

Strengthening of Legal Protection for LGBT in Sri Lanka: road to decriminalization

Situation Analysis

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Background:

Sri Lanka like most colonial countries, carries with it Colonial laws passed during the time of British rule. These laws reflect Victorian morality and have been severely criticized. One such law is the law against homosexuality. Even though Sri Lanka has subsequently seen very progressive laws in regards to women's rights, the issue of sexuality still remains a challenge. The violence perpetrated against LGBT¹ people by individuals, the media and religious organizations has curtailed the growth of a LGBT movement and the ability to raise awareness publicly in regards to issues of sexuality have been limited. In this context EQUAL GROUND conducted a study to document the violations that LGBT people face due to the lack of equal rights and the criminalization of LGBT people's lives. The aim of the study is to understand the repercussions of section 365 and 365A of the Sri Lankan Penal Code on lives of LGBT people. The objective of the study is to use the information gathered in creating a training module for lawyers whilst conducting trainings for lawyers across Sri Lanka with the hope of creating a network of lawyers sensitive to LGBT issues, who can protect the rights of LGBT people.

Methodology:

The study used qualitative and quantitative methodology in assessing the current situation with regards to law and its impact on LGBT persons. The Qualitative research is based on articles on issues of sexuality and the law, discrimination and its impacts, expert inputs on several topics and interviews with various stakeholders. The quantitative study has been based on interviews conducted in nine districts and ten towns. Interviews were conducted with the following stakeholders: Police, lawyers, medical practitioners, LGBT community members and human rights organizations/activists. The qualitative study has ensured the representation of the three major ethnic communities. A total of 109 interviews have been conducted in 13 Districts of Sri Lanka.

¹In this report LGBT denotes lesbians, gays, bisexuals, transgender (male-female, female to male and persons not conforming to stereotypical gender performances as male/female (cross dressers)).

Limitations:

1. The quantitative research could not be conducted in depth and the study focused on urban spaces such as the main town of each district.
2. Access to case law in regards to child abuse cases that deal with section 365 and 365A, cases regarding adult consensual sex were not easily available. The report depends heavily on articles in regards to child rights published by various organizations.

History of 365 and 365A

Section 365 of the Penal Code states:

‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description [i.e. simple or rigorous] for a term which may extend to ten years, and shall also be liable to a fine.’²

Until the end of 1995, its subsection, 365A, stated the following:

‘Any male person, who in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of an offence, and shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both, and shall also be liable to be punished with whipping.’³

These laws were passed in 1883 in Sri Lanka as part of Britain’s efforts to impose Victorian values in its colonies. In 1860 Lord Macaulay, the President of the Indian Law Commission recommended the inclusion of section 377 of the Indian Penal code. Similar laws were subsequently enforced in other colonies such as Sri Lanka.⁴ Macaulay’s initial draft punished a person for ‘touching a person for the purpose of unnatural lust’⁵ Macaulay was against a debate

² Sri Lanka Penal Code section 365

³Section 365 A of the Penal Code prior to the 1995 amendment.

⁴Misra.G. Decriminalizing homosexuality in India; *Reproductive Health Matters*; 2009 at http://vidyaryogya.com/images/pdf/16-03-2011/decriminalising_homosexuality_india.PDF accessed on 10/01/2013

⁵ Cl 361: “Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either

surrounding such immoral acts and therefore the law was passed without much debate. Therefore the language of the law itself is vague. There was no definition of what is carnal intercourse or against the order of nature. Indian courts have subsequently developed and expanded the definitions of the same. What is important to note is that the term ‘against the order of nature’ has been defined as non-procreating sex. The State’s ability to enter the private realm in enforcing the institution of marriage and hetero-normative values can be seen in these various judgments. Sri Lanka shares this same legal history of the law even though Sri Lankan Courts have not delved in to the definitions.

In 1995 the parliament approved several amendments to the Penal Code. The background to the Penal Code amendments is very much in line with the control over permissible and prohibited sexual encounters. The amendments came at a time when there was an increase of child sexual abuse. The focus was the abuse of young boys by foreigners. It is notable that it ignored the abuse of children within the family structure. They were spurred by concerns of increasingly reported instances of child sexual abuse, highlighted in the early 1990s.⁶

The technical committee set up by the government consisted of various stake holders and made several progressive recommendations, including the repeal of sections 365 and 365A that criminalize consensual adult intercourse. However these recommendations were ignored and a more regressive amendment was passed. Section 365 was amended to increase the penalty to rigorous imprisonment between ten and twenty years if the offence was committed by someone over the age of eighteen on someone below the age of 16. The second amendment was to section 365A⁷, that of gross indecency, the words ‘any male person’ was amended to read ‘any person’

description for a term which may extend to 14 years, and must not be less than two years”. As cited in Gupta. A. Section 377 and the dignity of Indian Homosexuals, *Economic and Political Weekly* , November 18, 2006, at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/15-1.pdf>

⁶ Tambiah

⁷ The current section reads- Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and

making it gender neutral, bringing women within its folds and imposing similar penalties as section 365. It also included a provision for compensation to be determined by the court and payable to the person under the age of sixteen.

Legal differences between section 365 and 365A

Sections 365 and 365A deal with two kinds of offences. Section 365 requires that carnal intercourse take place. The explanation to section 365 states that penetration is required for the offence to be completed.⁸ Section 365 then is a narrow definition and requires penetration. However the Court has interpretative powers and may the term penetration broadly as the Indian Courts have done. Under section 365 only the two parties involved attract criminal liability. However in the case of 365A the acts criminalized are broad. Within its scope any act deemed indecent which is sexual in nature can be criminalized. The term gross indecency has not been defined. Under section 365A who ever 'helps' in the act is also punishable. Punishments for both offences remain the same and the gravity of the offence committed against minors attracts a punishment of rigorous imprisonment up to 10 years. In both cases consent has not role to play.

Legal interpretations of 365/365A

Section 365 and 365A of the Sri Lankan Penal Code have not been part of legal discourse unlike its Indian counterparts. However looking at the two cases before the Court since colonial times to date and the interpretation given by lawyers and police officers during interviews has focused on the term carnal intercourse and gross indecency. According to the Concise Oxford Dictionary (ninth edition, 1995), the term "carnal" means "of the body or flesh; "worldly" and "sensual, sexual". Even though the term in its minimum understanding includes sexual acts between men and women law has ensured that through the criminalization of certain sexual acts that there has been a difference created between sexual intercourse and carnal intercourse. Carnal has been made equal to that of unnatural/against the order of nature.⁹The *natural* object of

shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."

⁸ Explanation to section 365- 'Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section'

⁹ Lohana Vasantlal Devchand vs. The State AIR 1968 Guj 252, 1968 CriLJ 1277, (1968) GLR 1052

carnal *intercourse* was made to mean that there should be the possibility of conception of human beings. Gross indecency has a broader scope and can include any act that is sexual in nature including even the viewing of pornography. It would be any act sexual in nature which is unacceptable. What then is acceptable is left to the court, the State and Society to decide.

It is interesting though to note that Sri Lankan Courts have accepted pleas of dissolution of marriage in cases where there has been a refusal of sexual intercourse. In one case the court even states that refusal to have carnal intercourse with the spouse is grounds for dissolution of marriage.¹⁰ Drawing from this and the experience of the Indian courts we may argue then that any sexual act within the accepted norm –i.e. marriage is permitted. However any act that does not fit within this hetero-normative patriarchal norm would be deemed carnal and indecent.

Drawing from the lack of legal discourse on section 365 and 365A we may argue that there is an opportunity provided while decriminalization remains a challenge that these terms remain narrowly defined, unlike the Indian legal precedents that have included all forms of non-procreative activities within the ambit of this law.

Since 1948 how has it been used to convict LGBT persons and others?

In Sri Lanka the dearth of cases under section 365 and 365A prevent an in depth analysis of how the law has been interpreted. However through interviews with LGBT persons and reports submitted by LGBT organizations to the UN and various advocacy measures show that the section is mostly used to intimidate, harass and coerce LGBT persons. Recently however two men were arrested under charges of gross indecency at Fort. They were expected to plead guilty to the charges.¹¹

The two documented cases are **King v. Wickremasinghe** where the case dealt with the sexual abuse of a child below the age of 16. The accused was charged for gross indecency.

In the case of **Amerasinghe v Daluwatta**¹² where an allegation of homosexuality was made against a member of the Army. The defendant filed a writ of certiorari alleging that due

¹⁰ Pathmanayaky v. Mahenthiran, CA125/84(F), 2003

¹¹ <http://www.dailymirror.lk/news/23546-two-men-fined-for-gross-indecency-.html>

¹² Court of Appeal C.A.128/98

procedure of law was not followed. The Court interestingly did not deal with the aspect of homosexuality but dismissed the case on grounds of procedural irregularities.

How other countries have interpreted these sections

In the following section the report will look at how other countries in South Asia have dealt with these sections.

India has had a long history of case law in regards to section 377 of the Indian Penal Code which is similar to section 365 of the Sri Lankan Penal Code.¹³ In 2009 the Delhi High Court read down section 377 in a much hailed judgment that placed constitutional morality at the center of judgment. However before the Naz judgment there were several instances where the court dealt with section 377. The report will highlight a few cases from the fifty documented cases.

Khanu v. Emperor¹⁴ is one of the first documented cases looking at section 377. While defining the section Kennedy A.J.C. held that it “punishes certain persons who have carnal intercourse against the order of nature with *inter alia* human beings.” Therefore the judge held that oral sex which was committed in this case is “clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings”.

In ***Kedar Nath vs. State Of Rajasthan***¹⁵ the court dealt with a case of child sexual abuse. The court while holding the defendant guilty looked in to the definitions and the aims of section 377. There are several cases of child sexual abuse filed before the Indian Court where the court has looked at section 377 as in India there is no comprehensive law to deal with child sexual abuse. However the Courts inability to distinguish between consenting adults and child sexual abuse cases can be seen time and again in these cases.

¹³ Section 377: Unnatural offences – 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 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

¹⁴ AIR 1925 Sind

¹⁵1985 (2) WLN 560

In *Noshirwan*¹⁶ and *Minwalla*¹⁷ the appearance or likelihood of the defendants to commit sodomy habitually, rather than the specificity of the particular act was a substantive consideration increasingly creating an association between the acts of sodomy with specific kinds of “people.”

While dealing with cases filed under section 377 what is interesting to note is the wide arm of the law in defining and redefining morality. By the 1980’s there is a growing link created between perversity and homosexuality by the Indian Courts as laid down in *FazalRab*¹⁸ and subsequently solidified in *Pooran Ram*.¹⁹

Consent becomes immaterial in the eyes of the law, ironically while consent remains the center of the rape debate in the courthouse. In the Case of *Mihir vs. State of Orissa*²⁰ the judge states that consent of the ‘victim’ is immaterial as “unnatural carnal intercourse is abhorred by civilized society”. Thus positing the homosexual in to the uncivilized and the perverse. In *Brother John Antony vs. The State*²¹ the case arose from complaints by students of a boarding school against a teacher who forced the children to perform oral sex on him and also masturbated them. In this case once again the “unnaturalness” of the act becomes of prime important. The fact that “an assault (possibly violent) has taken place is of secondary importance to the court.

In *Sakshi vs. Union of India (Uoi) and Ors*²². The Court looked at various sections of the Penal Code that deal with sexual abuse and criminalized sexual activity. The challenge by the petitioner was that section 377 was being used in cases of rape of women while the intention of 377 was not to deal with cases of rape. The petitioner also challenged the explanation requiring penetration being sufficient to prove rape. The Court upheld the need for section 377 and elaborated on the need to curtail immoral and unnatural sexual activity.

¹⁶ Noshirwan vs. Emperor AIR 1934 Sind 206

¹⁷ D P Minwalla vs. Emperor AIR 1935 Sind 78.

¹⁸ Fazal Rab Choudhary vs. State of Bihar AIR 1983 (SC) 323.

¹⁹ Pooran Ram vs. State of Rajasthan 2001 CriLJ 91.

²⁰ Mihir vs. State of Orissa, 1992 CriLJ 488.

²¹ 1992 CriLJ 1352

²² AIR 2004 SC 3566

In *NAZ Foundation v NCT Delhi*²³ the court gave a progressive reading of the equality provisions of the Constitution and held that constitutional morality was superior to public morality and that the Constitution and law should ensure no groups are discriminated against due to public morality. The courts stated that section 377 was against the Constitution of India which aspired to protect all its citizens. It acknowledged that section 377 led to gross violations against the LGBT community and prevented them from accessing health care and in preventing transmissions of STD's. The judges went on to hold that section 377 violated Article 14 of the Indian Constitution which guarantees equality as it created an unreasonable classification and targeted homosexuals as a class. The court expanded the term sex mentioned in article 14 to mean sexual orientation as well. The Court located the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21. The court while not striking down section 377 as a whole it declared the criminalization of consensual sex among adults in private as unconstitutional. In the Supreme Court when the case was heard on appeal the attorney general's department argued that section 377 was a reflection of British morality and had no place in the Indian legal system. The Court also heard the application of the parents of LGBT persons who argued that their children had to constantly live in fear due to this law and discrimination faced due to that.²⁴ The verdict by the Supreme Court was reserved.

*State vs. Hamsu*²⁵ dealt with the case of the murder of a child after he was sexually abused by the defendant. It is interesting to note that the court, post the Naz judgment, does not go on to elaborate on the unnaturalness of the offence or define carnal intercourse as we have seen other judgments have done. The case focuses on the abuse and the death of the child.

*Dineshbhai vs. Unknown*²⁶ however deals with what the judge terms 'various types of perversity' that are prohibited under section 377. While referring to the Naz judgment the court held that until it is read down by law, section 377 was applicable as in this case there was also a lack of consent.

²³ *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009)

²⁴ <http://www.thehindu.com/news/national/article3250607.ece>

²⁵ Death Sentence Ref.No. 5 of 2009

²⁶ APPEAL No. 1111 of 2003

Pakistan

Pakistan has a similar Colonial construction of criminality enacted through the Penal Code. Pakistan is governed by common law and Islamic law. Section 377 of the Pakistan Penal Code criminalized ‘carnal intercourse against the Order of Nature’, a similar provision as India. However in the recent years Pakistani Courts have taken a progressive stand in certain instances. Several judgments have upheld the rights of the transgender community in Pakistan²⁷ Acknowledging police harassment the court has ordered that all cases filed against transgender persons must be sent to the court. The Court also ordered that measures must be taken to ensure free health care and the right to inheritance. In the case of Shahzina and Shumail the court upheld the Right for a citizen of Pakistan to choose their gender and express the same. The Supreme Court acquitted Shumail of perjury, a charge filed by the high court as it considered Shumail of lying to the court regarding his sex.²⁸

Nepal

The Supreme Court of Nepal in the Sunil Babu Pant Case²⁹ directed the Government to end discrimination on the basis of sexual orientation and gender identity. Action is yet to be taken to introduce legal protections from discrimination. However, it is proposed that the new Constitution will include guarantees of non-discrimination on the grounds of sexual orientation and gender identity.

What is the proper legal procedure of convicting individuals through 365/365A?

In the first schedule of the Code of Criminal Procedure the law lays down the process to be followed for offences under the Penal Code.

²⁷ http://www.startribune.com/templates/Print_This_Story?sid=83740347

²⁸ Shumail Raj had lived as a transgender man for 16 years, after undergoing surgery to remove his breasts and uterus.

²⁹ Sunil Babu Pant and others v Nepal Government and others 2 NJA L.J.[2008] 261-286
http://www.njanepal.org.np/Anex_2.pdf

<i>Section</i>	<i>Offences</i>	<i>Whether peace officer may arrest without warrant</i>	<i>Whether a warrant or summons is to be issued in the first instance</i>	<i>Bailable/non bailable</i>	<i>Compoundable/non</i>	<i>Punishment under penal code</i>	<i>Jurisdiction of court</i>
365	<i>Unnatural offence</i>	<i>May arrest without warrant</i>	<i>Warrant</i>	<i>Not bailable</i>	<i>Not compoundable</i>	<i>Imprisonment of either description for 10 years and fine, whipping in addition.</i>	<i>Magistrate's court</i>
356A	<i>Act of gross indecency</i>	<i>May arrest without a warrant</i>	<i>Warrant</i>	<i>Not bailable</i>	<i>Not compoundable</i>	<i>Imprisonment up to 2 years or fine or both, whipping in addition.</i>	<i>Magistrate's court</i>

The police force has been tasked with the maintenance of order and in ensuring criminal activities do not take place. The police then are empowered to prevent an offence. Therefore the police may arrest any person who they deem as engaging in criminal activity. In the case of 365 and 365A while to charge a person under the section there is evidence of the act of ‘carnal intercourse’ or ‘gross indecency’ is required, to arrest we see in many cases, police arrests based on gender performance claiming that a criminal act is to be performed in the future.³⁰ However as stated before, there are no charges filed nor are those arrested taken before the court. Most of these arrests end in bribery, blackmail/extortion, violence and coerced sexual favors.

As we see in the first schedule even though arrest can be made without a warrant when a defendant is called to the magistrate court a warrant must be issued. Once a person is arrested charges must be filed with collaborated evidence and the accused must be produced before the

³⁰ We see this in cases of transgendered persons who are arrested for their mere presence in public spaces. Through the interviews it was found that when arresting the police use the ground of prevention of gross indecency.

magistrate. Under section 365 and 365A parties cannot enter into any settlement outside the court as the offence is seen as an offence against the State.

What are the other legal provisions that have been used to convict LGBT people in Sri Lanka?

Apart from sections 365 and 365A several other laws have been used to harass, intimidate and arrest LGBT persons.

Section 352 of the Sri Lankan Penal Code deals with the enticing or taking of a minor out of the lawful guardianship.³¹ This section has been used in some cases against lesbian women who have left their homes. The police have been able to use this to intimidate the couple especially when one of the women have been below the age of 16. Even in cases where the women have been adult's women have been forced to return to their parents homes by the police. This can be attributed to the communal policing and control of women's lives keeping in line with socio cultural beliefs and practices that allow women to leave the natal home only when they get married.

Section 353 Abduction defines abduction as 'whoever by *force* compels or by deceitful means, or by abuse of authority or by any other means induces a person to go from any place. This section too has primarily been used in cases where women have run away from their homes.³²

The **Vagrancy ordinance**³³ criminalizes every person behaving in a 'riotous, disorderly manner', those who idle and punishes 'common prostitutes' who act in an indecent manner.³⁴ LGBT persons, especially transgendered persons have been arrested under this section and have as mentioned before faced harassment, ridicule and have also been made to pay bribes to secure their release.³⁵

³¹Section 352, Penal Code, Sri Lanka.

³² 3 lesbian women who were interviewed stated that their family members had filed a complaint under section 353 charging their partner of abduction and kidnapping. In most of these cases the police take on the role of the court and decide on the necessary action. In most cases women have been forced to return home.

³³ The Vagrants Ordinance, http://www1.umn.edu/humanrts/research/srilanka/statutes/Vagrants_Ordinance.pdf

³⁴Section 2 and 3 of the Vagrants Ordinance.

³⁵Interviews with transgender persons.

<i>Section</i>	<i>Offences</i>	<i>Whether police officer may arrest without warrant</i>	<i>Whether a warrant or summons is to be issued in the first instance</i>	<i>Bailable/non bailable</i>	<i>Compoundable/non compoundable</i>	<i>Punishment under penal code</i>	<i>Jurisdiction of court</i>
353/354	Abduction/ Kidnapping	May arrest without warrant	Warrant	Non bailable	Non compoundable	Imprisonment for 7 years and fine	Magistrates court

Implications of these two sections since 1886

The implications of section 365 and 365A are many. Even though the law has not been used to prosecute LGBT persons, it has been used as a tool to target and harass the LGBT community and has led to the violation of several constitutional and fundamental rights that they enjoy as citizens of Sri Lanka. The LGBT community has been forced to exist as secondary citizens unable to even access the welfare measures of the State. In the following sections the report will lay down the implications these two sections have on LGBT people's lives.

- ***Harassment through Law***-In Sri Lanka until November 2012, when two adults were arrested under section 365A at the Fort Railways station, there have been no other cases under this section in regards to adults. We can draw from Gupta's research in India that most cases filed under this section are in regards to child sexual abuse or non-consensual sex between adults.³⁶ The inability to prove 'carnal' intercourse against the order of nature within the private realm has been the reason for this lack of case law. However the implication of this has been harassment of LGBT people by the police and other State and non-State actors when sexuality has been expressed in the public realm. The

³⁶Gupta.A. Section 377 and the dignity of Indian homosexuals.Economic and Political Weekly. 18 November 2006- Gupta argues of the 50 cases filed in Indian Courts 30% deal with sexual assault, child sexual abuse and cases of non-consensual sex between adults. In the case of Sri Lanka there have been no cases in regards to consensual sex between same sex adults.

harassment must be understood in its complexities if protection for the LGBT community is to be holistic. The engagement of GBT men with the law is significantly different from that of LBT women. For 'Men,' the large part of the conflict with law is in the public realms. For LBT women this harassment has been within the private and at the community level. This is not to say that Gay and transgender people do not face harassment from their families, rather to understand the nuances of the harassment faced by various sections of the LGBT Community.

A brief analysis of the interviews conducted with the LGBT community shows that Transgender and Cross dressers constantly face harassment by the police.³⁷ They are forced to bribe and in several cases forced to provide sexual favors in return of non-arrest. Even though there has been no proof of carnal intercourse section 365 and 365A create a discourse of criminality that pervades the sexual act and enters the public realm at every opportunity. The appearance of 'queerness' and the likelihood of engaging in 'carnal intercourse' provide the police with authority to harass arrest and abuse transgendered people. So even though the act is criminalized we see the illegality being marked on the body of those who do not conform to normative gender roles.

In the case of LBT women there have been several instances where families have filed kidnapping charges against the partner of a woman even though both parties have been adults. However these cases have not been followed through and charges have been dropped.³⁸ Kidnapping charges have been used to intimidate and coerce³⁹ however unlike India there has been no use of the writ of Habeas Corpus against LBT women.⁴⁰ Tambiah

³⁷ 100% of transgender people interviewed complained of harassment and violence

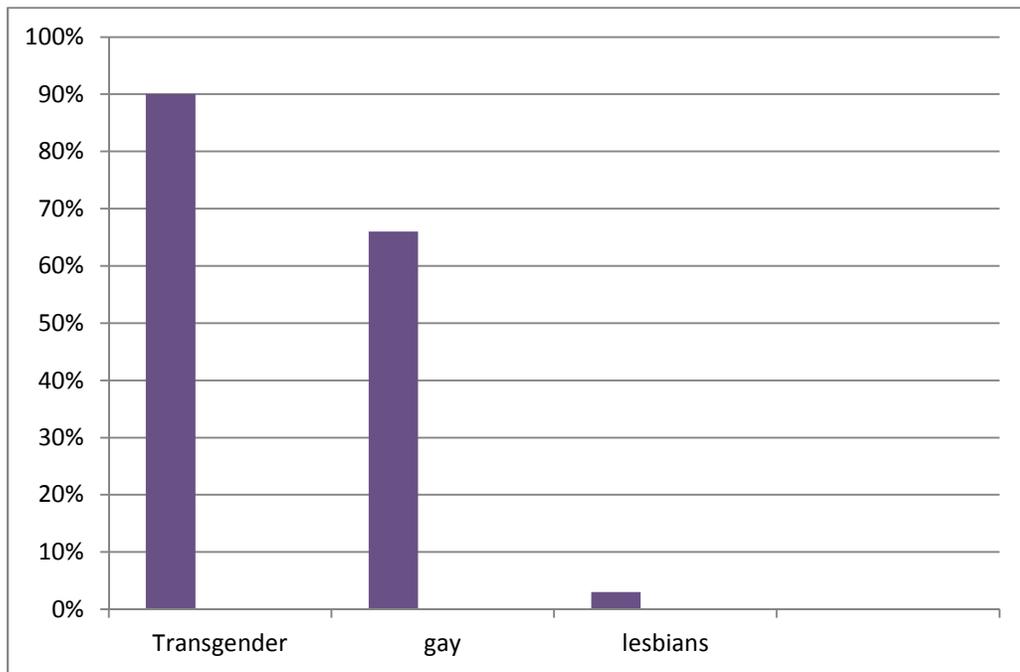
³⁸ Interview with lesbian in Colombo

³⁹ The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka; NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf

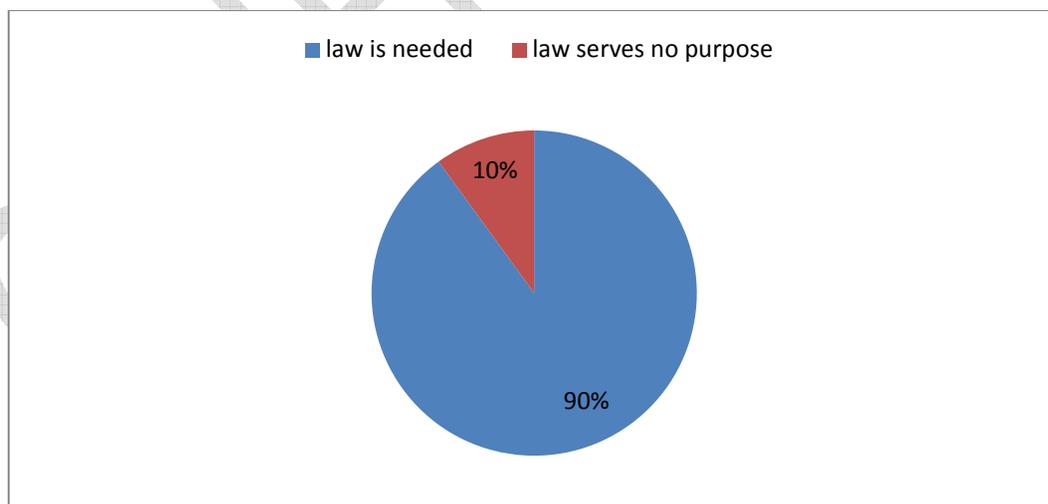
⁴⁰ Arasu. P, Thangarajah. P. Queer women and Habeas Corpus in India: The love that blinds the law. *Indian Journal of Gender Studies*, 19, 3 (2012) 413-435

speaks of parental, communal and cultural surveillance that entangle with the law to maintain gender stereotypes and suppress expressions of alternate sexuality.⁴¹

Police Violence faced by LGBT Persons

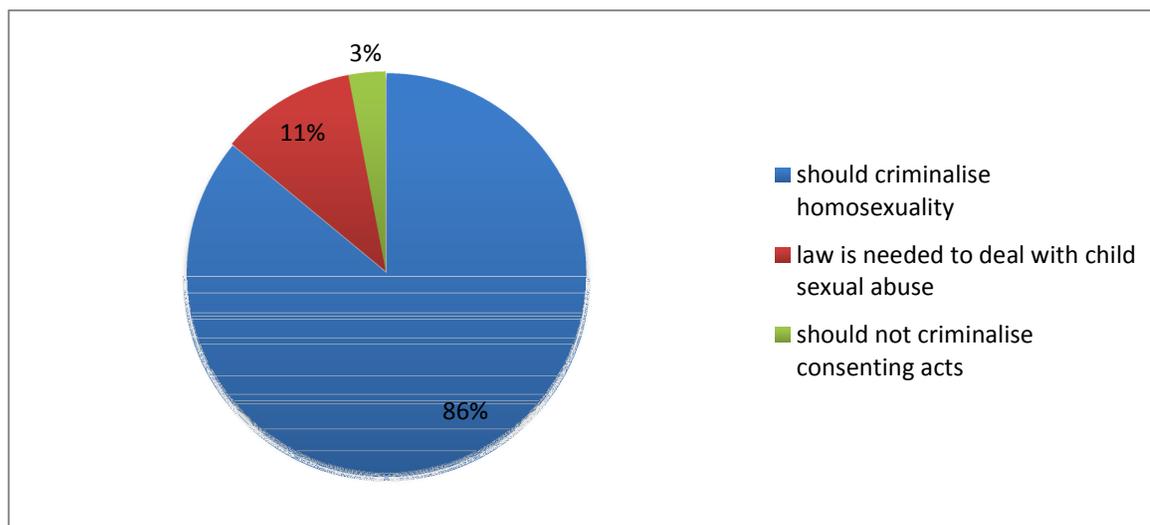


Police opinion on 365 AND 365A



⁴¹ Tambiah, Man-made laws and feminine feelings: A lesbian encounter with the law in Sri Lanka; *Lines Magazine*, May 2003 accessed on 13/01/2013 at http://issues.lines-magazine.org/Art_May03/yasmin.htm

Lawyers' opinion on section 365 and 365A



- **Unequal citizenry** – Due to criminalization and discrimination LGBT people are unable to access and enjoy the fundamental rights guaranteed by the Sri Lankan Constitution. The lack of a single case filed by an openly lesbian, gay, bisexual, or transgender person in regards to protection of freedom of expression or any other FR right is significant.⁴²LGBT people are forced to exist within the periphery of the Constitution. While the constitution states clearly that there can be no discrimination based on gender, religion, ethnicity or cast, sexual orientation is not included. The LGBT citizen is protected only if he/she maintains a hetero-normative performance. So while many LGBT persons may for example have approached the labor tribunal to deal with labor disputes, it is important to note that there have been no cases where the labor tribunal has dealt with an unfair dismissal based on sexual orientation.

Even though the freedom of expression is guaranteed under the constitution cross dresses and transgender people constantly face harassment due to their chosen gender expressions. In the past there have been several cases of 'impersonation' and

⁴² Of the 13 NGO's interviewed 78% had not worked on rights of LGBT persons even though they were human rights organizations and had a gender component. Most organizations didn't even view the violence faced by LGBT persons as a rights violation. This does not remove from the fact that maybe complaints of other human rights violations have been lodged by queer persons who do not publically identify themselves as queer. However this lack of identification symbolizes the fear and stigma queer persons face.

‘misrepresentation’ brought to the courts in which women who have been ‘disguised’ as men have been ‘discovered’ and their ‘true sexual identity’ exposed to the public. Similarly, trans-women have also been arrested for ‘misleading the public’.⁴³

However hate speech against LGBT communities have been legitimized and supported by the media. In June 2000 the Press Council expressed its support for a letter published in the Island, a local daily, urging that convicted rapists should be unleashed at a proposed conference on lesbian issues.⁴⁴ The decision stated that “...lesbianism itself is an act of sadism, and salacious publication of any opinion against such activities does not amount to a promotion of sadism or salacity, but any publication which supports such conduct is an obvious promotion of such violence, sadism and salacity”. The man who had filed the complaint was fined.⁴⁵

Several gay men have fled Sri Lanka in recent years and are at present engaged in seeking asylum in different countries including the USA and the UK, on grounds that they face persecution if they return to Sri Lanka. Among them are two gay Muslim men from the East of Sri Lanka who allege that they have been abducted, tortured, and have a Fatwa placed on their lives, due to their sexual orientation. EQUAL GROUND has also reported a similar case of a young Muslim man who fled his home in Beruwela in the south of Sri Lanka, after it was attacked due to his sexual orientation.

- **Access to health care-** Homosexuality is still deemed to be mental illness in Sri Lanka even though in many countries it has been removed from the list of mental illnesses. There are still several cases where LGBT people have been taken to psychiatrists and psychologist with the hope of curing ‘homosexuality’.⁴⁶ This has led not only to serious

⁴³ Women’s Support Group, Shadow report; NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women, January 2011, accessed on 16/01/2013 at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WSG_SriLanka48.pdf

⁴⁴ P. Alles, “Lesbian Conference in Colombo?” The Island, August 20, 1999.

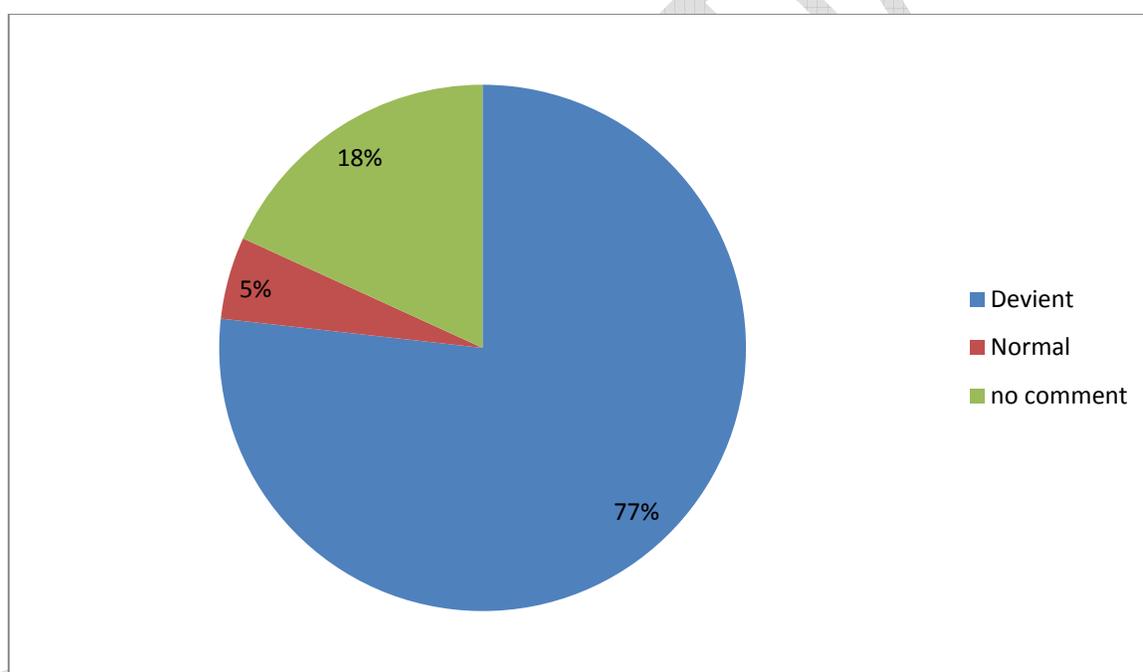
⁴⁵ Sri Lanka Press Council, Judgment to Complaint no S2/99/2096, 2000

⁴⁶ 83% of mental health specialist interviewed admitted to homosexuality being considered deviant and admitted to behavioral therapy and in some cases even shock therapy.

cases of medical experimentation and negligence but also places a huge psychological burden on the LGBT person, leading to depression and suicide. LGBT people have also been unable to access counseling or psychological treatment due to the lack of sufficient LGBT friendly psychiatrist/ psychologist.⁴⁷

Even though medical treatment to LGBT people has not been denied at a large scale⁴⁸, the apprehension is divulging complete and proper information to the doctor due to fear of discrimination must be noted.

Mental health practitioners' opinion



- **Failure to protect against child sexual abuse-** Even though initially there were strong progressive moves in terms of protecting the rights of the child in the current context we see a regress in the same. Police officers interviewed stated that section 365 and 365A

⁴⁷ 97% LGBT people wished not to approach a psychiatrist or psychologist to seek help in dealing with 'coming out', violence faced within the family and within the community. While 80% stated this was due to fear of negative reactions by the doctors 12% had experience negative behavior and a lack of understanding by the doctors they had visited.

⁴⁸ EQUAL GROUND Stigma index

were used to protect children against child sexual abuse.⁴⁹ But the cases themselves take many years and the courts fail to take a child centric approach in prosecution. Even though punishments under these sections are severe the courts have systematically failed in ensuring the certainty of punishment. As human rights activist have often argued it is not the severity but the certainty of punishment that is a deterrent against most crimes. The failure of the courts to distinguish between “two very different situations”, of non-consensual sex and consensual sexual relations, implies that “male adult seducers or abusers of young boys, men who forcibly rape other men and male homosexuals (who indulge in consensual sexual activities) are all one and the same thing”. Homosexual acts become abominable activities lacking the equivalent of “consensual heterosexuality” and therefore incomparable.⁵⁰

Sri Lanka has passed several progressive laws in regards to the rights of the child⁵¹ and the National Child Protection Authority was set up and empowered to advise the government of prevention of child abuse.⁵² Section 360E states that whoever solicits a child for the purpose of sexual abuse will be punished with ten years imprisonment.⁵³ It could be argued that this section is better suited to deal with cases of child sexual abuse

⁴⁹ 80% of the police officers interviewed stated that section 365, 365A was used against child sexual abuse. While 50% of the police officers thought this section was adequate in dealing with child sexual abuse. 50% of police officers admitted that this section was not supposed to be used in cases of child sexual abuse.

⁵⁰Gupta.A. Section 377 and the dignity of Indian homosexuals.Economic and Political Weekly. 18 November 2006

⁵¹ The Prevention of Domestic Violence Act No.34 of 2005 which provided for protection orders to be urgently obtained to safeguard those suffering and at risk of domestic violence including both women and children. The Penal Code (Amendment) Act No16 of 2006 of section 360C strengthened the law against child trafficking including that by electronic media, The International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007 provided that the best interests of the child shall be of paramount importance in all matters concerning children are but a few examples.

⁵² National Child Protection Authority Act No. 50 OF 1998
<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/52618/65161/E98LKA01.htm>

⁵³ Section 360E reads - (1) Whoever, whether within Sri Lanka or from outside Sri Lanka solicits by whatever means— (a) a person under eighteen years of age; or (b) any person believing such person to be under eighteen years of age, for the purpose of sexual abuse of a child, commits the offence of soliciting a child and shall on conviction be liable to imprisonment of either description for a term not exceeding ten years or to a fine, or to both such imprisonment and fine. Section 360E was included under the Penal Code (Amendment) Act, No. 16 of 2006

rather than sections 365 and 365A. As this section was inserted with the specific intention of dealing with child sexual abuse.

There is also the need to locate Child Sexual Abuse in the larger social and cultural contexts. If sexuality continues to be a taboo subject, with certain expressions of sexuality being virtually demonized, we are working against the possibility of a child being able to protect herself/himself from abuse. The government, in many ways, including through the laws it upholds, actively contributes towards entrapping sexuality with attitudes that are dangerously moralistic, judgmental and stigmatizing.

What are the other legal provisions in Sri Lanka that can be positively used by LGBT persons if there's a conviction based on 365/365A

In this section the report will look at the fundamental rights chapter and the scope of these FR guarantees

Currently the fundamental rights chapter is the only local law that can be used positively to challenge the law. However the Sri Lankan State has several international legal obligations under several conventions.

Sri Lanka has ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child as well as the second Optional Protocol to ICCPR and CEDAW, allowing individual complaints procedures. Even though in 2006 the Supreme Court found that the ratification of the First Optional Protocol to the ICCPR by the President was unconstitutional, and called for a review of the process, saying that such a Bill impinged on the right of the government of Sri Lanka to make sovereign decisions and therefore could only come into force if approved by a majority in Parliament and subject to a public Referendum.

While the Yogyakarta Principles are not enforceable in Sri Lanka it can be argued they do place pressure on the State keeping in line with its other international obligations to ensure equal protection of the LGBT community.

These international obligations demand that citizens of any nation be treated equally, have due procedure of law and be able to express their opinion, engage in work and access services provided by the State. And even though these conventions per se do not deal with sexual orientation it has been internationally accepted that sexual orientation cannot be a grounds of discrimination. There have also been cases decided by the Human Rights Committee for the rights of LGBT persons.⁵⁴ The International Court of Jurists have also held that international non-discrimination based conventions must and can be used to protect LGBT persons rights.⁵⁵

Under the Sri Lankan Constitution the Fundamental Rights Chapter lays down the rights of citizens of Sri Lanka.

Article 12 states that all persons are equal before the law.⁵⁶ It also states that they have the right to equal protection of the law. This section maybe used in challenging an arrest of an LGBT person, especially in cases where LGBT persons have been arrested without any proof and have faced harassment.

Article 13 ensures that due procedure of law is followed when a person is arrested or detained.⁵⁷ In many cases of arrests of LGBT persons there is no procedure that is followed and many LGBT persons are not produced before a magistrate. Article 13 may be used in ensuring that those arrested and harassed by the Police are provided with information and that the due procedure of law is followed.

Article 14 protects the right of every citizen to freedom of expression.⁵⁸ Under this article every citizen has the right of speech. However we see in the case of LGBT persons this has been

⁵⁴Toonen v Australia

⁵⁵ <http://www.unhcr.org/refworld/docid/4a783aed2.html>

⁵⁶ (1) All persons are equal before the law and are entitled to the equal protection of the law.

⁵⁷ No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

⁵⁸ 14. (1) Every citizen is entitled to -(a) the freedom of speech and expression including publication;

curtailed. It may be argued that under section 365& 365A only the act is criminalized therefore dissemination and awareness creation around issues of sexual orientation should not be curtailed. It may also be argued that under freedom of expression a person's gender performance is protected and therefore harassment of transgender persons 'effeminate' men and 'masculine' women would be a violation of article 14.

While all the options mentioned above do not directly deal with sexual orientation they are open to interpretation and in many countries have been used in progressive ways to expand the scope of the law and to ensure rights of communities are brought within the law.

In Sri Lanka it is also important to note that religions such as Buddhism and Hinduism do not deem 'homosexual' acts immoral and in several architectural structures we see the acceptance if not a celebration of various sexualities.

Conclusion

Sri Lanka has had a long history of violence against LGBT persons. The interviews conducted across districts bear witness to the homophobia prevalent and the violence that is perpetrated on a daily basis against those who express a different sexuality.

The law of any society has a large symbolic role to play in deciding what is 'right' and 'wrong' and we see this hold true in the case of section 365 and 365A, colonial laws that are now seen as part of our culture and morality. The lived life of 365 and 365A go beyond criminalization of certain acts. They discriminate against a whole community of persons, leaving them vulnerable to police abuse, denying medical care and legal rights. Like many countries the law is used to harass. While building steps towards decriminalization it is important that the law is laid down and procedure is followed through and that LGBT persons are not arrested on mere suspicion as it occurs now. It is important to ensure that as citizens of Sri Lanka LGBT persons are able to live and enjoy the rights provided in Sri Lanka.

Recommendation

- Decriminalization of adult same sex consensual sexual intercourse in private.

Strengthening of Legal Protection for LGBT in Sri Lanka: road to decriminalization

- Passing of laws and implementation of policies that ensure non-discrimination based on sexual orientation in all realms of public and private life. Ensuring equal protection, equal opportunity and substantive rights.
- The government when undertaking training sessions to the police must ensure that they are sensitized in regards to problems faced by LGBT community as well. Sensitization of police, who are the face of the legal structure. The State can also
- Sensitization of lawyers so as to ensure that in cases of police violence, harassment and in cases where the rights of LGBT persons are to be protected, proper and sensitive legal advice can be provided.
- Awareness creation among the LGBT community in regards to laws, rights and legal protection mechanisms.

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