

Exporting Identity

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There is no doubt that a gay revolution is sweeping the globe. Today, the term "gay" has been borrowed into Japanese, Portuguese, Spanish, Thai, Turkish, and other languages, signifying its increasingly perceived universality.² Gay and lesbian organizations now exist in virtually every continent and in many major urban centers throughout the world.³ A growing number of legislators and judges have taken up the cause of gay civil rights, and have actively supported protections based on sexual orientation in a host of areas, such as adoption, employment, domestic partnership, and immigration.⁴

Yet, at the same time, there has never been a better time to study the potential limitations and challenges faced by a global gay rights movement, particularly in countries where governments have mounted serious challenges to its development. For example, in Namibia, just last year, Home Affairs Minister Jerry Ekandjo told the National Assembly that the existence of homosexuality was entirely attributable to Western influences, observing "[w]e take everything [from Western culture] lock, stock, and barrel without carefully analyzing what is good and what is harmful to us. Today it is homosexuality, tomorrow the right to walk naked, the day after it will be the right to abuse drugs. At the end the so-called rights will lead to our own extinction."⁵ In this leader's view, "so-called gay rights can never qualify as human rights" because they are "inimical to true Namibian culture, African culture, and religion."⁶ As his commentary demonstrates, many political leaders attribute the formation of gay communities as an undesirable byproduct of foreign influence and globalization.

Indeed, across the non-Western world, the emergence of gay-identified communities has ushered in painful debates about the intersection between sexual identity, culture, and human rights. Nevertheless, the complicated social meanings that attach to same-sex sexual activity, as opposed to gay or lesbian identity, are often ignored by many Western-based activists, who regularly equate identity and conduct in their efforts to assist movements for lesbian and gay equality abroad. Yet these questions have undeniable legal consequences, particularly for the minoritizing discourse that animates the global gay civil rights movement. Traditionally, the law presumes that one's sexual orientation - heterosexual, homosexual, bisexual - is a fixed identity defined by the gender of one's chosen sexual partner. However, contrary to this view, some cultures view homosexuality as an activity, not an identity; others view it as a necessary phase in a quest for full-fledged adulthood; and still others equate it with transgenderism. Although there is certainly an appreciable emergence of self-identified "gay" or "lesbian" individuals throughout the world, many Western activists and scholars often fail to recognize that arguments for legal protection on the basis of sexual orientation often collide with, rather than incorporate, these preexisting social meanings of same-sex sexual activity. In other words, the presumed equation between sexual conduct, sexual orientation, and sexual identity, so prevalent in Western legal thought, tends to swiftly unravel when viewed in a cross-cultural framework.⁷

These complexities are not just differences in translation; they have profound implications for the constitutional, civil and criminal rights affecting sexual minorities across the world. As many public health activists have argued, gay and lesbian activists have made a divisive mistake by singlehandedly focusing on identity-based protections in order to achieve equality for sexual minorities. When considered in a cross-cultural context, identity-based protections actually reveal their own inherently self-destructive limitations, demonstrating a central paradox of global gay rights discourse. Instead of liberating sexual minorities, the use of

identity-based frameworks may paradoxically exclude them from protection. Therefore, a global gay rights movement must take into account sexualities and behaviors that fall outside of traditional categories of sexual orientation. If a constitutional framework for protection of sexual minorities is to be globally effective, it must recognize that many individuals who fall outside of neatly circumscribed categories of sexual identity are just as deserving of a model of liberation that includes them.

While I would stop short of advocating a culturally relativistic approach to gay civil rights in general, the changing social meanings surrounding gay or lesbian sexual identities raise deeply complex questions that are often ignored by scholars and activists in the name of globalizing gay civil rights. For laws based on sexual orientation impose - and require - a certain relationship between identity and conduct that is deeply context-specific. By exploring other permutations of the relationship between identity and same-sex sexual conduct, we can come to a better understanding of some of the complexities that accompany nascent gay civil rights movements in other cultural contexts. This understanding, in turn, highlights the importance of sexual autonomy and sexual self-determination over identity-based categories of protection.

For example, the most prominent model of gay civil rights (particularly in domestic American law) is based upon a specific relationship between sexual identity and sexual conduct that I call "substitutive." The substitutive model assumes that one's public sexual identity and private sexual conduct are interchangeable; that is, individuals who engage in same-sex sexual conduct can be legally classified by a fixed and clearly demarcable gay, lesbian, or bisexual sexual identity. Based on this equation, gay civil rights activists tend to opt between two strategies of constitutional protection: privacy-based strategies (which protect same-sex sexual conduct) or identity-based anti-discrimination strategies (which protect against discrimination based on sexual orientation).

As we have seen in the United States, a reliance on the substitutive model in such contexts can be extraordinarily beneficial in terms of creating unity and as a tool towards mobilization. Gay civil rights advocates, traditionally, argue that to demand protection against harassment and discrimination based on one's sexual identity, it is often necessary to openly acknowledge one's sexual orientation; in other words, to perform the act of "naming oneself," that is, "coming out" as gay, lesbian, or bisexual. However, this prerequisite of "naming oneself," in practice, translates into excluding large numbers of individuals who engage in same-sex sexual conduct. For example, anthropologists and public health activists have argued that the presumed equation between sexual behavior and sexual identity clashes with preexisting social meanings of same-sex sexual conduct.

As a result, the vast differences in the social meaning of homosexuality across different cultures require a more nuanced and thoughtful formulation of the public and private aspects of sexual identity. Here, what is needed is an alternative paradigm to the problematic assumptions upon which identity-based categories are based. Consequently, instead of concentrating on sexual identity, legal scholars in the West and elsewhere might benefit from exploring other paradigms of equality which focus on sexual autonomy instead.

Public Health and Constitutional Strategy in India

In India, several prominent public health activists have concluded that the language of "identities" and Western constructions of sexuality are markedly inappropriate in delivering culturally specific HIV/AIDS health services to some men in South Asia.⁸ Instead of the term "gay" or "homosexual," they have opted to use the term "men who have sex with men"

(MSM).⁹ The term MSM refers to men from all age groups, marital status, economic classes, educational backgrounds, caste and religious communities, sexual identities, and gender identities who engage in sexual activity with other men.¹⁰ Use of the term, they argue, is necessary for effective health interventions, because MSM do not possess a "gay" self-identity, do not see themselves as bisexual, yet are not "conventionally straight."¹¹ In other words, the term is used to denote those for whom homosexuality connotes a behavior, not an identity. Although I use India as a primary example of this phenomenon, largely due to the body of literature that has developed on this topic, I do not mean to suggest that the circumstances discussed here are entirely unique to India (or to males) alone.

Nevertheless in a basic sense, the existence of MSM - an identity based on conduct alone - forces us to think more critically about how to build strategies of inclusion when personal desires, sexual behavior, subjective identity, and public identities take vastly different expressions.¹² For these reasons, rather than enforcing a substitutive lesbian or gay identity, many activists have recognized the diminishing utility of such categories, and made the evaluation of categories of sexual identity an essential, active part of their platform. And, on a more abstract level, these evaluations challenge others to recognize cultural difference while preserving a framework of civil rights for sexual minorities.

Here, India offers Western activists an interesting case study. One might think that a gay and lesbian civil rights movement and a public health movement might be diametrically opposed in interests. The first, as we have seen in the United States, focuses on visibility though identity; whereas the second focuses on behavior, rather than identity. Yet, I argue that the Indian gay and lesbian movement's method of incorporating critiques of Western identity, while offering arguments for gay rights and sexual equality - aptly demonstrate the importance of integrating both of these perspectives in gay civil rights.

Although there are no laws which expressly criminalize homosexual status, in India, Article Three Hundred and Seventy-Seven, of British origin, criminalizes "unnatural offenses" and remains in force today.¹³ Because of Section 377's continued force in preventing both the public and private expressions of homosexuality, activists in India have launched a campaign for its repeal that concentrates specifically on the law's colonial origins. Significantly, the legal challenge in India focused squarely on men who have sex with men in their constitutional challenge, rather than gay-identified men. In doing so, the brief aptly demonstrates why eliminating sodomy laws will build a more inclusive community by removing a key obstacle to gay self-identification: criminalization of sodomy. In other words, activists recognized that consideration of MSM issues underscores the enormous need for protection of conduct and privacy-based protections.¹⁴

This strategy intersects privacy with two other elements: personal expression and sexual autonomy under the right to "life and liberty" under Article 21 of the Indian constitution.¹⁵ In India, the Supreme Court has interpreted this right to include "the right to live with human dignity and all that goes along with it, namely, the bare necessities of life . . . and also expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."¹⁶ Significantly, in India, the right to privacy includes a right to identity, as a bedrock Indian case on the right to privacy makes clear: "any plausible definition of the right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy."¹⁷

This interpretation of personal identity mirrors a similar preoccupation in gay rights circles in India with the right to determine both the interior and exterior aspects of a person's sexuality; in other words, to evaluate the relevance and importance of "coming out." But this difference also carries important lessons for gay rights strategies elsewhere. In other words, a strategy that focuses primarily on the right to privacy before identity-based protections allows an individual the autonomy to determine his or her sexual identity and preferences, instead of forcing them to adopt a particular identity in order to access constitutional protection. In other words, by demanding the right to privacy, Indian activists are actually demanding the right to deliberate - and determine - the interior and exterior aspects of their sexual identity, for themselves, and not as a prerequisite for a particular legal entitlement.

This unique strategy has led to a remarkable coalition between progressive human rights activists, public health activists and gay and lesbian activists who opt to challenge both the enforcement of identity-based categories and the sodomy laws that exist in India. Its localizing of a strategy for gay rights, coupled with a reexamination of its foundational precepts, reflects an important reassessment of the global utility of the identity-based, substitutive model. Instead of the government serving as a defender of Indian cultural purity and heterosexual tradition, gay and lesbian activists demonstrated that the central tool wielded by the Indian government - section 377- is nothing more than leftover baggage from colonialism. Like those who blamed the West for exporting gay identity, gay and lesbian activists similarly blamed the West for its exported criminalization of such behavior. In sum, the remarkable duality that this movement demonstrates - challenging the enforcement of substitutive categories of sexual identity, while challenging the criminalization of sodomy - exemplifies a profound possibility for powerful civil rights models.

Toward Sexual Autonomy

As the Indian experience suggests, current debates over gay rights involve much more than the simple legal question of whether or not individuals deserve protections based on the category of sexual orientation. Instead, in this changing era of globalization and cosmopolitanism, the questions posed by such debates (both legal and non-legal) are much more complex because they also raise questions about culture, tradition, and the response of law. Here, law has played a central role by serving as a tool for activists to demand constitutional inclusion and as a target that engenders further activism. Yet, the response of Indian activists suggests that it is possible to present the world with a dynamic, pluralistic view of law, culture and sexuality that transcends the limitations of an identity-based model.

As I have argued, the current choice between strategies of protection for sexual minorities-one focusing on privacy, another focusing on nondiscrimination on the basis of sexual orientation-are distressingly simplistic and under-inclusive of the different permutations between identity and conduct that exist with respect to human sexuality, both in the United States, as well as abroad. As I have argued, a person's subjectivity, or sense of self, may differ from the outward sexual identity which he/she may adopt. This dissonance between external identity, internal subjectivity, and conduct - when combined with the role culture plays in constructing each - throws the American framework of identity politics into question.¹⁸ What is needed, then, is a new legal framework for thinking about global gay rights that takes these potential, cultural differences into account.

One way to overcome the dissonance - cultural, legal, subjective - between one's conduct and one's social and sexual identity is to turn to another framework that encompasses both the expressive and private aspects of sexuality and sexual identity: sexual autonomy, or sexual self-

determination. A focus on sexual autonomy is preferable to one based on identity for three primary reasons. First, a model based on sexual autonomy is a deliberative one, thereby encompassing potential dissonance between subjectivity and external representation. Second, a sexual autonomy model focuses more squarely on the protection of sexual conduct, so that it includes protection for individuals who may engage in same-sex sexual conduct but who view themselves as heterosexual. Third, protections based on sexual autonomy are expressive, in that they protect the freedoms of individuals to express their public gender or sexual identities, and publicly voice the need for such protections. Finally, because the right to sexual autonomy encompasses aspects of both identity-based and privacy protections, it provides a much more thorough conceptual and legal framework for protection than existing models, which normally focus on either framework to the exclusion of other possibilities.

This view of deliberative sexual autonomy yields several real-world advantages. To begin, as this article has suggested, current pressures in gay civil rights - to come out, to speak out - often simplify, and hence reduce, the value of public deliberation about the intersection of sexual autonomy and sexual orientation generally. By linking gay civil rights to sexual orientation alone, the substitutive model diminishes the value that a deliberative autonomy model offers. However, because a deliberative autonomy model focuses on personal choice, this model honors not only the complexity of sexual orientation, but it confers value on the act of deliberation itself. Unlike the substitutive model, which draws lines between gay/straight and out/closeted, a deliberative autonomy rationale honors people's choices on personal identity while still engaging them in the debate over gay rights.

As we have seen, some identity-based models can be appropriate vehicles of constitutional protection for some individuals who readily adopt the category of "gay" or "lesbian." Yet such models often require individuals to "name" themselves or "come out" as an implicit prerequisite. However, a sexual autonomy framework allows for protection on the basis of both privacy and identity. It requires only that individuals have the right to determine their own preferences, orientations, and identities. And, as the Indian experience has shown, a sexual autonomy framework, quite unlike the current over-reliance on a substitutive equation between identity and conduct, avoids the accusation that it is a Western export because it builds on preexisting localized jurisprudence and civil rights movements for its efficacy.

Consequently, reassessing the utility of the substitutive paradigm carries important lessons for gay rights activists in any locality. And ultimately, by studying how different frameworks are excluded, we can create a more sophisticated, inclusive approach that integrates protections for sexual minorities with preexisting social meanings. By utilizing a vision of deliberative sexual autonomy while seeking civil rights protections based on both privacy and identity, we can honor the complex process of identity formation while still recognizing the need for equality on the basis of sexual orientation.

1 This essay is reprinted by permission of Yale Journal of Law and Feminism, Inc. from Yale Journal of Law and Feminism, Vol. 14, Number 1, pp. 97-176.

2. Stephen O. Murray, Increasingly Gay Self-Representations of Male-Male Sexual Experiences in Thailand, in *LADY BOYS, TOM BOYS, RENT BOYS: MALE AND FEMALE HOMOSEXUALITIES IN CONTEMPORARY THAILAND* 82 (Peter A. Jackson & Gerard Sullivan eds., 1999); Deborah P. Amory, Mashoga, Mabasha, and Magai: 'Homosexuality' on the East African Coast, in *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* 70, 76 (Stephen O. Murray & Will Roscoe eds., 1998).

3. Oliver C. Phillips, *Constituting the Global Gay*, in *LAW AND SEXUALITY IN THE GLOBAL ARENA* 17 (Carl Stynchin & Didi Herman eds., 2000); Barry D. Adam, Jan Willem Duyvendak, & Andre Krouwel, in *Introduction to THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 1 (Barry D. Adam et al. eds., 1999).
4. See generally *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS*, supra note 3 (detailing worldwide developments).
5. *Namibian Call to 'Eliminate' Gays*, *PLANET OUT NEWS*, at <http://www.planetout.com/news/article/2000.10.02/1> (Oct. 2, 2000).
6. *Id.*
7. In this article, I define "sexual orientation" as the "erotic or affectational impulse to the same and/or opposite sex." JOHN C. GONSEIRECH & JAMES D. WEINRICH, *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 1 (1991). I define one's "sexual identity" as the outward expression of one's sexual orientation, although others have used the term to refer to one's gender identity as well.
8. Shivananda Khan, *Culture, Religion and Human Rights*, 15 *NAZ KI PUKAR* 18 (Oct. 1996).
9. Shaffiq Essajee, *Interview with Anjali Gopalan, Executive Director of the Naz Foundation*, *TRIKONE MAG.*, Oct. 1996, at 7 ("Not to say there are no gay men in India but this identity is sort of a luxury that doesn't really extend beyond the educated upper classes. The majority of men who have sex with men don't see themselves as gay or even homosexual.").
10. Deep Purkayastha, *MSM Networks: Identity Categories versus Identity Continuum*, 27 *NAZ KI PUKAR* 16 (Oct. 1999).
11. JEREMY SEABROOK, *LOVE IN A DIFFERENT CLIMATE* 141 (1999). According to Shivananda Khan, use of the term MSM slowly came into being because the term "gay men" or "homosexuals" inadequately conflated identity with behavior. However, as Khan points out, even this term fails to include transgendered entities, like the waria of Indonesia; the bakla of the Phillipines, and hijras in India. See Shivananda Khan, *The Risks of Categorization*, 21 *NAZ KI PUKAR* 3 (Apr. 1998).
12. See Shivananda Khan, *The Language of Sexuality*, 5 *NAZ KI PUKAR* 14 (Feb. 1994) (noting that differences in language, religion, gender constructions and roles affect whether the terms lesbian, homosexual, bisexual are appropriate terminology).
13. See SEABROOK, supra note 11, at 162.
14. *Id.*
15. In India, the right to privacy, like the United States, is a judge-made instrument. See Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 *CHI. J. INTL. L.* 35, 48 (2001).
16. *Id.* at 50 (citing *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, 68 AIR SC 746, 747 (1981)).
17. *Id.* at 53 (citing *Sareetha v. T. Venkata Subbaiah*, 70 AIR AP 356 (1983)) (emphasis added).
18. See Peter Jackson and Gerard Sullivan, in *LADY BOYS, TOM BOYS, RENT BOYS*, supra note 2, at 19.