



The status of LGBT persons in Sri Lanka and successful legal interventions

What does Sri Lankan law say about homosexuality?

➤ PROHIBITION OF UNNATURAL SEX

Sec 365: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years.

What does Sri Lankan law say about homosexuality?

➤ PROHIBITION OF GROSS INDECENCY

- 365A: Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to 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.

What does Sri Lankan law say about homosexuality?

- Gender of the parties and nature of the offence not clearly specified
- Both provisions are inclusive of heterosexual conduct and not restricted to homosexuals

Interpreting the law

Case Law

CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE

Case laws

- Until recently no recorded cases under Ss. 365 & 365A in Sri Lanka

PROHIBITION OF ANAL SEX

- In the Indian case of *Noshirwan*, the accused admitted to trying to have sex with a man.
- One of the earliest cases on section 377 of the Indian Penal Code, the Court held that “carnal intercourse against the order of nature” meant anal sex.
- Accused was not charged due to lack of penetration during the act.

Case laws

PROHIBITION OF ORAL SEX AND SEX WITH NO REPRODUCTIVE PURPOSE

- *Khanu v. Emperor* – primary judgment on interpretation of s. 377 in India.
It said that s. 377 included all forms of sex that did not have the possibility of conception of human beings. Hence, oral sex was held against the order of nature. Vaginal sex may also fall under this offence
- Case of *Lohana Vasantlal* – “oral sex might be permissible if it was part of foreplay leading to “natural” (vaginal) sex.”
- As per these cases, following considered unlawful –
homosexual oral sex, heterosexual oral sex not leading to vaginal sex, usage of contraception, thigh sex, mutual masturbation

Case laws

PROHIBITION OF THIGH SEX

- 1961 *East Pakistani case* - Court held that “thigh sex” fell within the ambit of “carnal intercourse against the order of nature.”
- The Court held that “the entry of the male organ of the accused into the artificial cavity between the thighs of [the other partner] would mean penetration and would amount to carnal intercourse.”
- An Indian Court upheld this decision in a similar case involving “thigh sex” in 1969.

Case laws

PROHIBITION OF MUTUAL MASTURBATION

- 1992 Indian case of *John Antony*.
- Court held that mutual masturbation was also an unnatural offence within section 377, as “the male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice-like thing for manipulation and movement of the penis by way of insertion and withdrawal.”.

Interpreting the law

Case Law

GROSS INDECENCY BETWEEN PERSONS

Case laws

GROSS INDECENCY – APPLICATION

- Most Commonwealth jurisdictions prohibited gross indecency between two men.
- Sri Lanka prohibits, gross indecency between “any persons” and not exclusively between two men.
- TANZANIA – Gross indecency includes any act that “falls short of actual intercourse and may include masturbation and indecent behaviour without any physical contact.
- Canadian case - *Quesnel and Quesnel* - gross indecency means a “marked departure from decent conduct”.

Case laws

GROSS INDECENCY – APPLICATION

- Hong Kong case of *Savage*, the Court held that “whether an act is or is not an act of gross indecency depends upon the nature of the act, the circumstances in which it was committed and the time and place in which it was committed”.
- Singapore case - *NG Huat v. PP, 1995*, court held that gross indecency is “what would be considered grossly indecent by any right-thinking member of the public.”
- UK - *R v Court* - British House of Lords defined “indecent” as a “contravention of standards of decent behaviour relating to sexual modesty or privacy”

GOSL declares anti-gay laws unconstitutional - 2014

- October 2014, GOSL declared, discrimination of persons based on their sexual orientation was implicitly prohibited under Constitutional Right to Equality. This was repeated in Nov. 2017 at the UPR and in 2019 at the ICCPR review.
- “laws discriminating on the grounds of sexual orientation and gender identity are unconstitutional [and] Sections 365 and 365A [of the Penal Code] do not target any particular group but are there to protect public morality.”
- **Three key developments :**
 - Ss. 365 and 365A may not criminalise homosexuality or homosexual conduct
 - Provisions should not be interpreted to discriminate against homosexuals
 - offending provisions exist to protect public morality and public conduct and not private

- Sri Lanka's Ministry of Health and the Registrar General of Persons issued two circulars in 2016 on gender recognition.
- Ministry of Health Circular introduce process of gender recognition and issuing of a Gender Recognition Certificate.
- Registrar General Circular recognized the Gender Recognition Certificate and issued instructions to amend Birth Certificate with new gender and change Identity Cards and Passports.
- No third gender recognition. Only change of gender from one gender to another.

SRI LANKAN CASE LAW:

SUPREME COURT JUDGMENT ON GAY SEX CASE - 2016

- 2016 case heard by Supreme Court on two accused under section 365A of the Penal Code
- “There is no question that the individuals involved in the case are adults and the impugned act, no doubt was consensual. Section 365A was part of our criminal jurisprudence almost from the inception of the Penal Code in the 19th century. This offence deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggary in 2004 and not an offence in England now.”

SUPREME COURT 2016 CASE (Cont.)

- “The contemporary thinking, that consensual sex between adults should not be policed by the state nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England.”
- “Hence to visit the offence with a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual.... In view of the above I am of the view that imposing a custodial sentence is not warranted”

SUCCESSFUL LEGAL INTERVENTIONS IN SRI LANKA



- EMPLOYMENT DISCRIMINATION
- WORK PLACE SENSITISATION
- POLICE VIOLENCE
- PARLIAMENTARY INTERVENTIONS
- COMMUNITY PARTNERSHIPS

EMPLOYMENT DISCRIMINATION – CASE STUDY

- Part time employee dismissed from his employer for being gay.
- Employer was a major hotel.
- Employee was dismissed for having gay-sex inside a hotel room, out of contract hours when visiting as guest.
- Employee was locked in room, filmed making confession, asked questions on sexual preferences and told “we don’ t want your homosexuality here.”



EMPLOYMENT DISCRIMINATION – CASE STUDY (Contd.)

- iProbono lawyers intervened. Employer was advised on AG' s statement on non-discrimination. Also that treatment of employee was criminal offence of unlawful confinement.
- Employer apologised for shameful treatment, agreed to delete the video recordings, re-hired employee and dismissed manager responsible for discrimination.



WORKPLACE SENSITISATION PROGRAMMES

- Sensitisation programmes on LGBT inclusion in the work place.
- Programmes catered to both corporate leaders and employees.
- Assistance to prepare inclusive policies.
- Power of story telling.



POLICE VIOLENCE AND DISCRIMINATION INTERVENTIONS

- FTM Transgender case.
 - ▣ Sri Lanka has legal gender recognition.
 - ▣ FTM transgender person arrested by police after marrying his then girlfriend.
 - ▣ Victim was subject to abuse, degrading treatment and no access to lawyer.
 - ▣ Police refused to accept gender recognition cert and filed criminal case.



POLICE VIOLENCE AND DISCRIMINATION INTERVENTIONS

- FTM Transgender case.
 - ▣ iProbono lawyers intervened.
 - ▣ Magistrate accepted gender recognition certificate and recognised the marriage as valid.



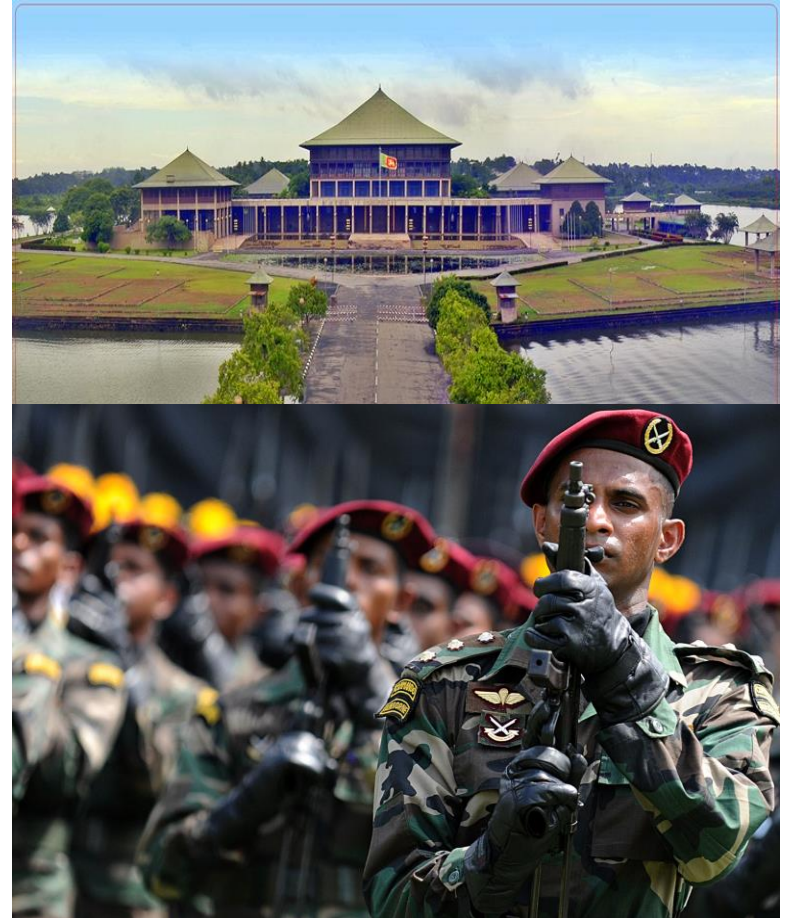
POLICE VIOLENCE AND DISCRIMINATION INTERVENTIONS

- Gay sex case.
 - 18 year old arrested and remanded for consenting gay sex with a 17 year old. Evidence was a video recording on phone.
 - Criminal charges filed under Penal code.
 - iProbono lawyers intervened. Delayed hearing.
 - Filed complaint with Attorney General



PARLIAMENTARY INTERVENTIONS

- Gender subcommittee (decrim)
- Fundamental rights subcommittee (Constitutional reform)
- Parliamentary Petitions Commission (Army Major case)



PARLIAMENTARY INTERVENTIONS

Parliamentary Petitions

Committee-Army Major case

- Army major dismissed from army for being gay. Denied pension and medals.
- Filed over 20 complaints with Human Rights Commission – no success.
- Filed case at Court of Appeal – dismissed.
- Filed complaint with Parliament.



PARLIAMENTARY INTERVENTIONS

- Gender subcommittee (decrim)
 - Successfully lobbied subcommittee to expand scope of “Gender” to include sexual orientation and gender identity.
 - Engaged with the subcommittee to call for decrim.



PARLIAMENTARY INTERVENTIONS

- ❑ Fundamental Rights Committee - Constitutional Reform
 - ❑ Made representations to the Committee to expressly include SOGI in the new fundamental rights chapter of the proposed new Constitution for Sri Lanka.
 - ❑ Very successful intervention. Protections were SOGI were expanded to prevent all forms of discrimination and recognise right to family, marriage, etc.



ACCESS TO JUSTICE WITHIN THE LGBT COMMUNITY

- The LGBT Partnership Forum.
- Alternate dispute resolution within the LGBT community.
- Utilising the New York Convention for LGBT inclusive arbitration.

LGBT PARTNERSHIP





THANK YOU