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## Summary Report

### To Act or No To Act? Section 377 of the Bangladesh Penal Code

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**Summary Report**

**TO ACT OR NO TO ACT?  
SECTION 377 of the BANGLADESH PENAL CODE**

Prepared

by

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## **Background**

Since its inception, the Centre for Gender, Sexuality & HIV/AIDS at the James P Grant School of Public Health (JPGSPH), BRAC University, has been working to promote a broad-based understanding of sexuality and sexual rights in society. As part of this commitment, the Centre organized a stakeholders meeting on the subject of Section 377 of the Bangladesh Penal Code on July 2, 2009. This report summarizes the discussions and debates that took place that day.

## **Why Section 377?**

The idea for a dialogue around Section 377 originally arose out of informal online communications with stakeholders earlier in the year. These conversations were stimulated by a number of events, most notably the Government of Bangladesh's negative response, at the country's first ever Universal Periodic Review in Geneva, to a report on the socio-political status of sexual and gender minorities in the country, and a related call to repeal Section 377. Events in neighboring India around the Naz Foundation case (see below for details) and preliminary findings from research carried out by the Centre on sexuality and rights in urban Bangladesh also galvanized interest in the subject. The Centre's research indicated that laws such as Section 54 of the Criminal Procedure Code, rather than Section 377, played the major role in the harassment of hijra and MSM communities. Subsequent online discussions indicated an urgent need for a discussion on the place of Section 377 in the everyday lives of sexually marginalized communities in the specific context of Bangladesh. The moment seemed especially propitious since the previous year had seen a remarkable efflorescence of groups mobilizing around issues of sexual rights, especially of LGBT rights. The Centre was in an ideal position to provide a platform to initiate dialogue among these various groups, not all of whom had necessarily been in conversation with one another.

## **A note on Section 377**

Section 377 of the Bangladesh Penal Code has been inherited directly from the Penal Code of 1860 put in place by colonial authorities in British India. The provision was part of a broader effort to govern "native" populations through the regulation of sexuality in general and the reform of native sexual practices deemed "perverse" (and therefore dangerous to the British) in particular. Different versions of the law were introduced across the British empire.<sup>1</sup> Although it is widely assumed to be a law against homosexuality, Section 377 actually criminalizes all

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<sup>1</sup> For details, see Human Rights Watch *This Alien Legacy: the Origins of "Sodomy" Laws in British Colonialism*. New York, December 2008.

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sexual activity that falls outside the procreative, heterosexual norm. This part of the Penal Code provides for the punishment of anyone who "voluntarily has carnal intercourse against the order of nature with any man, woman or animal...[...]." Just what constitutes an act "against the order of nature" is not specified so that the provision effectively criminalizes any act other than heterosexual penetration.

Introduced in the 19th century to reform and police "native" sexualities (and to protect colonial populations), Section 377 today is used by postcolonial states primarily to criminalize consensual same sex activity. In some instances, it is also used to prosecute cases of child sexual abuse since existing rape laws do not acknowledge male to male rape. The irony is that right wing forces which condemn homosexuality as an immoral "western" import are now the greatest defenders of Section 377, which they see as a bulwark against imperialist encroachments on "native" culture and tradition.

### **The 2009 Delhi High Court Judgment: Implications for Activism Elsewhere**

Representatives of the emerging lesbian, gay, and bisexual communities, of transgender and MSM groups, as well as researchers and activists who work on sexuality and rights, attended the meeting.

Auspiciously, the meeting fell on the very day that the Delhi High Court in a landmark judgment ruled that parts of Section 377 of the Indian Penal Code violated core principles of the Indian Constitution. Delivered in response to a public interest litigation case filed in 2001 by the Naz Foundation, a non-profit organization working on issues of HIV/AIDS prevention and



male sexual health, the High Court bench declared unconstitutional the part of section 377 of the Indian Penal Code (IPC) that criminalized "unnatural" sex. The 105-page judgment declared, "...Section 377 of the IPC in so far it criminalizes consensual sexual acts of adults in private as violation of... the constitution... As it stands, the section denies a gay person a rightful personhood..."<sup>2</sup> The court held that the provision violated fundamental rights to life, liberty, equality and the

<sup>2</sup> <http://www.bssnews.net/newsDetails.php?cat=8&id=43321&date=2009-07-03&dateCurrent=2009-07-08>



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provision regarding prohibition and discrimination on grounds of sex. If the historic verdict is upheld by the Supreme Court then homosexuality -- effectively criminalized under an archaic 149-year old law -- will be legal in India.<sup>3</sup> This much anticipated judgment has potentially path-breaking implications for sexuality and rights activism in South Asia

Participants immediately recognized the significance of the Indian verdict for the national context since the Indian and Bangladeshi laws shared the same colonial origins and were in fact identical. Most obviously, the decision could act as a precedent should the case for the repeal of Section 377 go to the High Court in Dhaka. In addition, discussants noted that such a positive decision in neighboring India was greatly encouraging for activists in Bangladesh, and could act as a catalyst for further activism. Whatever the long term implications, the Delhi victory was a source of immediate optimism and excitement.

### **Reaction to the Government's Response to Universal Periodic Review**

The discussion then moved on to the Government of Bangladesh's response to the report submitted by the Sexual Rights Initiatives (SRI) at the 4th Round of the Universal Periodic Review in February 2009 on the socio-political rights of sexual and gender minorities of Bangladesh.<sup>4</sup> It should be noted that the submission of the report was in itself a historic move since it was the first time the issue of sexual and gender minorities in Bangladesh was raised at any high level international fora. During the discussion of the report, the Foreign Minister denied the existence of homosexuality in the country. The GOB also rejected recommendations in the SRI report to decriminalize consensual same sex activity through repealing Section 377.

As noted by several speakers, the government's position on the question of same-sex sexualities in Bangladesh indicates a lack of co-ordination if not outright contradiction among different Ministries. For, on the one hand, reports prepared by the Foreign Ministry do not acknowledge the existence of same-sex practices, let alone homosexuality, while on the other, the Health Ministry continues to undertake programs to provide support for HIV/AIDS awareness among the MSM (men who have sex with men) community.

Participants discussed possible strategies for responding to the GOB's inaction and denial, including 1) the submission of a formal letter of protest from groups representing sexual and gender minorities to the Foreign Ministry, thereby

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<sup>3</sup> Ibid.

<sup>4</sup> [http://lib.chchr.org/HRBodies/UPR/Documents/Session4/BD/SRI\\_BGD\\_UPR\\_54\\_2009\\_SexualRightsInitiative\\_JOINT\\_upr.pdf](http://lib.chchr.org/HRBodies/UPR/Documents/Session4/BD/SRI_BGD_UPR_54_2009_SexualRightsInitiative_JOINT_upr.pdf)

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documenting the incident in state archives and 2) the incorporation of broader civil society groups into the movement to promote and advocate for the rights of sexual and gender minorities.

### **The State of the Field**

The meeting provided an opportunity for those present to begin the task of mapping work on same-sexualities currently being carried out in Bangladesh. As in many other countries, much of the initial impetus to work on sexuality came from interventions in the field of public health, especially through HIV/AIDS prevention programs. Speaking from their own experience, participants noted that the social stigma attached to such programs had receded, opening up a space for progressive work. Indeed establishing the human rights of sexually marginalized groups is now widely acknowledged to be a priority and an urgent need.

Some organizations are engaged in building rapport with sexual and gender minority communities; others such as Bandhu Social Welfare Organization have had a long-term presence in the field, providing much needed health support services, as well as running training workshops at the grassroots level. Over the years, Bandhu's work has expanded considerably. For example, from a focus on health services, the organization has moved on to rights-based work. Among other things, Bandhu is currently engaged in sensitizing religious leaders on sexuality and rights, a radical move by all measures. This has not led to obvious successes yet, with most religious leaders denouncing homosexuality as a sin. Nevertheless,

as some participants pointed out, even negative remarks were preferable to erasure through silence since the former at least acknowledges the existence of same sex desire/acts and homosexuality. Another sign of progress is that a leading human rights and legal aid organization, Ain o Salish Kendra, now includes a chapter on the rights of sexual minorities in its annual assessment of human rights in Bangladesh.



Researchers at ICDDR,B, which has been working with MSM and hijra communities since 1997, have just completed a three year project with the hijra community. Findings from the ethnographic project have already been translated



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into evidence-based behavior change communications material. A hijra community based theatre group named Rongberong was set up in 2005 under the direct patronage of ICDDR,B. The troupe performs improvisational theatre methods. ICDDR,B is also working on male to male sexual networking and sexual identity issues.

Participants recalled a path breaking conference organized in February 2009, at which representatives from various organizations working with sexual and gender minorities in Bangladesh convened in Cox's Bazaar. At this pioneering gathering, they formed a coalition that could serve as a national platform from which to work on rights-based activities. The coalition is meant to be fully functional with its own office by January 2010.

Participants also noted the formation of the South Asian Human Rights Commission for Marginalized Sexualities and Genders (SAHRCMSG) at a workshop organized by the Blue Diamond Society of Nepal in September 2008. The Commission will focus on documenting and addressing the violations of the rights of sexually marginalized communities and individuals in South Asia. Bangladesh is already a part of this process.

### **Visibility, Recognition and Naming: A Dangerous Path?**

For the most part, the discussion turned on whether the various sexual and gender minority groups in Bangladesh – the emerging LGBT community, MSM groups, hijras and others -- should file a challenge to Section 377 in court and if so, what the timing should be. While there was consensus that the law acted as an impediment to establishing the rights of sexually marginalized groups and should be repealed, a clear fault line emerged on the advisability of tackling the law in the immediate future. The crux of the discussion turned on whether or not to push for greater visibility and social recognition. A lively and heated discussion ensued, with compelling arguments forwarded by supporters and opponents of taking the debate and the law to the public domain.

First, in relation to the Delhi High Court judgment, some participants noted that it took years of groundwork in India to produce an environment in which the High Court actually accepted homosexuality. Activism in Bangladesh was at a much earlier stage so that it would be unrealistic to expect similar results if an appeal were filed any time soon. A few speakers were much more optimistic, and claimed that it might not take as a much time if activists worked strategically and effectively.



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Some participants advocated a progressive approach, proceeding on the assumption that Bangladeshi society was not yet ready to openly accept sexual and gender minorities. They cited the fact that a negligible number of cases had actually been filed under Section 377. Challenging Section 377 would draw unprecedented attention to and result in unwarranted harassment – socially and legally – of already vulnerable sexual minorities. Moreover, it was not clear what would happen to those individuals who were not ready to reveal their sexual and gender orientations publicly. Other participants pointed to the government’s refusal to acknowledge same-sex sexualities and genders, and the complete dearth of official statistics to back up arguments for recognizing these groups or for repealing Section 377.

In short, from this perspective, challenging the law would mean greater visibility without protection, which in turn would simply lead to more vulnerability and danger. As the most visible sexually marginalized group, representatives of the Hijra community expressed serious reservations about any move to challenge Section 377 in the current context, concerned about the repercussions should the move backfire.

Those who advocated a gradualist approach suggested taking measures to educate the mainstream on questions of same-sex sexualities before activists publicly challenged the law. Possible steps could include sensitization and awareness-raising programs in gender and health training workshops, HIV/AIDs prevention programs and so on.

Another strategic option that emerged from the discussion was to approach sexuality rights through the overarching umbrella of universal human rights. Since Section 377 can be used against heterosexuals as well, the rights of sexual and gender minorities could be advocated by forming coalitions with human rights groups in general.

### **No Visibility, No Political Voice?**

In contrast, other participants spoke passionately and eloquently about the urgent need to bring these issues into the public domain. They asked how feasible it would be to build an effective political platform without social and legal recognition of sexual diversity and same-sex sexualities. Indeed, without such recognition (which is different from social approval) the dearth of statistics referred to earlier would always remain. It is impossible to produce such statistics when people are forced to remain underground, for fear of persecution.

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One participant compared Section 377 to the atom bomb, remarking that just because the bomb had not been used for 50 years did not imply that its capacity to inflict destruction had diminished. Another turned the visibility argument on its head. From this perspective, the current lack of knowledge about diverse sexualities and genders among the general public had at least one advantage - it limited the scope of discrimination and violence. Once issues of sexual diversity become more visible - as they are bound to - harassment and discrimination will invariably rise. If Section 377 is still in place then, it will become one more tool in the hands of the bigoted. Therefore, it would be wiser to challenge and repeal the law now. In other words, sexually marginalized communities should not wait for the law to be used against them; protection from the law should come beforehand.

By the same token, some participants argued that legal acceptance would help to bring about social acceptance since in general there is more tolerance for the legal.

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## **Concrete Outcomes of the Meeting**

### **Feasible Short-Term Goals**

The Centre for Gender, Sexuality and HIV/AIDS, JPGSPH, BRAC University was chosen as the hub for future initiatives. All updates and work-in-progress would be reported to the center. The formation of a Secretariat was proposed.

Immediate activities included tapping into the strength of existing groups working on sexual rights. This could start with creating a database of people who are already involved in promoting the rights of sexual and gender minorities and those who are willing to work on the issue.

All progress was to be discussed in a follow-up meeting.

### **Future Directions**

In order to create a social environment that would gradually provide space for the acceptance and establishment of the rights sexual and gender minorities, participants suggested the following:

- Form alliances with other civil society and rights-based organizations.
- Ensure that mainstream organizations that work on rights are aware of the concerns of sexually marginalized communities.
- Expand on existing gains. For instance, the Election Commission in 2008 for the first time officially recognized the category of Hijra by extending members of the community voting rights. This constituted a significant victory, since hijras were finally recognized as full citizens of the country. However the Voter ID cards issued listed only two categories – male and female – from which individual hijras could choose to identify themselves. The next step could be to urge the Election Commission to provide the option of a third category, for those individuals who see themselves as a “third” gender.
- Improve coverage in the mainstream media. Media sensitization should target not just staff reporters but also media gatekeepers.
- Encourage the incorporation of sexuality/rights issues into existing gender trainings and awareness programs of NGOs.



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## Concluding Thoughts

Among other things, the meeting brought out the importance of coordinating and sharing information on advocacy campaigns and other steps undertaken by the various groups working on sexual rights among marginalized communities. Everyone agreed that any decision or undertaking that would potentially affect the "community" as a whole should be taken with the knowledge and consent of all groups concerned. It was also clear that empirical rather than anecdotal research on the extent to which Section 377 indirectly or indirectly affects the lives of individuals and communities, especially compared to Section 54 of the Penal Code, was called for.

Despite the stark difference on when to address Section 377, there was no debate on if the law should be challenged. The general understanding was that revoking the law was necessary at some point for sexual and gender minorities to fully exercise their rights as citizens.

The discussion on the afternoon of July 2 did not resolve major issues, nor was it expected to. Its significance lay elsewhere. That such a debate took place, and brought together the voices of those whose interests are the most at stake in this debate, was a significant achievement in itself.

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## **Annex**

### **DISCUSSION ON SECTION 377 BANGLADESH PENAL CODE**

2 July 2009, 3.30pm

#### **DRAFT AGENDA**

**Introduction of Participants**

**Background and Purpose of Meeting (GoB's comments at UPR, Geneva on s377, reaction of Civil Society Organisations in Bangladesh, any responses, update on today's judgment in India)**

**Discussion on impact of S377 and any related ongoing activity (research/advocacy etc)**

**Proposal for legal petition protesting the governmental response on non normative gender and sexual diversity including the issues to be included as part of the petition (sexual harassment, police reform, special budgetary allocation, sexual orientation etc)**

**Should 377 be the focus at this point? If yes then how?**

**Civil society's involvement with the LGBT community. A common body to work together?**

**Possible human right allies**

**Next steps in this connection**

**Any other business**