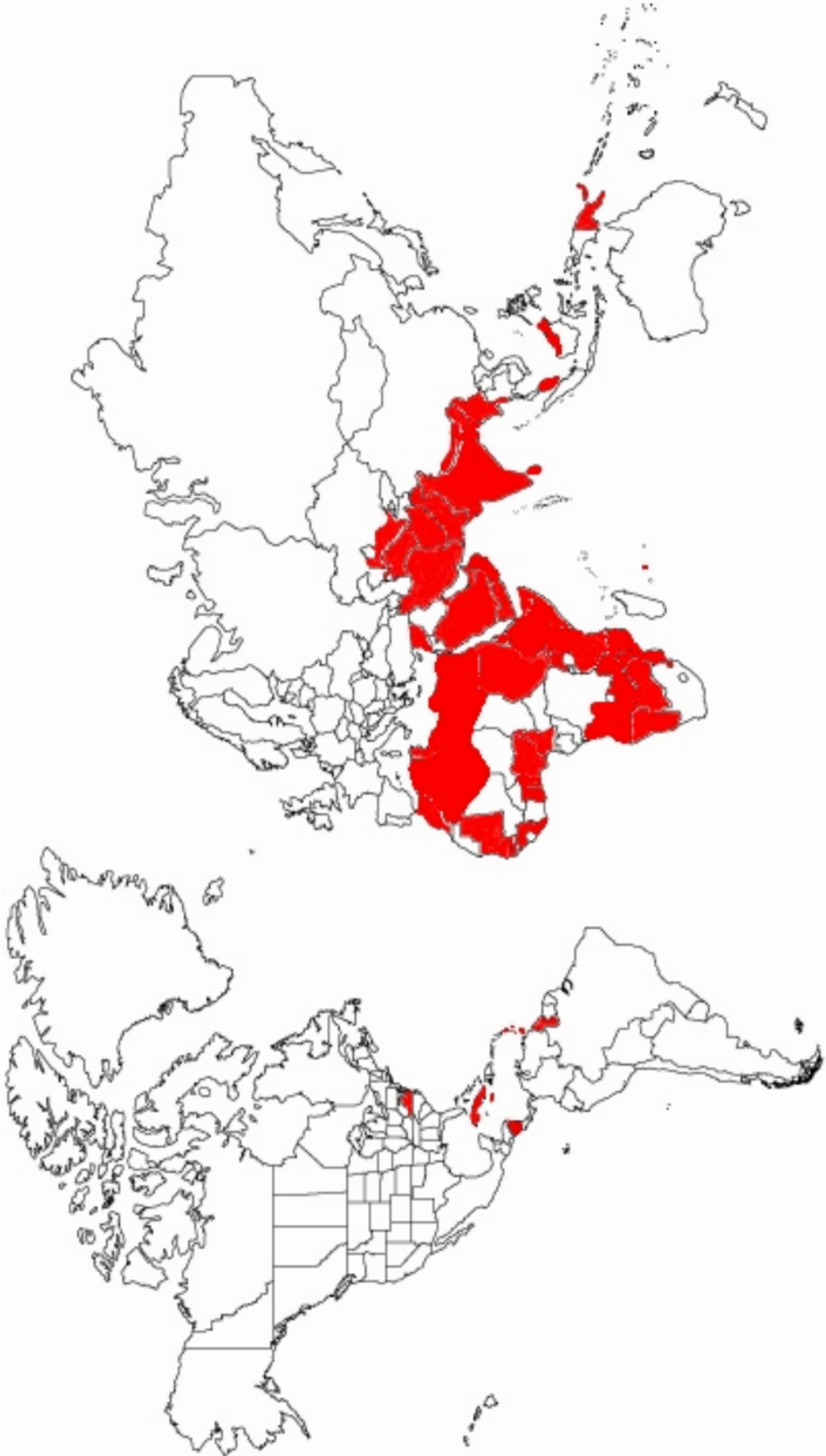
The **Committee on Economic, Social and Cultural Rights (CESCR)** has held, through the General Comment 14 (2000) on the right to the highest attainable standard of mental and physical health in the International Covenant on Economic, Social and Cultural Rights, that sexual orientation is a prohibited basis of discrimination and has an impact on health status. In consideration of the International Covenant on Economic, Social and Cultural Rights, Article 2, CESCR has raised the issue of sexual orientation discrimination in a range of contexts, including criminalization, employment, housing and the distribution of goods and services.

The **Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)** has asked questions related to its mandate to reporting governments which demonstrate that sexual orientation is a human rights issue for which governments are accountable. Specifically, CEDAW increasingly asks about protections from violence for lesbians and other non-conforming women, including sex workers, and has identified the need to eradicate prejudices and traditional attitudes that perpetuate violence by non-state actors.

The **Committee on the Rights of the Child (CRC)** noted in the General Comment (January 2003) that sexual orientation-based discrimination is a denial of rights that contributes to the vulnerability of young people to HIV/AIDS.

Open Letter Against Sec 377

Only the Countries coloured in orange continue to criminalize sodomy. To which world must India belong?



Contact Information

For any further information and/or interviews, please call Gautam Bhan at 99 11 00 68 64, or email at gautam.bhan@gmail.com, or Saleem Kidwai at s.inlucknow@gmail.com.

Thank you.