

SUBJECTED TO ABUSE

LEGAL PROVISIONS CAUSING HARM



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I. SUMMARY

Survivors of human rights violations by the police as illustrated in our case study have complied with sexual bribery requests due to fear of being detained, or in instances where their sexual orientation / gender identity is hidden, the fear of being 'outed'. The trauma caused by the act and the fears caused by the power imbalance between the parties do not allow the survivors to take further steps such as complaining about the abuse to authorities like the Human Rights Commission of Sri Lanka (HRCSL) or the Commission to Investigate Allegations of Bribery or Corruption (CIABOC). The existence of laws which criminalise consensual same-sex conduct has continued to be a prime enabler of such abusive acts by the police and other public and private actors. The criminalization of consensual same-sex sexual conduct allows the criminal justice system to look at LGBTI persons as deviant sexual offenders, effectively dehumanizing them and making them easy prey for abuse, harassment, violence, extortion and sextortion.

Sections 365 and 365A of Sri Lanka's Penal Code of 1883 and various provisions of the Vagrants Ordinance of 1841 have been interpreted and applied arbitrarily by law enforcement authorities including the police to criminalize consensual same-sex sexual relations. The laws that criminalise consensual same-sex sexual conduct and the non-recognition of rape of males under the Sri Lankan law which identifies 'rape' as an act by a male perpetrator on a female, leads to non-reporting or under reporting by males who have been subjected to sexual abuse.

Several UN Treaties and their Treaty Bodies and a few Special Procedures of the UN Human Rights Council have recognized that the criminalization of same-sex conduct violates the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. The Yogyakarta Principles, and the YP +10 Principles also set out state responsibilities with regard to protection of the human rights of LGBTI persons including a call to decriminalise and to provide appropriate remedies for human rights violations.

Decriminalisation of consensual same-sex conduct, repeal of morality laws providing for arbitrary policing, enactment of non-discrimination legislation and/or inclusion of sexual orientation and gender identity/expression in Art. 12 (2) as grounds of non-discrimination, providing for effective remedies, continued training and awareness campaigns on sexual orientation and gender identity/expression for the Police and other law enforcement authorities and for judicial actors are necessary steps to address the issue of police abuse.

II. CASE STUDY

SM¹ is a 31-year-old cis-gender male who identifies as gay. He is from the District of Gampaha and is of Muslim ethnicity. The incident he complained of happened in April 2021. A few days after a pandemic related curfew which had been in place was lifted at around 10 pm, SM was walking to the medical shop through a lagoon area to buy medicine for his friend who was sick. He was wearing shorts and an arm-cut t-shirt. At that time two police officers who were hanging around the area approached him and said they wanted to conduct a body search. SM did not think much about it and allowed them to conduct a search. He realized he had forgotten his National Identity Card, but he had photos of it on his mobile phone.

SM notes that one of the officers, who seemed to be the main officer, spoke to him in a degrading manner and kept touching him all over in a sexual manner making him very uncomfortable. The officer also insisted he accompany them to the police station, but the other officer said it would be better to just let him go. The officers went through SM's wallet and found two condoms and they immediately announced that SM should come with them to the police station. They hit SM on the head a few times as well. SM asked the officers if it was illegal to have condoms but was told that it was none of his business and that he shouldn't be wisecracking with the police or giving them attitude.

SM was quite terrified at this time and when the main officer saw this, he told him, *"if you want to be released and go home without any issues you have to do us a favour."* The main officer then took SM to a nearby bush and requested a sexual favour. SM was forced to perform fellatio and other sexual acts with the main officer. The other officer said nothing and just watched. Since SM was too scared and unfamiliar with what would happen if he did not comply, he performed the act as demanded. The officers were police casuals the whole time, and even lit a cigarette during the act. He presumed they were from the local police station. Since he didn't have much money on him, SM was let go but he was forced to give his mobile number. Two days later he received a phone call from the main officer asking to meet him. SM told the officer that he was out of town and a week later changed his mobile number.

With assistance by BRIDGE to Equality (BRIDGE) SM submitted a complaint to the Human Rights Commission of Sri Lanka (HRCSL) about the violation of his human rights. While he received inquiry letters from the HRCSL, they arrived late and could not be responded to. In the meantime, due to the complaint, officers from the police station had called him and asked him to visit the police station, which he had not done due to fear. He now wishes not to pursue this case due to his fear that his family members will find out about his sexual orientation.

¹ Not his real name

III. LAW AND POLICE ABUSE

Our case study is just one of many similar cases BRIDGE to Equality has documented relating to police abuse. Many of these incidents have followed a similar method by which the survivor is requested a sexual bribe by the police. Many of the survivors have complied with such requests due to fear of being detained or in instances where their sexual orientation/gender identity is hidden, the fear of being 'outed'. The trauma caused by the act and the fears caused by the power imbalance between the parties do not allow the survivors to take further steps such as complaining about the abuse to authorities like the Human Rights Commission of Sri Lanka (HRCSL) or the Commission to Investigate Allegations of Bribery or Corruption (CIABOC). Further, complaints to the police become meaningless as it is they themselves who are the perpetrators. The existence of laws which criminalise consensual same-sex conduct has continued to be a prime enabler of such abusive acts by the police and other public and private actors. The criminalization of consensual same-sex sexual conduct allows the criminal justice system to look at LGBTI persons as deviant sexual offenders, effectively dehumanizing them and making them easy prey for abuse, harassment, violence, extortion and sextortion.

LGBTI persons already face multiple acts of marginalization including stigma and criminalization. Sections 365 and 365A of Sri Lanka's Penal Code of 1883 criminalize "carnal intercourse against the order of nature" and "acts of gross indecency in public or in private", respectively. Both sections have been used to criminalize consensual same-sex sexual relations, although the Penal Code does not provide a definition of the terms used by those sections. Those convicted of the 'crime' under section 365 may face up to ten years' imprisonment with gross indecency being punished with up to two years' imprisonment. Section 365A opens up the authority of the police to even inquire into acts done in the privacy of the bedroom thus leading to police raids and arrests of homosexual couples².

Sections 365 and 365A are continued to be used by the police to arrest persons even when there is no evidence of an 'act' under these sections by merely considering gender performance and/or by claiming that an act may take place in the near future. While judicial officers at present have resorted to dismissing such cases brought before them³, police have continued to use the law to threaten LGBTI persons and obtain sexual and/ monetary benefit. Trainings for the police, like the one which became public because of a viral video in August 2021⁴, where a counsellor speaking at the event claimed that homosexuality was against the culture and asked the participants of the programme to declare out loud that they would not let their children fall prey to homosexuals, add fuel to the negative stereotypes about LGBTI persons dehumanizing them. A case against the holding of such training was concluded in

² Human Rights Watch, Sri Lanka: Forced Anal Exams in Homosexuality Prosecutions, <https://www.hrw.org/news/2020/10/20/sri-lanka-forced-anal-exams-homosexuality-prosecutions> (October 2020)

³ Daily Mirror, Colombo Chief Magistrate dismisses case against three gay men for homosexuality https://www.dailymirror.lk/breaking_news/Colombo-Chief-Magistrate-dismisses-case-against-three-gay-men-for-homosexuality/108-226559 (December 2021)

⁴ The Morning, LGBT discrimination by Sri Lanka Police: Violation of their own laws in training?, <https://www.themorning.lk/articles/153684> (August 2021)

January 2023 with a circular issued by the IGP in December 2022 being filed on record. The circular titled 'Matters to be considered when dealing with transgender people and people who have undergone gender transition' instructed the police on how to engage with transgender persons. The circular does not apply to all persons in the LGBTI spectrum.

The laws that criminalise consensual same-sex sexual conduct and the non-recognition of rape of males under the Sri Lankan law which identifies 'rape' as an act by a male perpetrator on a female⁵, leads to non-reporting or under reporting by males who have been subjected to sexual abuse. Instead rape of males gets subsumed under section 365B titled 'Grave Sexual Abuse'⁶ which is a gender -neutral provision. This provision provides for a lesser minimum punishment than for rape.⁷

Further, vague and overbroad provisions of the Vagrants Ordinance No.4 of 1841, which proscribe social behaviour, leads to arbitrary enforcement of the Ordinance. Section 2 of the Ordinance criminalizes 'riotous and disorderly behaviour' and section 7 (1) (b) penalizes 'any person found committing any act of gross indecency or found behaving with gross indecency in or about any public place.' In both these instances, the statute fails to define terms such as "disorderly and riotous" and "gross indecency" and provides no explanation as to what such behaviour entails. This permits the police to undertake arbitrary and discriminatory arrests as any behaviour the police purports to consider unacceptable within these terms can be brought within the purview of such vaguely worded sections.

The above legal provisions are non-compliant with the International Covenant on Civil and Political Rights (ICCPR), and the UN Human Rights Committee has affirmed in its General Comment on the right to liberty under Article 9(1) of the ICCPR that "any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application." This is further exacerbated when police personnel are given unfettered discretion to undertake arrests without a warrant based on some of these vaguely worded provisions. For instance, section 3 (2) of the Vagrants Ordinance allows for arrest without a warrant every person deemed to be an 'idle or disorderly' person.

⁵ Section 363 of the Penal Code of 1883 (as amended)

⁶ Section 365B: (1) Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363.

⁷ The prison term for rape is seven to twenty years rigorous imprisonment and the prison term for Grave Sexual Abuse is from five to twenty years rigorous imprisonment.

Several UN Treaty Bodies and a number of Special Procedures of the UN Human Rights Council have recognized that the criminalization of same-sex conduct violates the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention. UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.⁸

Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse and have recognized that it can lead to torture and other ill-treatment.⁹ As the Special Rapporteur on torture and other ill-treatment noted, *“a clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization.”*¹⁰

The UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law.¹¹ In 2017, the UN Committee on the Elimination of Violence against Women condemned use of the Vagrants Ordinance by the Sri Lankan police “to arbitrarily arrest women in prostitution, using their possession of condoms as evidence of engaging in prostitution, and subjecting them to harassment, sexual bribery, and extortion.”¹²

⁸ E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992. The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, notes: “States have an obligation to protect the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention.”

⁹ E.g., see Born Free and Equal, *Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, para. 20 and, generally, paras 18-25

¹⁰ Para 15 & 48, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016

¹¹ WGAD Opinion 7/2002 (Egypt) UN Doc. E/CN.4/2003/8/Add.1 (2002) pp. 68-73, Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94, Opinion 42/2008 (Egypt), UN Doc. A/HRC/13/30/Add.1, adopted (2008) pp. 195- 201.

¹² CEDAW, Concluding observations on the eighth periodic report of Sri Lanka, https://digitallibrary.un.org/record/1286137/files/CEDAW_C_LKA_CO_8-EN.pdf (March 2017), para. 26

CONSTITUTION

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 guarantees in its Fundamental Rights Chapter the right to equality before the law and equal protection of the law of all persons (Article 12).

It prohibits discrimination on grounds of race, religion, language, caste, sex, political opinion, and place of birth but does not prohibit discrimination on the grounds of sexual orientation, gender identity or gender expression.

The Sri Lankan government has indicated before various UN bodies including most recently the UN Human Rights Committee, that ‘the prohibited grounds of discrimination under Article 12 (2) of the Constitution are non-exhaustive, and discrimination on the grounds of sexual orientation is implicitly prohibited.’

Further, Article 11 of the Constitution provides for the right to be free from torture or cruel, inhuman or degrading treatment or punishment, which is a non-derogable right.

The Convention against Torture Act of 1994 also provides recourse for a survivor to file a case with the High Court but this process has been condemned as long winding and not leading to true accountability.

Sri Lanka is a Party to all core international human rights treaties including the ICCPR and the Convention against Torture (CAT). The rights protected under these treaties apply to all Sri Lankans.

Principle 7 of the Yogyakarta Principles of 2007 (a set of principles on the application of international human rights law in relations to sexual orientation and gender identity), which addresses the right to freedom from arbitrary deprivation of liberty, requires states to take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention.¹³ This includes the repeal of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice. Further, Yogyakarta Principles 2 on the Right to Equality and Non-discrimination, and Principle 5 on the Right to Security of the Persons require the state to decriminalise consensual same-sex conduct and to take all possible measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity and ensure that perpetrators are investigated, prosecuted and punished and that victims are provided appropriate remedies and redress, including compensation. Principle 10 on the Right to be free from Torture, and Cruel, Inhuman or Degrading Treatment or Punishment requires states to take measures to prevent and protect acts which violate the right as well as provide training programs to the Police, prison officials and others in a position to perpetrate or prevent such acts. These requirements are further strengthened by Principle 28 on Effective Remedies and Redress and Principle 29 on Accountability.

In 2017, the Yogyakarta Principles +10 (YP+10) were adopted¹⁴. This included 10 more Principles to the original 29. Principle 33 on the Right to Freedom from Criminalisation and Sanction on the basis of sexual orientation, gender identity, gender expression or sex characteristics requires states to ensure that legal provisions which are punitive in nature and applicable to acts relating to morality, decency, vagrancy, sodomy, sex work, loitering and begging among others need to be repealed. It also requires that pending repeal that there be a moratorium on the application of such laws to punish such acts. The principles also require states to ensure that the judiciary, law enforcement authorities and healthcare providers are provided training in relation to their human rights obligations regarding sexual orientation, gender identity, gender expression and sex characteristics.

The Anti-Corruption Act No.9 of 2023 passed in July 2023, recognizes 'sexual bribery' as an offence and as a form of corruption. The Act identifies sexual favour as a form of gratification (bribe) and section 143 of the Act states that a giver of the gratification can be a competent witness against the person accused of taking the gratification. Sexual favour is defined in the interpretation section as comprising of "*sexual intercourse; or any act may not amount to sexual intercourse, but may amount to or constitute physical, verbal, or non-verbal conduct of a sexual nature, including the exposure of a private body part or any act performed by the use of information and communication technology or any other means.*" This is a very wide definition, but it is yet to be seen how the provisions of this Act will be implemented and their impact on acts of abuse by the police.

¹³ Available at http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf

¹⁴ Available at http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

IV. CONCLUSION

Incidents where police request sexual bribes as illustrated by our case study have been far too common in Sri Lanka. The magnitude of such acts is much higher when the survivor/victim is from an already marginalized or vulnerable populace as in our case study where the survivor identified as gay and belonging to the Muslim minority, thereby situating himself at an intersection of vulnerabilities.

The Police have the cover of the law when engaging with LGBTI persons due to the arbitrary construction and application of centuries old legal provisions. Such acts by the police violate international human rights law as well as the fundamental rights provisions in the Constitution, but the legal provisions in the Penal Code and Vagrants Ordinance continue to be in place due to Article 16 of the Constitution which permits the continued validity and operation of all existing written and unwritten law notwithstanding their inconsistency with the fundamental rights chapter.

The existence of these provisions which criminalise same-sex sexual conduct thus leads to the Police having an automatic upper-hand in their relationship with LGBTI persons. This results in survivors having to endure any abuse meted out by the police due to lack of recourse and fear of continued persecution.

Decriminalisation of consensual same-sex conduct and repeal of morality laws providing for arbitrary policing are first steps to provide survivors the confidence to come forward when their human rights have been violated. Enactment of non-discrimination legislation and/or inclusion of sexual orientation and gender identity/expression in Art. 12 (2) as grounds of non-discrimination, providing for effective remedies, continued training and awareness campaigns on sexual orientation and gender identity/expression for the Police and other law enforcement authorities and judicial actors are all necessary next steps in the journey to provide equal rights for LGBTI persons.

V. RECOMMENDATIONS

To the Government of Sri Lanka:

1. Repeal sections 365 and 365A of the Penal Code in so far as they are applicable to those who engage in consensual same-sex sexual relations.
2. Amend section 363 of the Penal Code to include rape by and of all genders in accordance with international human rights law and standards.
3. Repeal the Vagrants Ordinance No. 04 of 1841 and if needed review and replace in accordance with international human rights law and standards through the Penal Code or through specific legislation any part of the law that requires retention.
4. Pending repeal of Sections 365 and 365A of the Penal Code and the Vagrants Ordinance implement a moratorium on all arrests undertaken under sections 365, 365A of the Penal Code and the Vagrants Ordinance.
5. Enact in accordance with international human rights law and standards comprehensive anti-discrimination legislation including sexual orientation, gender identity / expression as grounds of non-discrimination.
6. Include sexual orientation and gender identity/ expression as prohibited grounds of discrimination in the Fundamental Rights Chapter of the Constitution and/or in any new Constitution to be enacted.

To the Police:

1. Implement a moratorium on all arrests undertaken under sections 365, 365A of the Penal Code and the Vagrants Ordinance. The arbitrary use of the provisions to harass and/or arrest LGBTI persons should be stopped.
2. Maintain desegregated data regarding complaints of harassment, violence and abuse against LGBTI persons.
3. Maintain desegregated data on arrests made of consenting adult partners under sections 365, 365A of the Penal Code and the provisions of the Vagrants Ordinance.

4. Issue a policy guidance/circular applicable to the entire Police Force on measures to take when engaging with LGBTI persons, the existing circular with regard to *'Matters to be considered when dealing with transgender people and people who have undergone gender transition'* maybe expanded in application to LGBTI persons as a whole.
5. Conduct awareness trainings with appropriate qualified trainers on sexual orientation, gender identity/expression from a human rights perspective for members of the Police Force
6. Ensure immediate disciplinary action and appropriate legal measures against members of the police force who have engaged in human rights violations.
7. Provide effective and appropriate remedies including compensation to survivors of police abuse.

To the Human Rights Commission of Sri Lanka:

1. Monitor systematically acts of abuse, harassment, and violence by law enforcement authorities which are based on sexual orientation and gender identity/expression
2. Collect SOGIE disaggregated statistical data on complaints made to the HRCSL
3. Provide recommendations and policy guidance to law enforcement authorities including the police as to measures to take when engaging with LGBTI persons
4. Review any policies prepared by law enforcement authorities for compliance with international human rights law and standards.
5. Provide awareness training on sexual orientation, gender identity/expression from a human rights perspective for law enforcement authorities.
6. Inquire into and provide recommendations in accordance with international human rights law and policies in cases brought against law enforcement authorities by LGBTI persons.



BRIDGE to Equality - BRIDGE project which aims to improve the protection of human rights for LGBTQ people in Sri Lanka through the use of international human rights law to enable justice actors (judges, lawyers and other legal professionals), activists and human rights defenders to improve justice outcomes for the LGBTQ community; with a focus on overcoming challenges imposed by the current legal framework, as well as the overall promotion and protection of human rights of LGBTI people.

BRIDGE is jointly implemented by DAST, National Transgender Network and Young Out Here in partnership with the International Commission of Jurists since 2021.



www.bridge2equality.org



bridgetoequality@gmail.com



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