

Decriminalisation of consensual same-sex sexual acts in the South Asian Commonwealth: struggles in contexts

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Introduction

Many countries the world over have laws that criminalise consensual sexual acts among persons of the same sex. These laws are differently worded as ‘gross indecency’, ‘buggery’, ‘debauchery’ or ‘carnal intercourse against the order of nature’. More commonly they are known as ‘sodomy laws’. Sodomy laws affect almost everybody, if not in the practice of being charged, then in the societal attitudes that follow. No doubt they bear serious implications for same-sex desiring persons, including those who identify as *hijra*, *kinnar*, *kothi*, *aravani*, *zanaanaa*, *khusra*, *khwajasara*, *queer*, *third gender*, lesbian, gay, bisexual, and transgender (hereinafter referred collectively as LGBT). The laws present a serious threat to HIV prevention initiatives aimed at, for example, men who have sex with men (MSM). These laws also impact attitudes towards certain sexual acts like oral and anal sex, regardless of who is committing them, heterosexual or homosexual.

A global review of these laws is entirely worthy. This essay focuses on the Commonwealth countries of South Asia. In this category, Bangladesh, India, the Maldives, Pakistan and Sri Lanka (a total of five countries) have this criminalisation. Although Bhutan and Nepal (also Afghanistan and Iran according to some definitions) are considered part of South Asia, they are not included here because they are not Commonwealth countries.

Kirby (2011), Sanders (2009) and the Human Rights Watch (2008) have pointed to criminalisation as a direct reflection of Victorian period law-making in what was then the British Empire. The British buggery law was reformulated as ‘unnatural’ offences in the Indian Penal Code of 1860. In this revised form it travelled the world. Ironically though the penalisation has long ceased to exist in its place of origin (the present United Kingdom), it continues to flourish elsewhere.

This essay looks at the criminalisation in the South Asian Commonwealth, drawing upon application of human rights, also vigilant of issues beyond the law, and exploring the potential of decriminalisation. It is arranged in four parts: part 1 describes the nature and abuse of criminalisation. Part 2 gives an account of the application of human rights. Part 3 goes beyond legal issues, building upon perspectives of affected individuals and activists. Part 4 explores the potential of decriminalisation.

Methods

This is in continuation of my working paper from three years ago (Baudh 2008). I had approached it then more as legal research, basing it on secondary and published materials. I realised I had taken on too large a region, and there was not sufficient legal material on the subject. Commencing the present endeavour I made two amends: I limited my scope to South Asia, and I expanded my research methods to include interviews.

I have relied on interviews with Joya Sikder, founder of the *Badhan Hijra Sangha*, and the president of Sex Workers Network of Bangladesh; Tinku Ishtiaq, a gay activist in Bangladesh; Rahmat Ullah Bhuiyan, deputy manager – Program, Bandhu Social Welfare Society, Bangladesh; Rosanna Flamer-Caldera, executive director, EQUAL GROUND, Sri Lanka; and two members of the Organization for Protection & Propagation of Rights of Sexual Minorities, or simply O, in Pakistan (they requested not to be named).

All the interviewees have given their informed consent to be quoted in this essay. I gave them the choice to be anonymous. I changed names where requested. I also anonymised the data where required.

The criteria for inclusion in my group of interviewees was geographical location and practical experience. I interviewed those who are located in South Asia and have practical experiences of the criminalisation – as a direct subject of it or having engaged with it as an activist. I myself have been working on the subject for some time now. This includes my voluntary involvement with the Voices Against 377 (2004 onwards), my association with the South and Southeast Asia Resource Centre on Sexuality (2006–9), and my membership of the Task Force for setting up of South Asia Human Rights Association for Marginalised Sexualities and Genders (2008 onwards). My prior acquaintance with some of the activists in the region was very useful.

The interviews took place between April and September 2011. Three of them were in person, two via email, and one on Skype. They were based on a checklist of questions. I have maintained copies of all written correspondence, audio recordings and transcriptions. Out of them I have selected quotes, which form significant portions of this essay.

It is missing perspectives from the Maldives. I do not know of anyone who may have insights into the subject, neither do I know of any literature on criminalisation there. I am happy to be informed otherwise.

There has not been any financial support for this research. I have relied on random opportunities that came my way, for example, my visit to Dhaka in April 2011,¹ where I conducted some of my interviews.

My thanks to Matthew Waites and another reviewer (unknown to me) for comments and inputs on a previous draft. All responsibility for errors and omissions is mine. I have not received any remuneration, neither have I given any to anyone. This is an independent piece of work, its biases my own. I dedicate it to my mother, Vidyawati. True to her name, she is the bearer of education to me.

1. Criminalisation

In this first part I describe the nature and the abuse of criminalisation. It begins with an overview that branches into four subparts – one each on Bangladesh, Sri Lanka, Pakistan and India.

There are sodomy laws across the world and their wording varies from country to country. The most common version in South Asia is called ‘*Unnatural Offences*’; it reads as follows:

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 in this section. (*The Penal Code 1860*)

Table 10.1: Overview of criminalisation

Country	Terms of Penalisation	Penalty	Subjects
Bangladesh	=	+	FN
India	=	+	FN
Pakistan	=	Minimum imprisonment up to two years, maximum ten years, also liable to fine.	FN

1 Task force meeting, South Asian Human Rights Association for Marginalised Sexualities and Genders (SAHRA), Dhaka, 6–9 April 2011; supported by a Norwegian organisation, LLH. I stayed back an extra few days at my own cost to conduct interviews for this essay.

Sri Lanka	(1) 365: =	(1) Maximum ten years	FN
	(2) 365A (1995): gross indecency in public or in private	(2) Maximum two years imprisonment or fine or both; higher penalty for offence with minor (<18)	
Maldives*	(1) Sharia Law penalises sexual acts between men and between women.	(1) For men: banishment for nine months to one year or a whipping of ten to 30 strokes; for women: house arrest for nine months to one year.	(1) Only same sex sexual acts (male & female).
	(2) =	(2) +	(2) FN

Sources: *ILGA (2011)*, *Human Rights Watch (HRW 2008)*, *Kirby (2007)*, *Narrain and Dutta (2006)*.

Notes:

|=| Terms of the law identical to the most common version (as cited above).

|+| Imprisonment up to ten years, may extend to life, also liable to fine.

FN Facially neutral, that is, the criminalisation applies equally to heterosexual and same-sex sexual acts.

* Two contradictory accounts. On the one hand *ILGA (2011)* states that 'the Penal Code of Maldives does not regulate sexual conduct.' On the other, a schedule in *Kirby (2007)* states that the Maldives Penal Code of 1960 has Sections 377 C, 377 D. Also the *Human Rights Watch (HRW 2008, p. 6)* states, 'In Asia and the Pacific, colonies and countries that inherited versions of that British law [377] were: Australia, Bangladesh, Bhutan, Brunei, Fiji, Hong Kong, India, Kiribati, Malaysia, Maldives ...' *Narrain and Dutta (2006)* are also of the view that Maldives inherited the same Section 377 as the rest of the region.

Notwithstanding the commonality of the numeral 377, practice and impact of this criminalisation has varied. In India for example, in absence of any other law, Section 377 has been used for prosecuting child sexual abuse. It has also been used as an instrument of human rights violations. More about its abusive practice follows.

1.1 Bangladesh

According to a newspaper report (*The Daily Star 2008*), law enforcement agencies in Bangladesh use Section 377 to harass the MSM. However in an interview to me a local gay activist, Tinku Ishtiaq offered a contradictory account (*Ishtiaq 2011*):

Even though 377 exist in the books it has never been used and I have not heard of it being used as a threat either. However, there are anti-vagrancy and some anti-prostitution laws which are used against *Hijras* [in South Asia, Hijras are neither man, nor woman. For brevity and

for present purposes, they can be understood as ‘transgender’]. Law enforcers in Bangladesh rarely prosecute people for violating laws, but use them as threats to coerce money.

In another interview, Joya (Sikder 2011) who self identifies as Hijra, shared with me her personal experiences – of arrest, custodial violence and abuse. Interestingly they have nothing directly to do with Section 377:

I still have this swelling on my right hand. I won’t be able to explain how much they beat us! They use their batons and sticks to full force, especially on us who are hijras in women’s clothes. They accuse us of all sorts of things, thievery, pickpocketing, etc.

I was arrested in 1999. There is this park near the Shahjalal international airport. There I was with all my make-up. I was having *chaat* and *paani puri* [street food], just like other people. Suddenly this policeman grabbed me by my hair and dragged me to the police van. They couldn’t decide what to do with me. So they just drove me around – for two hours. Then they took me to the police station.

Obviously by then I was pleading them, ‘let me go.’

They said ‘no, you bastard, if we let you go you will be back in the park again, and you will spread your disease.’

At the police station they took me to the cabin of second officer.

He didn’t know what to do with me. He yelled at the constable, ‘what have you brought ... why have you brought this *Thing* into my room? What are we going to do with this – *Thing?*’

‘She goes around the city selling her body.’

‘Okay, okay. Just throw her in the jail for a night.’

The next day I was sent to the court. While entering the court, I saw a huge queue of lawyers. One of them came to me.

‘If you accept you’re guilty, it will be a fine of 500 taka. Another 500 for me to do the work, so a total of 1000 taka’, he said.

That’s when I got to know about this Section 54.

Section 54 of the Criminal Procedure Code in Bangladesh is another colonial law that came into force in 1898. It is used as an instrument of violation against anyone, not just hijras or transgender persons. According to the US Department of State, ‘Section 54 of the Criminal Procedure Code and Section 86 of the DMP Ordinance provide for the detention of persons on the suspicion of criminal activity without an order from a magistrate or a warrant, and the government regularly arrest persons without formal charges or specific complaints’ (US Department of State 2005). The Bangladesh Legal Aid and Services Trust (BLAST) challenged Section 54 in the Supreme Court of Bangladesh High Court Division in 1998. They relied on several instances

of abusive exercise of power and violation of fundamental rights. The court in its judgment stated that ‘a good number of people died in the police custody after their arrest under Section 54’. It went on to say that ‘such tragic deaths are resulted [sic] due to sweeping and unhindered power given to a police officer under section 54 of the Code’ (*BLAST v Bangladesh* 2003, p. 9). The court recommended the Government to revise Section 54.

1.2 Sri Lanka

The criminalisation in Sri Lanka exists in the form of Sections 365A of the Penal Code. A local NGO, the Women’s Support Group (WSG) states:

Section 365A of the Penal Code (enacted in 1883) criminalises sexual activity between two adults of the same sex. In 1995 the government amended the word ‘males’ in the original text to ‘persons’, thereby criminalising sexual activity between women as well ... To date although there have been no convictions under this provision of the Penal Code, complaints have been received by police stations citing this provision.’ (WSG 2011, pp. 2–3).

Resonating with the account on Bangladesh (by Tinku Ishtiaq), Rosanna, executive director of EQUAL GROUND (an NGO in Sri Lanka), confirmed that Section 365A is not used (Flamer-Caldera 2011):

I mean legally there have been no cases, but they do pick up on the vagrancy law and other laws that they use to intimidate and harass. 365A allows the police for example to just grab you off the street and intimidate you into giving them sexual favours or money to keep it out of the courts.

She narrates an incident that illustrates the influence of criminalisation:

When we tried to advertise for the International Day Against Homophobia, the newspaper group we were advertising with – who had been very supportive the last three years, had even been giving us a thirty per cent discount – suddenly decided no. That they are not going to put our advertisement because it says homophobia and homosexual on it. Apparently their legal team said that it is illegal to ‘promote homosexuality’. Without actually knowing the meaning of 365A, they are using it to further marginalise and suppress LGBT voices.

Rosanna challenged the association of this law with homosexuals though.

Where does it say in this law that homosexuals are criminals? It does not. It just says ‘carnal intercourse against the order of nature’ – and that goes for heterosexual people too. So why is it that we [LGBT persons] are targeted? Is it because we ourselves have said, ‘yes we are being criminalised according to this law’ and making a big deal out of it?

According to Rosanna the barriers to LGBT persons are more cultural and social, for example forced heterosexual marriages, and the marginalisation that occurs at schools, in health services and in the workplace.

1.3 Pakistan

Summer (name changed on request) is Muslim, Pakistani and queer. She is a Lahore-based activist (on women's and queer issues), mixes in the queer scene, and is a member of the Organization for Protection & Propagation of Rights of Sexual Minorities or simply 'O'. Commenting on the criminalisation in Pakistan, Summer said:

It is my understanding that occasionally 377 is used as a threat against traditional communities of trans women, particularly sex workers. And also it is felt as a threat by gay men. (Anon. (a) 2011)

Farhan (name changed on request) is a young activist in Lahore who is also a member of 'O'. According to Farhan Section 377 is not used but there are cases of extreme sexual violence particularly against hijras (Anon. (b) 2011):

I have heard accounts of hijras who were gang raped and then offered to the police as thieves who then gang rape them again. The law is used to demean them and justify their rape. I do not know of any LGBT person having been convicted or sent to jail under Section 377, but the Section is in use in rape and child molestation cases.

Speaking of an actual attempt to apply Section 377 to consenting adults, Summer recalled the case of Shahzina and Shumail:

The Lahore High Court in bringing down the judgment for Shumail Raj and Shahzina Tariq attempted initially to use 377. Upon realising that it requires penetration, and there was no implement of penetration, which is to say there was no penis, since the court had declared they were both women, they could no longer employ 377. That is when they charged them with perjury. (Anon. (a) 2011)

The case of Shahzina and Shumail is described in greater detail in an interview elsewhere (Khan 2007). The brief facts of the case are as follows: Shumail, biologically a female, preferred to dress as a man. Shumail and Shahzina, both adults, got married of their free will, albeit as man and as woman. Unhappy with their wedding, Shahzina's father started harassing them. To stop this harassment Shahzina-Shumail sought an intervention from the court. They showed their marriage certificate. The judge told the father to stop harassing Shahzina-Shumail as they are legally married. This did not stop him. Still hopeful of pursuing their legal remedy, Shahzina-Shumail approached a higher court. The father told this court that his daughter had in fact married a woman. Medical reports confirmed Shumail's sex as female. The court wanted to know why Shumail should not be prosecuted under Section 377 – and for perjury. Section 377 was found not to apply, as pointed by Summer. They were prosecuted and convicted for perjury.

Another case surfaced more recently. According to a newspaper report (BBC News 2010), the police disrupted a wedding ceremony of two adults: Rani who is a *khusra* (local term in Pakistan for transgender person) and a

man, Malik Iqbal. The police arrested them along with their 45 guests. The First Instance Report (FIR) cited a number of provisions including Section 377 (Suhail 2010).

1.4 India

In India Section 377 has had a greater visibility, especially during the last two decades. More so with the Delhi High Court reading it down in 2009 – to decriminalise consensual sex between adults in private (*Naz Foundation v. NCT Delhi* 2009; hereafter *Naz* 2009). Prior to the decriminalisation though, Section 377 was understood very differently. An earlier study of Indian judgments (Narain 2004, p. 55) considered a total of 46 reported cases. Of these 30 cases (65 per cent) deal with child sexual abuse (by men), of which 20 involve boys and ten involve girls. The remaining 16 cases (that involved adults) do not lend themselves easily to an analysis of LGBT lives. The facts as recorded are not only scarce, they are couched in the same vagueness as the language of Section 377.

More contemporary readings of the case law have thrown light on the lives and struggles of individuals who were subjects of Section 377 – in a time when it was untouched by more modern understanding – of gender and sexuality. For example, a recent analysis of the court decision of 1934, which brings out the convict, Nowshirwan Irani as protagonist. According to the author, Nowshirwan stands for a ‘subaltern Oscar Wilde’ (Narain 2011). Readings as these are not only novel, they are crucial for restoring segments of lost history. Nowshirwan is even more relevant to this essay because of his geographical location in Sind. At the time Sind was part of pre-partition India (it is located in the present day Pakistan). Such cases are crucial for collating a legal history which will apply equally to the present day Pakistan and Bangladesh.

There are more contemporary accounts of human rights violations in India that demonstrate to greater detail the villainy of Section 377. A few of them are particularly well known, for example the police raid on an NGO in 2001 (Human Rights Watch 2002). There are many other instances that are now part of the Delhi High Court ruling (*Naz Foundation v NCT Delhi* 2009). There are also documentations elsewhere (PUCL 2001; PUCL 2003), hence not repeated here for brevity.

2. Human rights application

2.1 International human rights, an overview

The criminalisation has been a subject of judicial scrutiny in different jurisdictions. There is an entire body of case law, and what follows here is a bare listing. The European Court of Human Rights and the United Nations Human

Rights Committee have both held, in different cases, that the criminalisation is a violation of the right to privacy (*Dudgeon v United Kingdom* (1981); *Norris v Ireland* (1988); *Modinos v. Cyprus* (1993); *Toonen v Australia* (1994)). The US Supreme Court held the criminalisation to be in breach of personal liberty (*Lawrence v Texas* 2003). The Constitutional Court of South Africa ruled that such laws are in violation of the rights to privacy, equality, and human dignity (*National Coalition for Gay and Lesbian Equality v The Minister of Justice* 1999). The High Court of Fiji held the criminalisation to be unconstitutional (*McCoskar v The State* 2005). The most recent addition to this listing of judicial decriminalisations is the Delhi High Court ruling (*Naz Foundation v NCT Delhi* 2009) – more about that follows later in the essay.

The judicial scrutiny has not always yielded similar outcomes. In contrast to the list above, there are cases that have rejected the idea of decriminalisation. The Supreme Court of Zimbabwe, for example, rejected an application of the right to equality and chose to retain the criminalisation (*Banana v The State* 2000, cited in Quansah 2004, pp. 213–14). Also, the Court of Appeals in Botswana chose to retain the criminalisation on the grounds of public morality (*Utjiwa Kanane v The State*, 2003 cited in Quansah 2004 pp. 202–206). Judicial application of human rights on the subject is thus scattered and varied.

More recently a number of international initiatives have sought to apply human rights to this criminalisation. In response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia in 2006. The result was the Yogyakarta Principles: a guide to human rights and their application to sexual orientation and gender identity. Principle 6, the right to privacy, calls for the repeal of ‘all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent’ (Yogyakarta Principles 2006). There are also state initiatives that have international bearings. The British Foreign Office Minister Ian McCartney affirmed ‘Britain’s commitment to the universal decriminalisation of homosexuality’ (Morning Star 2007). Foreign and Commonwealth Office (FCO) of the UK has since had an ‘LGBT programme’ and an ‘LGBT toolkit’ (FCO n.d.). In 2008 a Core Group of States (Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway) presented a statement on behalf of 66 States in the UN General Assembly calling for an end to discrimination based on sexual orientation and gender identity (ARC International 2009). In 2010 the United Nations Committee on the Elimination of Discrimination Against Women adopted a General Recommendation that referred to sexual orientation (UN CEDAW 2010, para 18, p. 4). In 2011 the UN Human Rights Council passed a historic resolution on sexual orientation and gender identity and discriminatory laws and practices and acts of violence (UN OHCHR 2011). Application of human rights in this area internationally has thus widened and continues to grow.

2.2 Sri Lanka

Sri Lanka experienced the application of human rights differently. According to a study by the United Nations Development Programme (UNDP), during a conflict in the 1990s ‘it was pointed out that the wording of the existing “anti-homosexual” provision referred only to “man”, and that this was discriminatory. Therefore, the word “person” was used to replace “man”, resulting in legislation that now criminalises both men and women. In this way, the introduction of a bill – that aimed at decriminalising homosexual conduct between men – ultimately resulted in a widening of the scope of the original law’ (UNDP n.d.).

There is much to learn from this experience, but I do not know of any comprehensive documentation or analysis of it. In my interview with Rosanna (of EQUAL GROUND) she shed some light. It was an initiative by the Centre for Policy Alternatives (CPA), an NGO working on research and advocacy. Another NGO, Companions On a Journey (COJ) was also involved. Together they sought law reform from the Ministry of Justice, challenging Section 365A on the grounds of human rights, said Rosanna. She began her commentary by saying that she was not herself involved. At the time, she said, she was not even involved in any LGBT activism. I asked her how she felt about women being included within the folds on criminality. She said, ‘It’s ironic because the Government has never been conscious of gender balance in any shape or form – to say that law was gender biased was rather strange’ (Flamer-Caldera 2011).

Rosanna views this more as an action of the Government. It can also be seen as a reaction – to the process initiated by the CPA. I asked her if CPA consulted anyone. Only with COJ, she said. ‘And even COJ was very new at the time. This whole “gay community” was a new concept. The process came and went, nobody even noticed. When we started working in the area of gay rights we learnt about what had happened.’ Does she feel any resentment, I asked her. No, she said (Flamer-Caldera 2011).

Many questions remained unanswered. On what grounds exactly was Section 365A challenged? Was there any prior documentation of human rights violations? At whose behest was this process initiated? Was it affected persons themselves, for example LGBT? Should a civil society organisation or an NGO or a group of lawyers initiate such a process – without consulting those who are directly affected?

Some of these questions emerged also in the process that took place in India. Without referring to them directly the following section briefly describes the process.

2.3 India

There is much joy and hope pinned on the recent decriminalisation. In a historic moment on 2 July 2009, the Delhi High Court ‘read down’ Section

377 to decriminalise consensual sex between adults in private (*Naz* 2009).

The historic moment does not stand in isolation. It rests in part on the Constitutional guarantees and the case law in India. It rests in part on its predecessor judicial applications in Europe, North America, South Africa, and the United Nations Human Rights Committee. It rests in part on the personal courage and belief of community, organisations, groups, and individuals in India who began agitating over the issue two decades ago. More immediately it rests upon the eight years of litigation that began in 2001.

An NGO working on HIV/AIDS in Delhi, the Naz Foundation India, found that Section 377 was a hindrance to carrying out HIV/AIDS interventions – amidst MSM. Under the professional advice and supervision of another NGO, the Lawyers Collective, Naz Foundation filed a Public Interest Litigation (PIL) in the Delhi High Court, challenging the constitutional validity of Section 377. The challenge was mounted on the grounds that: (i) the law is arbitrary in its classification of natural and unnatural sex; and (ii) it causes a serious setback to HIV/AIDS outreach work amidst MSM, thus violating their right to life. The Government, through the Ministry of Home Affairs, took an adversarial position defending Section 377 on the grounds of public morality.

In its journey from 2001 to 2009, Naz PIL roamed the corridors of judiciary with an unpredictable future. It struck a dismal note in 2004 when it was dismissed on the ground that there was no real ‘cause of action’, that Naz had no *locus standi*, that the entire petition was an academic exercise. In an appeal (on the limited question of *locus standi*), the Supreme Court of India set aside this dismissal. The PIL was thus given a new lease of life in 2006 and sent back to the Delhi High Court for ‘consideration on merits’.

It faced opposition from the Government and also from some private organisations and individuals. Newly revived but still vulnerable, it was clear that if it was to stand ground it had to garner greater support. Voices Against 377, a Delhi based coalition of different organisations and groups filed a supporting intervention. This bolstered the argument for decriminalisation beyond the necessity of tackling HIV/AIDS. It demonstrated the investment of women’s rights groups, child rights groups and groups working on human rights, sexuality, and education.

The opposition from Government was divided and diluted when the National AIDS Control Organisation (NACO), under the Ministry of Health, filed an affidavit to the effect that Section 377 was indeed a hindrance to HIV/AIDS interventions. It was later to prove to be the most decisive disintegration of the opposition to decriminalisation. More about it will follow later in the essay.

The application of human rights in Pakistan and in Bangladesh needs to be understood in the context shared by the activists from there.

3. Beyond legality

3.1 Society, family and religion

Tinku Ishtiaq, a gay activist shared his understanding of the situation in Bangladesh:

The only recognition of LGBT people is the existence of the small but visible Hijra community. Consequently the majority of Bangladeshis associate homosexuality with Hijras and reserve their scorn for this community. Very few people have come out in Bangladesh and the reaction to their coming out has been mixed. Some, like myself, have been grudgingly accepted by some relatives and straight friends while ignored by others. There has been no visible hostility from anyone. Some other people who have come out have been ostracised by their families and many have been driven to marrying the opposite sex through the general societal and familial approbation. Once married, they are rehabilitated, even though most married gay men continue to have clandestine sexual liaisons with other men/boys. I have rarely heard about violence against gay men who had come out in some way. Since the major barrier is societal, not legal, the process to tackle it would be to address the issues socially (Ishtiaq 2011).

Summer, a Lahore based activist, shared her understanding of the situation in Pakistan:

People are scared of the families more than anything else. Family pressure and duress is there for many many things. It is there for men, it is there for women, it is there for trans-women. Religion is a big issue, and a sort of self hatred as a result of that. So there is family duress and there is religion, the two of them also intertwine and do a little dance of evil on your head – because the family invokes religion and then once God is invoked you cannot go anywhere (Anon. (a) 2011).

Tinku Ishtiaq and Summer point to the role of society, family and religion. According to them it bears greater influence than the law.

3.2 Rule of law, a grounded perspective

An obscure piece of legislation like Section 377 may be lying unnoticed. People who would have been affected by it may be blissfully unaware. A process or an initiative that draws attention to it would be then like waking up sleeping dogs or bringing home the ‘absent drunkard father.’ In the words of Summer again:

I don't think that in Pakistan changing the law has a great deal of effect. There is no rule of law. Law is academic most of the time. It doesn't do anything for us – one way or the other. It is the absent drunkard father who comes home once in a while, smacks us around and then off to drink again. Right now what the kids want is ‘daddy don't come home’.

We get criticised even for having an organization [O], for even having any kind of public events – because what we are told is, ‘let sleeping dogs lie, everybody is living their lives quietly. What is your problem?’ (Anon. (a) 2011)

The invocation of absent drunken father and sleeping dogs is not a measure of Summer’s personal fears or an overly fertile imagination. It is not far-fetched to imagine erratic outcomes of legal interventions. Consider what happened in Sri Lanka for example. As already discussed, a legal process aimed at decriminalisation ultimately resulted in widening of its scope (UNDP n.d. p 19). More recently the Parliament in Malawi went about a similar exercise that brought women within the folds of criminalisation. According to the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), ‘In December 2010, the Parliament passed a bill amending the Penal Code of Malawi. In late January 2011, President Bingu Wa Mutharika assented to the bill, thus completing its enactment into law. The new Section 137A, captioned “Indecent practices between females,” provides that any female person who, whether in public or private, commits “any act of gross indecency with another female” shall be guilty of an offence and liable to a prison term of five years’ (ILGA 2011, p 26).

3.3 Legal intervention, what if

If an attempt is made to address this criminalisation through a legal intervention, what would be its impact? I posed this question to my interviewees from Pakistan and Bangladesh.

Summer rejected the idea of any legal intervention in Pakistan. She feared for those who are or will be directly affected:

Queer people who could, would flee. Those who couldn’t, would come under scrutiny in ways that they were not before. If an attempt was made to decriminalise it means an attempt would be made to remove or make ineffective a law that nobody uses. It would only have a detrimental effect because the problem isn’t that the law doesn’t accept, the problem is that the society overwhelmingly rejects any and all homosexuality (Anon. (a) 2011).

Another Lahore based activist, Farhan feared violent backlash. According to him:

There will be a huge backlash and it will be violent particularly to the people who are working to decriminalise 377 and the people who wear their sexuality on their sleeves. Hijras, Zenannas, Khwajasara, MSM and others such will be an unfair target (Anon. (b) 2011).

Summer also feared that it will end up informing the law enforcement authorities of ways in which harassment can be meted out legally:

A law that is there, but does not get employed often, will be remembered suddenly, to fight any kind of queer activism. The way in which it was

attempted to be used in the Shazina-Shumail case. (Anon. (a) 2011)

Pointing to political volatility in Pakistan – that witnessed frequent and extreme forms of violence – Farhan spoke of the killing of Salman Taseer, a champion of minority rights:

The current turmoil that Pakistan is going through it is very difficult to even raise a voice or hint on such issues. The recent barriers faced by Christians and other religious minorities (on Section 153A and the shooting of ex-governor of Punjab Salman Taseer) gave me a huge reality check of not just the situation but also the mind-set of the people around me. (Anon. (b) 2011)

The killing sent strong signals to all sections of society, not just those supporting religious minorities. It reinforced the sense of fear and vulnerability to all those who are at odds with the dominant religious view.

Tinku Ishtiaq, a gay activist echoed similar fears – of a backlash in Bangladesh:

If there are attempts at decriminalisation now, there is likely to be a backlash. There could be violence against the gay community particularly against hijras and those who are perceived as effeminate men or masculine women. The violence or other overt forms of discrimination could be used against other people who are openly out. (Ishtiaq 2011)

Like Summer in Pakistan, Tinku rejected the idea of any legal intervention:

Personally, I would oppose decriminalisation attempts at present as it has the potential of bringing great danger to the LGBT community, which lacks recourse to any support systems. (Ishtiaq 2011)

Activists both in Pakistan and in Bangladesh thus rejected the idea of legal intervention. According to them the problem is social, not legal. A legal intervention is neither necessary nor desirable.

What then could be the way forward, if any? Drawing on lessons from a campaign in another sphere, Summer attempted a response:

I can imagine an engagement of Islamic discourse that will lead to some kind of Islamic decriminalisation, or in reducing of the thing. That is what happened with the rape law. I do not know the details, basically it used to be that if rape is not proved, the woman was automatically liable for fornication. There was a campaign as a run up to the Women's Protection Bill, which aimed to separate rape from fornication. There was a television programme called 'Zara Sochiye' – which means 'just think about it'. It put the question about legality of the rape law requiring four witnesses, in Islamic terms: Is it Islamically legal to do this? The programme lasted several weeks, that did a lot for generating public opinion. People were interested, people would watch and talk about it. Following the logic of the Quran – that they knew and they understood – it was apparent that this is a nonsensical and utterly unjust law. The law has now been changed: rape is rape, fornication

is fornication. If rape is not proved, the woman is no longer charged with fornication.

Now I can see a campaign that works like that may have some effect. Except that while there was widespread agreement within large sections of society that rape law is cruel, against human rights, and against Islam; there is a very narrow, sliver of the same society that believes that homosexuality may not be a sin. And that is because a very clear verse in the Quran which says: 'you lie with men when you should lie with women, you commit an abomination'. It has a context, there's a whole story behind it, but Quran is not read comprehensively. It is read often as a series of discrete sentences. If one sentence says something, it is very uncommon to look at the sentence before and the sentence after. (Anon. (a) 2011)

4. Decriminalisation

Is a legal intervention for decriminalisation right now unnecessary and undesirable?

Both Tinku Ishtiaq (from Bangladesh) and Farhan (from Pakistan) brought out in particular the vulnerability of hijras as a set of people who will bear the brunt of any backlash. Interestingly, Joya Sikder, herself a hijra, did not express the same fears. She expressed an unequivocal support:

It [the criminalisation] is quite invisible, it poses minimum risk, but I would do anything to get rid of it. No arrests have been made so far, but the sheer existence of this law poses a risk for us. Sex should be a matter of one's own discretion. I am an adult, I can make my own decisions. Who is proposing to me, and I am proposing to whom; boys proposing to me, or girls proposing to me; that is not the main thing. I can love anyone. Whether I am having anal sex or oral sex, it is not about that. Why should others, someone from outside, even look into it? It is a private matter.

On this ground alone, so aptly articulated by Joya, the criminalisation must be tackled.

Also, the impact of criminalisation is seen not only in the number of prosecutions and the convictions that follow (Goodman 2001). They may well be none. The impact of the criminalisation can be assessed in so many other areas. For example, the attempt to use it in cases of consensual relationships such as Shahzina-Shumail, or in FIRs as in the case of Rani and Malik Iqbal; or the threat to use it for extracting money or to force sex, or the mere perception of criminality as in the case of a newspaper refusing to publish EQUAL GROUND's advertisement.

There are cases from other jurisdictions that have challenged the criminalisation successfully even though it was not being used. For example, Norris complained to the European Court of Human Rights about a law that

criminalised male homosexual activity (*Norris v. Ireland* 1988). According to him he was liable under the law for his homosexual conduct, and that he suffered, and continued to suffer, unjustified interference with his right to respect for private life. The court held that the law indeed interfered with Norris' right under Article 8 of the European Convention on Human Rights. The decision of the court effectively expanded the definition of 'victim' – Norris had not been subjected to a police investigation and yet his case was admitted.

Another case that challenged the criminalisation in the European Court came a few years after (*Modinos v. Cyprus* 1993). As in South Asia, the criminalisation in Cyprus was framed during the country's colonial occupation and hence predated the Constitution of Cyprus. Modinos complained that 'the prohibition on male homosexual activity constituted a continuing interference with his right to respect for private life'. Like Norris, Modinos was never subjected to any police investigation. And further the attorney general of Cyprus had declared an explicit policy *not* to initiate prosecution. The court held that the policy of non-prosecution provided no guarantee that action will not be taken by a future attorney general. Therefore the criminalisation continuously and directly affected the private life of Modinos.

4.1 India

Closer to home, within the region, the criminalisation was successfully challenged in India (*Naz* 2009). It expanded the contours of human rights beyond *Norris* (1988) and *Modinos* (1993). The Delhi High Court decision did not rely on privacy alone. It brought into the spotlight privacy in the right to human dignity. Sex is not a dirty thing that people ought to be simply left alone with: it is something that people derive their personhood from; the core of their being is vested in their sexuality. A violation of that zone of privacy is therefore also a violation of human dignity. In this way the rights to human dignity and privacy were read together under Article 21 of the Constitution (the right to life and personal liberty).

As part of argument under Article 21 an area the decision tackled was 'public morality'. The question was: is there a 'compelling state interest' in retaining the criminalisation for the sake of public morality? In response the decision invoked the idea of 'constitutional morality':

[P]opular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality. (*Naz* 2009, para 79)

Ruling also on the right to equality, the High Court declared Section 377

as arbitrary and hence violating Article 14. It held that the discrimination caused to MSM and gay community was unfair and unreasonable (*Naz* 2009, para 82). Although neutral on the face of it, the criminalisation discriminated indirectly. The High Court decision made a new and useful interpretation of Article 15 (on prohibition of discrimination) – for the first time in India, sexual orientation was considered a ground analogous to sex (*Naz* 2009, para 85).

In arriving at its decision the court relied on a range of material: case law, both Indian and foreign; international conventions and understandings on human rights; UN declarations and conferences on HIV/AIDS; and prior statements of validation from the Government of India. The decision is located primarily on the Constitution and a number of precedents from the Supreme Court of India.² It also borrowed from cases from elsewhere in the world.³ It referred to the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic Social and Cultural Rights (ICESCR), and the European Convention on Human Rights (ECHR). It referred to the Yogyakarta Principles and borrowed the definitions of sexual orientation and gender identity from there (*Naz* 2009, para 43 p. 36). It also acknowledged the statement presented in the UN General Assembly (*Naz* 2009, para 59 p. 49). It referred to the written works of Edwin Cameron, Michael Kirby, Ryan Goodman, and Dilip D'Souza. It relied on the Constituent Assembly debates and quoted Dr B.R. Ambedkar – on 'constitutional morality'. Politically astute, the decision also cited prior statements of validation by the prime minister of India, Manmohan Singh, and the health minister Ramadoss. And finally, in its conclusion, the decision invoked the first prime minister of independent India, Pandit Jawaharlal Nehru:

If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in

- 2 Landmark decisions such as *Maneka Gandhi v Union of India* (1978), *Kharak Singh v State of U.P.* (1964), *Gobind v State of Madhya Pradesh* (1975), *Raj Gopal v State of Tamil Nadu* (1994), *District Registrar, Hyderabad v Canara Bank* (2005), *PUCL v Union of India* (1997), *Budhan Choudhary v State of Bihar* (1955), *Indra Sawhney* (1992), *Francis Mullin v Union of India* (2006), and *Khet Mazdoor Samity v State of West Bengal* (1996).
- 3 Landmark decisions such as *Egan v Canada* (1995), *Law v Canada* (1999), *Olmstead v United States* (1928), *Griswold v State of Connecticut* (1965), *Eisentadt v Baird* (1972), *Jane Roe v Wade* (1973), *Bowers v Hardwick* (dissent, 1986), *National Coalition for Gay and Lesbian Equality v The Minister of Justice* (1998), *Dudgeon v United Kingdom* (1981), *Norris v Republic of Ireland* (1988), *Modinos v Cyprus* (1993), *Toonen v Australia* (1994), *Lawrence v Texas* (2003), *Romer v Evans* (US 1996), *Vriend v Alberta* (Canada 1998), *Leung T.C. William Roy v Secy for Justice* (2006), *Dhirendra Nandan & Another v State* (2005), and the Nepali Supreme Court decision of 2007.

Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised. (Naz 2009, para 130, p. 104)

4.2 Bangladesh

The reverberations of the Delhi High Court decision were heard far and wide. Reflecting on the impact in Bangladesh, Joya Sikder said:

The day when 377 was decriminalised in India, that very day we called an urgent meeting here [in Bangladesh]. Immediately we got down to serious talks. We were very happy and at the same time we were amazed that, 'look our strong neighbour has done this. What should we do?' (Sikder 2011)

This eagerness on the part of Joya called for closer examination. I found it intriguing that someone who has never been directly affected by the criminalisation should be so eager to get rid of it. I asked Joya when and how she first found out about Section 377. She said:

This was much later, much after 1999. When I had joined the NGO sector for work. There was this funny song [in Bangla] that grew popular in the hijra community. Its lyrics [in English] are something to this effect: 'here here, look at us, look at us, we are the beauties, we are the beauties, men in women's clothes, this is what we enjoy, but 377 is our destroyer.' I listened to this song and I grew curious about 377. That's when I found out. Someone from Bandhu had written the song. It was carried on by this organization called Shilpi Sangha, they made it very popular – in tune and all that. (Sikder 2011)

The trail from Joya pointed in the direction of Bandhu, an NGO working on HIV/AIDS in Bangladesh. Bandhu had produced not just the song that caught the attention of Joya, it had a number of in-house publications that refer to Section 377. The annual report of 2009 had information about a meeting that followed soon after the decriminalisation in India. It stated:

[I]n less than a week after the Delhi High Court decision, there was a meeting in Bangladesh, on 7 July 2009, presided over by the head of a Delhi based NGO, Partners in Law and Development (PLD). Another meeting followed a few months after, on 24 November 2009, where a staff member from the Lawyers Collective presented on 377, describing the process of decriminalisation and explaining the decision. (Bandhu Social Welfare Society 2009a, p. 18–20)

The trail that began with Joya offered a snapshot view of the ongoing decriminalisation process in Bangladesh. It showed that HIV/AIDS NGOs like Bandhu are invested in decriminalisation for more than a decade now (see also Bandhu Social Welfare Society 2009b). It illustrated the reverberations of

the Delhi High Court decision. And it also showed the involvement of Indian NGOs, namely the Lawyers Collective and the PLD.

4.3 Sri Lanka

NGOs are at the forefront of decriminalisation processes in the region. There are a mix of decriminalisation initiatives in Sri Lanka, for example, that are led by NGOs working on human rights, HIV/AIDS, LGBT and women's rights.

The role of the Centre for Policy Alternatives (CPA) in Sri Lanka is mentioned earlier in this essay. The CPA website carried more information on the organisation's initiatives. In a section on 'past projects and programmes', the website listed a document titled, 'A Case for Decriminalisation of Homosexuality in Sri Lanka'. The document was compiled in 1999 with the assistance of Companions on a Journey. It attempted to make a case for the repeal of Section 365A (Centre for Policy Alternatives n.d.). Another document on the CPA website linked the criminalisation with HIV/AIDS:

There are several discriminatory laws not specific to HIV/AIDS that undermine efforts to control the spread of the virus. The Penal Code of Sri Lanka (Amendment Act No. 29 of 1998, Section 365A) continues the 'criminalisation of homosexuality, carnal intercourse against the order of nature and acts of gross indecency'. Penal sanctions against such acts when committed by consenting adults in private cannot be considered reasonable or just in a liberal society. These laws also undermine programs aimed at the prevention of HIV/AIDS and other STIs since they drive marginalised people further underground. (Centre for Policy Alternatives 2007, p. 9)

The Women's Support Group (WSG) called for the repeal of Section 365A (WSG 2011, p. 10). The CEDAW Committee's Concluding observations on Sri Lanka, dated 4 February 2011, urged the Government to 'decriminalize sexual relationships between consenting adults of same sex' (UN CEDAW 2011, para 25, p. 5).

Rosanna, executive director of EQUAL, wondered about challenging the criminalisation at the United Nations Human Rights Committee (UNHRC) – as it was done in the case of *Toonen v Australia* (1994). 'But who is there to actually take on that challenge?' she said. 'We are looking for that bright young person to come and give us a boost' (Flamer-Caldera 2011).

Rosanna elaborated her organisational strategy in broad terms:

Our organisational strategy is to gain the understanding and the support of the masses. Even if 365A changes today, even if it is overturned today and put aside, the attitudes and the perceptions of the people in general about homosexuality, that is not going to change overnight. In order for us to live a life that is equal and [a life] with freedom and dignity, we need to have a lot of people thinking 'this is okay' (Flamer-Caldera 2011).

Indeed a decriminalisation initiative involves more than a legal intervention. It must be vigilant of socio-political circumstances and take a multipronged approach. This is echoed in the following section too, on Pakistan.

4.4 Pakistan

From amidst my set of interviewees the strongest opposition to the idea of decriminalisation came from Pakistanis. Some of these arguments are presented in the preceding part 3. In the course of my interviews I found the interviewees shifted their positions sometimes. This shifting was not a measure of their inconsistency. Rather it showed their self-reflection and reasoning. As I found in the case of Summer, who initially rejected decriminalisation, as the interview progressed she was more open to the idea. She said:

Any strategy to empower and free queer people has to have law as only one – and only one prong – and one of many prongs. So it cannot be the central thing. I am not against decriminalisation, I am against decriminalisation as campaign now. Decriminalisation in ten years, you want to have a ten years strategy, okay. You want to have a two years strategy, no.

This multi-pronged and long-term approach envisaged by Summer must address family, community, religion and patriarchy. She said:

I cannot imagine bringing any kind of decriminalisation campaign without first laying a whole lot of ground work that builds support within family structures, and community structures – when I say community I mean kinship communities and networks. A thorough and multifaceted engagement with Islam and a thorough and multifaceted engagement with patriarchal institution of the family, without doing those two things decriminalisation is – it would mean bringing about crisis. (Anon. (a) 2011)

Summer pitched the tackling of patriarchy and Islam as necessary pre-conditions for a decriminalisation initiative. The brief moment of her favourable positioning appeared to have passed. She placed rather tough conditions on a venture that has not even begun.

Summer showed a glimmer of hope at another point in the interview – when she spoke of the Delhi High Court decision (*Naz* 2009) and its influence in Pakistan. She said:

I think it has brought queerness to the fore in way that it was never before. It is brown people saying that gay people are okay. And you know, the newspapers – in English and Urdu – published photos in which I recognized my friends! (Anon. (a) 2011)

The Delhi High Court decision appeared to have sparked a rivalry only too familiar between the two countries, a rare instance where the rivalry played out in a good way: the judiciary in Pakistan appeared keen to outdo its Indian counterpart. This might have been speculation or wishful thinking on Summer's

part (and my own), but it was worth considering. In an unprecedented move the Supreme Court in Islamabad ordered that trans people should receive equal protection and support from the government (PinkNews 2009). Summer connected this to the Delhi High Court decision. She said, 'I think the timing of that was very much because of the Delhi decision, it was just within a month' (Anon. (a) 2011).

As such there is no decriminalisation initiative currently in sight in Pakistan.

5. Conclusion

I had made two amends when I began this essay. I narrowed the scope of my earlier research and I expanded my methods (to include interviews). The scope still proved too vast. I could barely describe the decriminalisation in South Asia. The expansion of research methods proved useful. It allowed me crucial insights into socio-political aspects. It need not be secondary to legal material though. I found it essential. I would have liked to offer more analysis but I ran out of both time and the word limit prescribed for this essay. My concluding thoughts therefore are preliminary and provisional.

While Section 377 is said to be of no direct impact in Bangladesh, Joya is eager to heckle this 'sleeping dog'. As a hijra she is more visible than her LGBT associates, and hence more susceptible. She is more likely to bear the brunt of backlash. In Pakistan, Summer likened the law to an 'absent drunkard father'. It was comic and worrying at the same time. It summed up her fear of legal intervention, in the near future, or ever, without simultaneous tackling of society, family, and religion. Thus perched precariously between an absent drunkard father and the proverbial sleeping dogs, the decriminalisation in India has unwittingly nudged its neighbours on either side.

South Asia is passing through a unique moment in the history of this criminalisation. An understanding of the law and related socio-political aspects can make the most of it.

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