

Persecution of the LGBTIQ Community: Does Sri Lanka's Police have Nothing Better to Do?

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Early last week (September 22), news emerged that the Fort Magistrate's Court was set to sentence two men who had confessed to engaging in same-sex sexual relations. The news stirred up controversy, with some media outlets claiming that this case was the first of its kind to be heard in Sri Lanka. However, this is simply not true; the police repeatedly persecute the Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer/Questioning (LGBTIQ) community in this country.

In a Facebook post, LGBTIQ activist and lawyer, Aritha Wickramasinghe, highlighted two other cases ongoing at the courts. In one of the cases - ongoing at the Negombo Magistrate Court - the police had arrested a man, and based on his confession on who else he had sex with, in his own home, had arrested and remanded more men. In another case, the police had arrested three gay men in a hotel room. The men were not engaging sexual relations, but they are being prosecuted for same-sex sexual relations because they had condoms in their wallets. Mr. Wickramasinghe went on to highlight that in both cases, the arrested individuals had to undergo degrading anal examinations.

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Sri Lanka's Legal Landscape

In Sri Lanka, same-sex sexual relations among consenting adults are criminalised by Section 365 and 365A of the Penal Code, which states that "carnal intercourse against the order of nature" (in other words, any type of sex that is considered unnatural) and "acts of gross indecency" are criminal offences punishable by the law, carrying a sentence of up to 10 years. Section 365 and 365A do not specify that these offences pertain to same-sex sexual relations, but they are most often used against LGBTIQ individuals.

Further, According to Section 365, sexual intercourse needs to occur for it to be constituted as a crime in the eyes of the law. 365A, on the other hand, is more ambiguous; the term "gross indecency" can be interpreted in different ways and does not necessarily mean that a sexual act needs to take place for a charge to be placed. In other words, a simple act such as holding of hands by a same-sex couple in public can be constituted as an act of indecency and they can be arrested. Further, in both these provisions, whether the acts are consensual or not is not taken into account.

In addition, the Vagrancy Law and Section 399 of the Penal Code regarding cheating by impersonation are also used against the LGBTIQ community in Sri Lanka, particularly against transgender individuals.

However, while "acts of gross indecency" and "unnatural carnal intercourse" are criminalised,

technically, diverse Sexual Orientations and Gender Identities/Expressions are not outlawed. Fundamental Rights recognised by the Sri Lankan Constitution includes non-discrimination under article 12(2) which states that “no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, and place of birth or any one of such grounds”. At least on two occasions, the Sri Lankan government has committed before the United Nations that LGBTIQ persons are constitutionally protected, and non-discrimination on SOGIE is implicitly included under this constitutional provision. In fact, with the intervention of the Human Rights Commission in 2016, the Registrar General’s Department and the Ministry of Health issued two circulars, to provide Gender Recognition Certificates (GRC) to transgender persons who wish to amend the gender assigned to them at birth in official documents.

That said, the fact that these laws exist invite and excuse discrimination, harassment, violence, and stigma against the LGBTIQ community. In fact, the implications of the law, in Sri Lanka’s conservative context, go far beyond its legal scope. For instance, earlier this month, a transgender individual was denied entry to a popular bar in Colombo simply due to her “appearance”.

Legal System’s Inefficiency in Dealing with Sexual Crimes

Sri Lanka is one of the 72 countries that criminalise private, consensual, same-sex sexual activity among adults. Almost half of these countries are Commonwealth jurisdictions. The irony of Sri Lanka continuing to use an archaic Victorian law, put in place by the British colonisers in 1883, while touting a Sinhala-Buddhist, nationalist rhetoric, cannot be ignored.

However, what is more important is why the police need to look into the bedrooms of consenting adults, when they clearly have their hands full with much graver matters.

For instance, Sri Lanka Police’s Grave Crime Abstract for the Year 2015 reveals that the police have recorded 379 rape cases of women over 16 years of age. Investigations are pending for 232 of them, while over a 100 of them are pending at the levels of Magistrate Courts, District Courts, High Courts, or at the Attorney General Department. In total, 365 cases are pending, while zero convictions have taken place. When it comes to statutory rape (women under 16 years of age), while 1,654 cases have been recorded in 2015, 1,632 of them are still pending, with investigations pending for 894 of them. Only one case has ended in a conviction.

The same report for 2019 reveals that the situation has not improved. While the police have recorded 289 rape cases of women over 16 years of age, 278 cases were still pending, with investigations were pending for 223 of them. Again, no convictions have taken place. The report also shows that 1,490 statutory cases have been recorded, of which 1,472 are pending, with investigations pending for over a thousand of them. Again, only one conviction has been made.

This clearly shows that the police’s and the legal system’s resources are misplaced in persecuting the LGBTIQ community, and consenting, same-sexual relations among adults.

Problematically, it is difficult to discern how many cases of “unnatural sex” or cases of same-sex sexual relations have been recorded, as it is lumped together with cases of grave sexual abuse in the Grave Crime Abstract. This shows that the legal system does not take consent into account when considering sexual relations among same-sex adults.

No One is Safe from Arbitrary Arrests

Another concern that stems from arrests of this nature is whether the law is protecting those who it is meant to protect – common citizens of the country.

As mentioned above, Section 365 and 365A of the Penal Code and the Vagrancy Law are used to arbitrarily arrest, harass, and discriminate against LGBTIQ individuals. However, this is not an issue only faced by the LGBTIQ community. Sri Lanka's police is known to arbitrarily arrest and intimidate ethnic and religious minorities in Sri Lanka – predominantly Muslims and Tamils. Just last year, Sri Lankan authorities imprisoned a Muslim woman for wearing a dress displaying the wheel of a ship, claiming she was disrespecting Buddhism by donning clothing depicting a 'Dharma Chakra.'

What this means is that no one – especially those who do not conform to commonly-accepted social norms – is safeguarded by the law; in fact, the law is actively used against them. This begs the question: it might be the LGBTQ community today, but who will be next?

Shihara Maduwage

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Daily Mirror online

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