

Sexual Orientation and Gender Identity

SUMMARY OF KEY ISSUES IN PREVIOUS UPR CYCLES

In its second Universal Periodic Review, India received 3 recommendations for addressing discrimination based on sexual orientation and gender identity. The United States called for “adequate protections for members of religious minorities, scheduled castes, and adivasi groups ..., and LGBT citizens”. Canada proposed measures be instituted to “address violence and discrimination directed towards persons based on their sexual orientation, especially related to employment”. Argentina advised studying “the possibility of eliminating any criminalization of same sex relations.” India only accepted the recommendation from Argentina.

Some of the general recommendations that India accepted have implications for protecting LGBTI persons from discrimination. These include the recommendation from Vietnam calling for “providing more resources for enjoyment of economic and social life for vulnerable groups like women, children ... and minorities” and the one from Norway recommending fully integrating a “gender perspective” in the follow up of UPR-II.

In its report for the UPR-II, India noted (para 37): “Homosexual intercourse was a criminal offence until 2009 under Section 377 of the Indian Penal Code, 1860. The law was struck down by the Delhi High Court in 2009, in the matter of Naz Foundation v. Govt. of NCT of Delhi as a violation of fundamental rights in the case of consensual adults.” Yet, in an appeal by conservative groups against this landmark judgment, the government abdicated its duty to defend the fundamental rights of the sexual minorities, leaving this onerous task entirely to civil society. While reversing the Delhi High Court decision, the Supreme Court in 2013, noted that it was the Parliament's job to de-criminalise homosexuality. Instead of the government, it was civil society that filed a curative petition against the re-criminalisation of homosexuality in Supreme Court. This has been admitted and is currently pending.

In 2014, the Supreme Court in the case of NALSA v UOI upheld the Constitutional rights of transgender persons, recognizing the right to self-determination of gender identity and recommending affirmative action through reservations. Regrettably, the government's proposed draft transgender rights Bill (2016) has been widely critiqued for rolling back the rights elaborated by the Supreme Court in the NALSA decision. Attempts at legislative amendments to decriminalize consensual same sex behaviour have also failed in the Parliament.

On two occasions in 2016, India chose to abstain from voting in the UN HRC. The first time was on a resolution for protection against violence and discrimination based on sexual orientation and gender identity, including through the appointment of an Independent Expert to undertake the same. The second was on the amendment proposed by the Africa Group to push back this resolution. Considering India's international and Constitutional obligations, as well as its acknowledgment of peer-nations' recommendations, the government must frame policies and measures in consultation with the civil society to de-criminalise homosexuality, affirm equality and protection against discrimination to LGBTI in all fields of life.

NATIONAL LEGAL FRAMEWORK

The British colonial Government Enacted Section 377 of the Indian Penal Code, based on Victorian morality, to criminalize homosexual behaviour. The section states: 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 ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This archaic law denies basic human rights to sexual minorities. Section

377 IPC, criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution which include the rights to equality, non-discrimination, privacy, bodily autonomy, and health. State and non-state actors have also used this provision to persecute and harass LGBT persons, including through extortion and blackmail. Several other vague and over broad laws have also been used to criminalize or harass LGBT persons in India, including nuisance laws, state police acts, laws that criminalize begging, and laws that regulate sex work.

CHALLENGES

De-criminalise homosexuality and ensure legal protection from sexual assault to all persons

Rights of Trans and Intersex persons

Equality, non-discrimination and related provisions

ISSUES AND IMPACTS

In 2013, the Indian Supreme Court reversed the ruling of the Delhi High Court de-criminalising adult consensual same sex relations in the Naz Foundation case (2009). On appeal, in Suresh Kumar Koushal, the Supreme Court upheld the constitutionality of section 377 which criminalises homosexuality, stating that it was the prerogative of the legislature to consider deleting the provision. The civil society organisations that opposed the appeal have filed a curative petition which was admitted by the Supreme Court in February 2016. The curative petition notes an alarming increase in the use of Section 377 following re-criminalisation, with 1347 complaints recorded by the National Crime Records Bureau in 2015. Attempts to introduce a bill in Parliament to de-criminalise homosexuality in 2015 and 2016 were defeated.

Comprehensive law reforms related to sexual offences were introduced by the Criminal Law Amendment, 2013. The reforms expand the definition of rape to include all forms of non- consensual penetrative sex. Yet, legal redress is limited to women in disregard of the Verma Committee's recommendations on which the amendments are based, that define rape be gender neutral qua the victim but gender specific qua the male perpetrator.

In the NALSA vs. Union of India case (2014), the Supreme Court recognized the right to self-determine gender, stipulating protection and welfare by state, including through affirmative action (as part of constitutionally recognized Other Backward Classes). While few States have formulated policies and schemes for trans-persons, the central government proposed Transgender Persons Protection of Rights Bill, 2016, contradicts the Supreme Court judgment. It denies self-determination of gender identity, instead pathologizing it; it fails to prescribe affirmative action measures to reverse historic discrimination, stigma and exploitation, even as it criminalizes traditional support systems and lifestyles associated with the lived realities of transgender people. The Bill confuses and conflates transgender identity with intersex-identity. The bill needs to elaborate separately legal protection for intersex persons' to address specific concerns of the intersex community. The Bill proposes rehabilitation instead of rights protection as a framework and has been widely critiqued and rejected by the community.

CHALLENGES

Equality, non-discrimination and related provisions

LGBTI persons face discrimination in both public and private domains. While section 377 explicitly serves as a tool of persecution, LGBTI persons are also targeted by laws relating to beggary, public nuisance, solicitation and sex work. LGBT people are forced to leave home, education, because stigma, bullying and punitive responses for not complying with dominant social norms. This impacts support systems available to them, as well as employment and livelihood options. While all trans persons are stigmatized and lack adequate support systems to protect them against attacks from their natal families and community, the situation is far worse when this status combines with being poor, SC/ST, disabled or because regional location. An affirmation of non-discrimination in law, backed by institutional changes in health care, education and employment are necessary aspects of eliminating discrimination on grounds of sexual orientation and gender identity.

ISSUES AND IMPACTS

RECOMMENDATIONS

Repeal Section 377 of the Indian Penal Code and other discriminatory legislations that criminalize same-sexual acts between consenting adults.

Enact a comprehensive gender inclusive sexual assault legislation that protects all men, women, transgender persons and others irrespective of their sexual orientation. Legal redress for sexual assault must be available to women, men and trans persons irrespective of sexual orientation or gender identity.

Withdraw the Transgender Persons (Protection of Rights) Bill 2016, and engage in meaningful and substantial public consultation with members of the transgender community, and ensure that any transgender rights legislation is fully consistent with international human rights law.

Draft a law for the protection of the rights of transgender with full community consultation, in compliance with the NALSA judgment and global best practices.

Ensure that police officers refrain from detaining and harassing persons based on their real or perceived sexual orientation or gender identity; and that police officers who abuse or harass persons based on their sexual orientation or gender identity are investigated and subject to disciplinary action or to prosecution,

Recognise the self-determination of transgender identity without reference to medical certification or sex reassignment surgery.

Take measures to address violence and discrimination directed towards persons based on their sexual orientation or gender identity by state and by non-state actors, including by passing an anti-discrimination law where sexual orientation and gender identity are prohibited grounds.

Ensure re-orientation of medical practitioners, mental health professionals and service providers, to notions of 'normal' and 'natural' in relation to sexuality, gender and the body.

Internationally accepted norms must apply with the aim to end surgical and medical intervention in intersex infants and children, and access to safe and secure sex reassignment surgeries must be made available to adults who seek it.

Protect against discrimination on multiple grounds including gender identity and sexual orientation with respect to health care, education, housing, employment and access to public spaces.

Promote a comprehensive sex-education program as part of the school curricula that addresses the heterosexist bias in education and fosters a liberal outlook about matters of sexuality, including orientation and sexual identity.

Affirmative action and allocation of more resources for social security of transgender persons, especially in areas of healthcare, education, employment and housing.

Take measures to safeguard the rights to freedom of expression, association and peaceful assembly for all LGBT people.

REFERENCES

Naz Foundation vs. Govt. of NCT Delhi, 2010 CriLJ 94

Suresh Kumar Koushal and another v NAZ Foundation and Others, CIVIL APPEAL NO.10972 OF 2013

Pawan Dhall and Paul Boyce, 'Livelihood, Exclusion and Opportunity: Socioeconomic Welfare among Gender and Sexuality Non-normative People in India', Evidence Report No. 106, Sexuality, Poverty and Law, February 2015, p 20.

Ratti, R. (Ed.). (1993). A lotus of another color: An unfolding of the south Asian gay and lesbian experience. Boston, MA: Alyson.

Shakuntala Devi (1977). The World of Homosexuals. Vikas Publishing House. ISBN 9780706904789

India: Repeal Colonial-Era Sodomy Law, report from Human Rights Watch, 11 January 2006.

National Legal Services Authority vs. Union of India and others, WRIT PETITION (CIVIL) NO.400 OF 2012

Transgender Persons (Protection of Rights) Bill, 2016 at: <http://www.prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2016-4360/>

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