10

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

Sumit Baudh

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 to 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 have an impact on 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 worthwhile. This chapter focuses on the Commonwealth countries of South Asia. In this category, Bangladesh, India, the Maldives, Pakistan and Sri Lanka are subject to 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 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.

Chapter 10, pp. 287–311 of Corinne Lennox & Matthew Waites (eds.) (2013) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (London: School of Advanced Study, University of London).

In this chapter criminalisation in the South Asian Commonwealth is explored, drawing upon application of human rights, paying close attention to issues beyond the law and exploring the potential of decriminalisation. 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; and part 4 explores the potential of decriminalisation.

Methods

This survey moves on from my working paper of five years ago (Baudh 2008). Having taken more of a legal-research approach then, it became clear the region studied was too large and there was insufficient legal material on the subject. The scope of this chapter is limited to South Asia and research methods were expanded to include interviews.

It relies 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 the Protection and Propagation of Rights of Sexual Minorities, or simply O, in Pakistan (who requested anonymity).

All interviewees gave informed consent to be quoted in this chapter and were given the opportunity to be anonymous. Names were changed and data anonymised where requested.

The criteria for inclusion in the group of interviewees was geographical location and practical experience. I interviewed those located in South Asia who have practical experience of criminalisation – either through having been directly subjected to it or of having engaged with it as an activist. My long-time involvement with this subject includes voluntary involvement with the Voices Against 377 (2004 onwards), my association with the South and Southeast Asia Resource Centre on Sexuality (2006–9) and membership of the Task Force for setting up 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, based on a checklist of questions, took place between April and September 2011, three in person, two via email and one on Skype. Copies of all written correspondence, audio recordings and transcriptions were kept and quotes selected from them which form significant portions of this essay.

Perspectives from the Maldives are missing since I am unaware of anyone who may have insights into the subject, or of any literature on criminalisation in that country – though I would welcome it.

No financial support was provided for this research. It relies on random opportunities, for example my visit to Dhaka in April 2011,[1] where I conducted some of the 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, nor given any. The work is independent, its biases my own. I dedicate it to my mother, Vidyawati. True to her name, she has always been my teacher.

1. Criminalisation

Covering the nature and abuse of criminalisation, this section 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 on a few extra days at my own cost to conduct interviews for this chapter.

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. ILGA (2011) states that 'the Penal Code of Maldives does not regulate sexual conduct.' But a schedule in Kirby (2007) states that the Maldives Penal Code of 1960 has Sections 377 C, 377 D. Also 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 the 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 the 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 one of my interviews a local gay activist, Tinku Ishtiaq, offered a contradictory account (Ishtiaq 2011):

> Even though 377 exists 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 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 judgment stated that 'a good number of people died in the police custody after their arrest under Section 54'. It continued, '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 that the Government revise Section 54.

1.2 Sri Lanka

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.

However, Rosanna challenged the association of this law with homosexuals.

> 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 in schools, health services and 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 and Propagation of Rights of Sexual Minorities (or simply 'O'). Commenting on 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 and 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: Shumail, biologically a female, preferred to dress as a man. Shumail and Shahzina, both adults, got married of their own free will, albeit as a man and as a woman. Unhappy with their wedding, Shahzina's father started harassing them. To stop this Shahzina-Shumail sought an intervention from the court and showed their marriage certificate. The judge told the father to stop harassing Shahzina-Shumail as they were 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 out 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 the 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 been more visible, especially during the last two decades. And this was even more the case following the Delhi High Court's 'reading it down' in 2009 – to decriminalise consensual sex between adults in private (*Naz Foundation v. NCT Delhi* 2009; hereafter *Naz* 2009) (Lennox and Waites, 'Introduction', this volume). Prior to decriminalisation, though, Section 377 was understood very differently. An earlier study of Indian judgments (Narrain 2004, p. 55) considered a total of 46 reported cases. Of these, 30 cases (65 per cent) dealt with child sexual abuse (by men), of which 20 involve boys and ten involve girls. The remaining 16 cases (involving adults) do not lend themselves easily to an analysis of LGBT lives. The recorded facts are not only scarce, but 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, with the convict, Nowshirwan Irani, as protagonist. According to the author, Nowshirwan stands for a 'subaltern Oscar Wilde' (Narrain 2011). Readings such as these are not only novel, they are crucial for restoring segments of lost history. Nowshirwan is even more relevant to this chapter because of his geographical location in Sind, which at the time was part of pre-partition India (it is located in present-day Pakistan). Such cases are crucial for collating a legal history which will apply equally to present-day Pakistan and Bangladesh.

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

2. Human rights application

2.1 International human rights, an overview

Criminalisation has been subject to judicial scrutiny in different jurisdictions. Out of the entire body of case law, the bare bones are outlined here. The European Court of Human Rights and the United Nations Human Rights

Committee (UNHRC) have both held, in different cases, that 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 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* 2009) to be outlined later in the chapter.

The judicial scrutiny has not always yielded similar outcomes. In contrast to the list above, some cases 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 criminalisation (*Banana v. The State* 2000, cited in Quansah 2004, pp. 213–14). Also, the Court of Appeals in Botswana chose to retain criminalisation on the grounds of public morality (*Utjiwa Kanane v. The State*, 2003, cited in Quansah 2004 pp. 202–6). 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, resulting in 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 with 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 a lack of comprehensive documentation or analysis of it. In her interview, Rosanna (of EQUAL GROUND) shed some light, that 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 was not involved herself and at the time was not taking part in any LGBT activism at all. Asked how she felt about women being included in the criminality fold, 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 viewed this more as a Government action. It can also be seen as a reaction – to the process initiated by the CPA. Asked if the CPA consulted anyone, she said, 'Only with COJ, 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? 'No', she replied (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 individuals? 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 also emerged in the process that took place in India. Without referring to them directly, that process is briefly described in the following section.

2.3 India

Much joy and hope is pinned on recent decriminalisation measures. 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).

That historic moment does not stand in isolation. It rests in part on constitutional guarantees and Indian case law. It rests in part on its preceding judicial applications in Europe, North America, South Africa and the UNHRC. 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.

The Naz Foundation India, an NGO working on HIV/AIDS in Delhi, 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, the 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 to defend Section 377 on the grounds of 'public morality'.

In its journey from 2001 to 2009, when Naz PIL roamed the judicial corridors, its fate was unpredictable. A disheartening note was struck 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.

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 proved to be the most decisive disintegration of the opposition to decriminalisation. This will be expanded upon later in the chapter (see also Narrain 2004; 2011).

Meanwhile, the application of human rights in Pakistan and in Bangladesh needs to be understood in the context shared by activists in those countries.

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 then be like waking up sleeping dogs or bringing home the 'absent drunkard father'. Again quoting Summer:

> 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 its scope (UNDP n.d., p. 9). More recently, the Parliament in Malawi carried out 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? This was one of the questions I posed to interviewees from Pakistan and Bangladesh.

Summer rejected the idea of any legal intervention in Pakistan, fearing 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).

Farhan, another Lahore-based activist, feared a 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 – which witnessed frequent and extreme forms of violence – Farhan spoke of the killing of Salman Taseer, a champion of minority rights:

> [With] 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 felt by 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 in both Pakistan and Bangladesh thus rejected the idea of legal intervention. According to them the problem is social, not legal and such an 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 of 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, but 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, criminalisation must be tackled.

Also, the impact of criminalisation is not limited to the number of prosecutions and convictions that follow (Goodman 2001). There may well be none. The impact of 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.

Cases from other jurisdictions have challenged criminalisation successfully, even when 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, since he was liable under the law for his homosexual conduct, he suffered, and continued to suffer, unjustified interference with his right to respect in his private life. The court held that the law indeed interfered with Norris's 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 criminalisation in the European Court followed a few years later (*Modinos v. Cyprus* 1993). As in South Asia, 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 would not be taken by a future attorney general. Therefore, criminalisation continuously and directly affected the private life of Modinos.

4.1 India

Criminalisation was successfully challenged in India (*Naz* 2009), expanding 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 context of 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. The rights to human dignity and privacy were read together and combined under Article 21 of the Constitution (the right to life and personal liberty).

As part of the argument under Article 21, the decision tackled the area of 'public morality'. The question was: is there a 'compelling state interest' in retaining 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 the 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 in the Constitution and a number of precedents from the Supreme Court of India.[2] It also borrowed from cases worldwide[3] and 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 also referred to the Yogyakarta Principles, from which it borrowed the definitions of sexual orientation and gender identity (*Naz* 2009, para. 43, p. 36). The decision also acknowledged the statement presented in the UN General Assembly (*Naz* 2009, para. 59, p. 49), referred to the written works of Edwin Cameron, Michael Kirby, Ryan Goodman and Dilip D'Souza, and relied on the Constituent Assembly debates, while quoting 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 an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that

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, Hydrabad 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. Baired* (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 and Another v. State* (2005) and the Nepali Supreme Court decision of 2007.

> 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)

Joya's eagerness called for closer examination. Finding it intriguing that someone who has never been directly affected by 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 organisation 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 gave details about a meeting that followed soon after 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, pp. 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 have 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 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. In Sri Lanka, for example, a mix of decriminalisation initiatives 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 has already been mentioned and more information is available on its website. A section on 'past projects and programmes' includes a document entitled, 'A case for decriminalisation of homosexuality in Sri Lanka'. 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 linked 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 EQUALGROUND, considered challenging criminalisation at the UNHRC – as happened 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 expanded on 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 [one] 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 keep a close eye on socio-political circumstances and take a multipronged approach. This is echoed in the case of Pakistan, outlined in the following section.

4.4 Pakistan

Within my set of interviewees the strongest opposition to the idea of decriminalisation came from Pakistanis. Some of these arguments are presented in Part 3. During the interviews I found the interviewees sometimes shifted their stance. This was not a measure of their inconsistency, rather, it demonstrated their self-reflection and reasoning. Summer for example, initially rejected decriminalisation but became more open to the idea as the interview progressed. 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. Her brief moment of approval appeared to have passed – she placed rather tough conditions on a venture that had 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). Connecting this to the Delhi High Court decision, Summer said, 'I think the timing of

that was very much because of the Delhi decision, it was just within a month' (Anon. (a) 2011).

No decriminalisation initiative is currently on the horizon for Pakistan.

5. Conclusion

For this chapter I narrowed the scope of my earlier research and expanded my methods to include interviews. Even so, the scope proved too vast and it was only possible to scratch the surface of decriminalisation in South Asia. However, the expansion of research methods proved useful, since it allowed crucial insights into socio-political aspects to be introduced. These findings should not be regarded as secondary to legal material, however – I found them essential. It would have been preferable to offer more analysis but time and the word-limit ran out. My concluding thoughts are therefore 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 and more likely to bear the brunt of a backlash. In Pakistan, Summer likened the law to an 'absent drunkard father', a statement both 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, decriminalisation in India has unwittingly nudged its neighbours on either side.

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

Bibliography

Anon. (a) (2011) Interviewed by S. Baudh, Dhaka, Bangladesh, 8 April.

Anon. (b) (2011) Interviewed by S. Baudh, [Email] Lahore, Pakistan/New Delhi, India, 10 May.

ARC International (2009) 'World Congress on Human Rights, Sexual Orientation, and Gender Identity' [Note circulated at the congress] Paris, 15 May.

Bandhu Social Welfare Society (2009a) *Annual Report 2009* (Dhaka: Bandhu).

— (2009b) *The Fourth Consultation Meeting on Policy and Advocacy – A right to live in dignity, social justice and wellbeing: MSM in Bangladesh*. Rajendrapur, Gazipur, Bangladesh, 8–10 Nov. 2008 (Dhaka: Bandhu).

Baudh, S. (2008) *Working Paper: Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, New Delhi: South and Southeast Asia*, The South and Southeast Asia Resource Center on

Sexuality, available at http://tarshi.net/downloads/Working_ Paper_ Sbaudh_16M08.pdf (accessed 14 Jan. 2013).
BBC News (2010) 'Pakistan "eunuch wedding" is stopped by police', 26 May, available at www.bbc.co.uk/news/10166519 (accessed 14 Jan. 2013).
Bhuiyan, R. (2011) Interviewed by Baudh S. Dhaka, Bangladesh, 11 April.
Centre for Policy Alternatives (CPA) (n.d.) *Governance*, available at http://cpalanka.org/governance/ (accessed 14 Jan. 2013).
Centre for Policy Alternatives (CPA) (2007) *HIV/AIDS in Sri Lanka: A Profile on Policy and Practice*, available at www.hivpolicy.org/Library/HPP001560.pdf (accessed 14 Jan. 2013).
Dave, N. (2011) 'Ordering justice, fixing dreams', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 25–42.
Fernando, M. (2008) 'Vagrant voices', *Himal Southasian* 21 (3), p. 37, available at www.himalmag.com/component/content/article/1010–vagrant-voices.html (accessed 14 Jan. 2013).
Flamer-Caldera, R. (2011) Interviewed by S. Baudh, [Skype] Colombo, Sri Lanka/New Delhi, India, 28 Sep.
Foreign and Commonwealth Office (FCO) (n.d.) *Global Issues, Human Rights, Equality and Non-discrimination, LGBT Rights*, available at www.fco.gov.uk/en/global-issues/human-rights/equality/lgbt-rights/ (accessed 14 Jan. 2013).
Goodman, R. (2001) 'Beyond the enforcement principle: sodomy laws, social norms, and social panoptics', *California Law Review*, 89 (3), pp. 643–737.
Human Rights Watch (2008) *This Alien Legacy*, available at www.hrw.org/sites/default/files/reports/lgbt1208webwcover.pdf (accessed 14 Jan. 2013).
— (2002) *Epidemic of Abuse – Police Harassment of HIV/AIDS Outreach Workers in India*, available at www.unhcr.org/refworld/docid/3d4fc51f4.html (accessed 14 Jan. 2013).
International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (2011) *State-sponsored Homophobia – A World Survey of Laws Prohibiting Same-sex Activity Between Consenting Adults*, available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed 6 Dec. 2011).
Ishtiaq, T. (2011) Interviewed by S. Baudh, [email] Dhaka, Bangladesh/New Delhi, India, 24 April.
International HIV/AIDS Alliance and the Commonwealth HIV and AIDS Action Group (CHAAG) (2010) *Enabling Legal Environments for Effective HIV Responses – a leadership challenge for the Commonwealth*, available at www.aidsalliance.org/publicationsdetails.aspx?id=496 (accessed 14 Jan. 2013).
Khan, N.S. (2007) Interview, 'In plainspeak', available at www.tarshi.net/asiasrc/plspk/2007_3/interview.asp (accessed 14 Jan. 2013).

Khanna, A. (2011) 'The social lives of 377', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 174–202.

Kirby, M. (2011) 'The sodomy offence: England's least lovely criminal law export?', *Journal of Commonwealth Criminal Law*, available at www.acclawyers.org/wp-content/uploads/2011/05/2–Kirby-The-Sodomy-Offence-2011–JCCL-22.pdf (accessed 14 Jan. 2013), also in this volume (chapter 2).

— (2007) 'Discrimination on the ground of sexual orientation – a new initiative for the Commonwealth of Nations?', *The Commonwealth Lawyer* 16.

Kugle, S.S. (2010) *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (Oxford: Oneworld Publications).

Morning Star (2007) 'Minister states commitment to LGBT rights', 17 May, available at www.morningstaronline.co.uk/news/content/view/full/45429 (accessed 14 Jan. 2013).

Narrain, A. (2004) *Queer: Despised Sexuality, Law and Social Change* (Bangalore: Books for Change).

— (2011) 'A new language of morality', in A. Narrain and A. Gupta (eds.), *Law Like Love* (New Delhi: Yoda Press), pp. 253–77.

Narrain, A. and B. Dutta (2006) 'Male-to-male sex, and sexuality minorities in South Asia: an analysis of the politico-legal framework', in Naz Foundation International, *Risks and Responsibilities: International Consultation on Male Sexual Health and HIV in Asia and the Pacific*. New Delhi, 23–26 September, available at http://nfi.net/downloads/Risks_Responsibilities/background%20papers/Political%20and%20legal%20framework%20regarding%20MSM%20in%20South%20Asia.pdf (accessed 14 Jan. 2013).

PinkNews (2009) 'Pakistan court orders equal benefits for trans people', 16 July, available at www.pinknews.co.uk/news/articles/2005–13279.html (accessed 14 Jan. 2013).

PUCL-K (2003) *Police Violence Against Transgender Community* (Bangalore: People's Union for Civil Liberties (Karnataka)), available at www.pucl.org/Topics/Gender/2004/transgender.htm (accessed 14 Jan. 2013).

— (2001) *Human Rights Violations Against Sexual Minorities in India*, (Bangalore: People's Union for Civil Liberties (Karnataka)), available at www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf (accessed 14 Jan. 2013).

Quansah, E.K. (2004) 'Same-sex relationships in Botswana: current perspectives and future prospects', *African Human Rights Law Journal*, pp. 201–17, available at www.chr.up.ac.za/test/images/files/publications/ahrlj/ahrlj_vol04_no2_2004.pdf (accessed 5 Dec. 2011).

Sanders, D. (2009) '377 – and the unnatural afterlife of British colonialism', *Asian Journal of Comparative Law* 4, pp. 165–206.

Sikder, J. (2011) Interviewed by Baudh S. [translation by Haque E.] Dhaka, Bangladesh, 11 April.

Suhail, S. (2010) 'Hijras, marriage and the law', *CHAY Magazine*, available at http://chaymagazine.org/2010–queer-jun/254–hijras-marriage-and-the-law (accessed 14 Jan. 2013).

The Daily Star (2008) 'Change mindset to ensure rights of MSM people in society', 28 Feb, available at www.thedailystar.net/newDesign/news-details.php?nid=25318 (accessed 14 Jan. 2013).

UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) (2011) 'Concluding observations/Sri Lanka', UN Doc. CEDAW/C/LKA/CO/7 (4 Feb. 2011), available at www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-LKA-CO-7.pdf (accessed 14 Jan. 2013).

— (2010) 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN Doc. CEDAW/C/GC/28 (16 Dec. 2010), available at http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/GC/28&Lang=E (accessed 9 Dec. 2011).

UN Office of the High Commissioner for Human Rights (OHCHR) (2011) 'Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation', 17 June, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E (accessed 14 Jan. 2013).

UNDP (n.d.) *Law, Ethics and HIV/AIDS in South Asia: a study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka*, available at www.undp.org/hiv/docs/alldocs/Asia%20–%20Law,%20Ethics%20and%20HIV-AIDS%20–%20Study%20of%20the%20Legal,%20Social%20Environment%20of%20Epidemic%20in%20Bangladesh,%20India,%20Nepal%20and%20Sri%20Lanka.pdf (accessed 14 Jan. 2013).

US Department of State (2005) 'County reports on human rights practices', Bureau of Democracy, Human Rights, and Labor, available at www.state.gov/g/drl/rls/hrrpt/2005/61705.htm (accessed 14 Jan. 2013).

Women's Support Group (WSG) (2011) *NGO Shadow Report to the UN Committee on the Elimination of All Forms of Discrimination Against Women: The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka*, available at www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf (accessed 14 Jan. 2013).

Yogyakarta Principles (2006) *The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, available at www.yogyakartaprinciples.org/principles_en.htm (accessed 14 Jan. 2013).

Legal cases

[BLAST] Bangladesh Legal Aid and Services and Trust and Others v. Bangladesh and Others 55 DLR (HCD) (2003) 363, available at www.blast.org.bd/content/judgement/55–DLR-363.pdf (accessed 14 Jan. 2013).

Dudgeon v. United Kingdom (1981) Ser. A, No. 45.

McCoskar v. The State (2005) FJHC 500, available at www.paclii.org/fj/cases/FJHC/2005/500.html (accessed 14 Jan. 2013).

Modinos v. Cyprus (1993) Ser. A No. 259.

National Coalition for Gay and Lesbian Equality v. The Minister of Justice 1999 (1) SA 6, available at www.saflii.org/za/cases/ZACC/1998/15.html (accessed 14 Jan. 2013).

Naz Foundation v. NCT Delhi 2009, available at http://lobis.nic.in/dhc/APS/judgement/02–07–2009/APS02072009CW74552001.pdf (accessed 14 Jan. 2013), also published in the *Delhi Law Times* 160 (2009), p. 277.

Norris v. Ireland (1988) Ser. A, No. 142.

The Penal Code, 1860. Act XLV of 1860 Bangladesh. Section 377, available at http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=11 (accessed 14 Jan. 2013).

Toonen v. Australia 1994 (Communication No. 488/1992) U.N. Doc CCPR/C/50/488/1992.

Utjiwa Kanane v. The State, Criminal Appeal No 9 of 2003 (30 July 2003) unreported. Cited in Quansah 2004, pp. 202–6.