

# Human Rights

## MODULE 2

*Human Rights*



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## Overview

This is the second module of the training guide, which consists of 4 modules. This module seeks to give the participants a thorough understanding of human rights.

This module encourages a localized and broad understanding of human rights to counter the common narrative that human rights are a western concept. The module also examines the contribution of the United Nations to the development of human rights mechanisms through treaties, treaty-based mechanisms and charter-based mechanisms.

Using group work, as well as presentations, participants' capacities will be developed on fundamental rights recognized in Sri Lanka. At the end of the implementation of this module, the participants will know how to access redress mechanisms where fundamental rights are violated, and how to access information under Sri Lanka's Right to Information Act.

This module contains 7 sessions to be delivered over 6 hours.





## Online Reference

To access the Online Version of the Module 02 and the Presentation,  
SCAN THE QR CODE BELOW:



Or simply type the below URL on your web browser:

**[www.shorturl.at/vxzOW](http://www.shorturl.at/vxzOW)**



## Session Plan

Time: 09:00 AM- 05:00 PM (6 hours)

START TIME	TIME ALLOCATION	SESSION
09:00 AM	15 minutes	Recap of day 1
09:15 AM	1 hour	Session 01: What are human rights? <i>Activity &amp; discussion</i>
10:15 AM	1 hour	Session 02: History of human rights A timeline
11:15 AM	15 minutes	Break
11:30 AM	1 hour	Session 03: Human rights in Sri Lanka <i>Presentation and Q&amp;A</i>
12:30 PM	1 hour	Mid-day break
01:30 PM	1 hour	Session 04: UN contribution to human rights <i>Presentation &amp; Q&amp;A</i>
02:30 PM	30 minutes	Session 05: Sri Lanka's adherence to international human rights standards <i>Presentation and Q&amp;A</i>
03:00 PM	45 minutes	Session 06: Indian experience <i>Presentation &amp; Q&amp;A</i>
03:45 PM	15 minutes	Break
04:00 PM	45 minutes	Session 07: Yogyakarta Principles Reflections in pairs and discussions
04:45 PM	15 minutes	Closing and final thoughts

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# Session 01: What are Human Rights?

*An activity followed by a discussion.*

## Time

1 hour

## Target group

All groups

Approximately 30 participants in a group

## Objectives

At the end of this session, the participants will be able to:

- Articulate what is meant by human rights
- List features of human rights

## Tools needed

- Flip chart paper & markers
- Tape/ repositionable spray to display the poster paper on a wall

## Preparation

- Slides

## Steps:

- Divide the participants into 5 groups.
- Ask every group to take 30 minutes to write down a list of things one needs to have for a happy and fulfilling life. Ask the participants not to speak with each other.
- First the participants will write down basic needs. Go to each group at 5-10-minute intervals and prompt with the following questions:
  1. Imagine you are going to work – what kind of transport will you need, what kind of job do you want to do, & how do you want to be treated at work if you want a happy and fulfilling life.
  2. Imagine you are unwell. What kind of healthcare will you need?
  3. What kind of a government do you need for a happy and fulfilling life? How do you want to be treated by the government?
  4. Can you have a happy and fulfilling life if there is violence?
  5. Can you have a happy and fulfilling life if there is crime and injustice against you?
- After the lists are complete, request each group to present their lists.
- The teams will have similar lists. Highlight new/unique responses.
- Display all the posters on a wall.
- Explain that all the teams listed the same things as requirements for a happy and fulfilling life. This is because, as human beings, our needs and aspirations are similar. Simply by virtue of being human we have certain needs and aspirations. The concept of rights is



based around these common needs and aspirations that you have simply because you are human.

- Move on to examine the link between needs and aspirations listed by the participants and human rights. Take each item in the participants' lists and identify the corresponding right. Some examples are given below. Note that some requirements will connect to a number of rights. Where possible – refer to the international human rights documents that recognise this right.

Requirements identified	Corresponding human rights
Food	Right to food
Water	Right to clean water
Family	Right to form a family
	Right to enter into marriage freely with consent
	Right to have children
	Right to choose not to have children (Right to bodily autonomy)
Love	Right to select a partner of choice
	Right to be free from discrimination based on sexual orientation
Non-violence	Freedom from torture
	Right to due process
	Right to gender equality
	Right to be free from corporal punishment
Engage in community /Religious activities	Right to religion & practice religion with others
	Freedom of association
	Right to promote one's language
	Right to enjoy culture
Rulers who are not corrupt	Right to vote
	Right to regular, free and fair election
Health care	Right to health care
	Right to access benefits of scientific advancements
Education	Right to education
	Freedom of thought
	Freedom of expression & publication
Treated with respect by government	Right to equality and non-discrimination
Justice	Right to equality before the law
	Right to equal protection of the law
	Right to due process
	Right to remedy
House	Right to own land
	Right to engage in an occupation
	Right to privacy
Money	Right to engage in an occupation
	Right to own property
Mental health	Right to leisure
	Right to mental health services

- Explain that human rights are rights we have simply because we exist as human beings – they are not granted by any state. Without human rights, human beings cannot live a happy and fulfilling life, or fulfil their needs and aspirations that we have, simply because we are human. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status. Our needs and aspirations are common to us because we are all human beings. This is why the lists of all groups had the same items.
- Using the slides, explain key features of human rights and principles around human rights.

## Notes

- The principle of **universality** of human rights is the cornerstone of international human rights law. This means that we are all equally entitled to our human rights. This principle, as first emphasized in the UDHR, is repeated in many international human rights conventions, declarations, and resolutions.
- Human rights are **inalienable**. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.
- All human rights are **indivisible and interdependent**. This means that one set of rights cannot be enjoyed fully without the other. For example, making progress in civil and political rights makes it easier to exercise economic, social, and cultural rights. Similarly, violating economic, social, and cultural rights can negatively affect many other rights.
- **Non-Discrimination:** Equality and non-discrimination are core principles of international human rights law. Everyone, without distinction, is entitled to enjoy all human rights, including the right to be treated as equal before the law and the right to protection from discrimination on various grounds that include sexual orientation and gender identity.
- Article 1 of the UDHR states: "All human beings are born free and equal in dignity and rights." Freedom from discrimination, set out in Article 2, is what ensures this equality.
- **State laws and policies** – which should protect everyone from discrimination – are the source of both direct and indirect discrimination against millions of lesbian, gay, bisexual, transgender and intersex people around the world. In more than a third of the world's nations, private consensual same-sex relationships are criminalized. These laws violate rights to privacy and to non-discrimination, both of which are protected in international law, and expose individuals to the risk of arrest, prosecution and imprisonment, and, in a few countries, the death penalty. Such laws also hamper efforts to halt the spread of HIV by deterring people from coming forward for testing and treatment for fear of stigma, discrimination and abuse.
- Other examples of discriminatory measures include bans on lesbian, gay, bisexual, transgender, intersex and questioning/queer (LGBTIQ) people holding certain jobs, discriminatory restrictions on free speech and public demonstrations, and the denial of legal recognition of same-sex relationships. Many States require transgender people to

submit themselves to sterilization as a condition of obtaining legal recognition of their gender, without which many are forced to live on the margins of society, excluded from regular employment, healthcare and education, and denied other basic rights.

- **State Responsibility:** States have a legal obligation both to make sure that their own laws and policies do not discriminate against people based on sexual orientation and gender identity, and that the legal framework offers adequate protection against such discrimination practiced by third parties. This obligation transcends culture, tradition and religion. All States, regardless of their history or regional specificities, must guarantee the rights of all people. Governments that refuse to protect the human rights of LGBT people are in violation of international law.

**Summarise:**

- Human rights are rights we all have simply because they are human. They are not given anyone and cannot be taken away. Human rights are universal, inalienable, indivisible, and interdependent.

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## Session 02: History of human rights

*Participants, in groups illustrate landmark events in the history of human rights.*

### Time

1 hour

### Target group

All groups

Approximately 30 participants in a group

### Objectives

At the end of this session, the participants will be able to:

- Describe the history of human rights
- Distinguish the establishment of United Nations as an event in the history of human rights
- Observe the philosophy of human rights in religious teachings

### Tools needed

- Print outs/ cards of Notes section below, separated as 7 cards.
- Flip chart paper and markers

### Preparation

- Slides

### Steps:

- Explain that in this session, the participants will take a look at the history of human rights.
- Divide the participants in to 7 groups and provide each group with 1 card/print out. You may give the cards with shorter descriptions to smaller teams.
- Request the participants to read the cards and take 20 minutes to illustrate the story or the event in the flip chart paper.
- Participants may look online for additional information.
- After the groups have illustrated the events, request each group to tell the story to the rest of the group, using the illustrations.
- Highlight the key principles relating to the contemporary understanding of human rights and modern human rights documents where similar rights have been recognised.
- During the presentation of UDHR, open the UDHR on the screen and take a quick glance through the articles together with the participants.  
<https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- UDHR in Sinhala and Tamil can be found here:  
[https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/snh.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/snh.pdf)  
[https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/tcv.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/tcv.pdf)
- Provide an opportunity for participants to comment and ask questions.

## Notes:

### Religion

Philosophy of human rights is found in all of world's religions.

In following Dharma, a number of values and attitudes are listed in the Hindu scriptures as necessary for a human being, for example absence of conceit, absence of hypocrisy, speaking the truth, harmlessness, accommodation, straightforwardness and compassion for all beings. Ahimsa (Non-violence) is often regarded as an absolute Dharma<sup>1</sup>.

By the time of the enlightenment of Lord Buddha human sacrifice was rampant. Bonded labour, exploitation, slavery & sexual abuses were common. Lord Buddha's antidote for all suffering was founded on the equality of all living beings. Concept of rights is not alien to Buddhist philosophy. It is implied. All have duties in the form of reciprocal obligations that could be analysed as rights and duties. Dharma determines duties expressly and rights are implied. For instance, every person has a duty not to harm a living being (embodied in the first of the five precepts), because every living being has the right to live<sup>1</sup>.

"For the whole law is summed up in a single commandment, 'You shall love your neighbour as yourself'", reads the Bible. 'Love your neighbour' is essentially a call to care for human rights of all. Freedom, equality, and dignity are bestowed on all by virtue of being human- that is made in the image of God<sup>1</sup>.

Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights. Due to their Divine origin, no ruler, government, assembly or authority can curtail or violate in any way the human rights conferred by God, nor can they be surrendered<sup>1</sup>.

### Magna Carta 1215

Under threat of civil war, King John of England in 1215 made the declaration of Magna Carta, one of the earliest publication of rights. Magna Carta decreed that the sovereign is subject to the rule of law and that 'free man' holds certain liberties. It also affirmed the right to religious freedom.

### The British Bill of Right 1689

American Declaration of Independence 1776

- Stated that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty & the pursuit of happiness.
- The Declaration however, preserved the institution of slavery.

## French Declaration on the Rights of Man and Citizen (1789)

Due to suppressive taxation, feudalist suppression and resentment of privileges enjoyed by aristocrats, the French people revolted and overthrew the monarchy. The revolution led to the Declaration on the Rights of Man and Citizen that recognized the following:

- Men are born and remain free and in equal rights
- The goal of political association is the construction of natural rights such as rights to liberty, property, safety & resistance against oppression.
- Liberty consists of doing anything that does not harm others.
- Law is the expression of general will. All citizens have the right to contribute to its formation
- No man can be accused, arrested, or detained unless according to law
- A person is innocent until proven guilty
- Free communication of thoughts and opinions is a right of man
- Men have right to private property

Despite the women's march on Versailles in October 1789, women's rights were not recognized in the French Declaration.

## Birth of the United Nations in 1945

The idea of human rights emerged stronger after World War II. The extermination by Nazi Germany of over six million Jews, Sinti and Romani people, gay people, and people with disabilities horrified the world.

In 1945, countries got together to form the United Nations.

The Charter of the United Nations is the founding document of the United Nations. It was signed on 26 June 1945, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

UN Charter was the first human rights document to recognize equal rights of men and women.

UN Charter established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat, and set out powers and functions of each of the organs.

## Universal Declaration of Human Rights 1948

In 1948, the United Nations General Assembly adopted by resolution, the Universal Declaration of Human Rights (UDHR). UDHR acknowledges the inhumane violence of World War II and addresses the need to prevent a similar catastrophe: 'Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind..., and freedom from fear and want has been proclaimed as the highest aspiration of the common people...', reads the Preamble of the Declaration.

UDHR is a historic achievement. Hernán Santa Cruz of Chile, member of the drafting sub-committee, recalling the moment of adoption of the UDHR writes, 'I perceived clearly that I was participating in a truly significant historic event in which a consensus had been reached as to the supreme value of the human person.... In the Great Hall...there was an atmosphere of genuine solidarity and brotherhood among men and women from all latitudes, the like of which I have not seen again in any international setting'.

The UDHR was the first document of its kind to set out comprehensively, rights universal to all human beings. Today, UDHR is the best known and the most cited human rights document in the world, having been translated into 512 languages. UDHR has inspired numerous legally binding human rights treaties, and some of its content has been recognized to form part of customary international law.

**Summarise:**

Our modern understanding of human rights is so closely linked to the United Nations. However, the values of human rights can be found much earlier in history. All the world's religions embody principles of equality of human beings in some form or the other.

However, the United Nations has made a remarkable contribution to the area of human rights by adopting a coordinated approach to promote and protect human rights. In the next session, we will examine the role of UN in detail.

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## Session 03: Human Rights in Sri Lanka

*Presentation and Q &A*

### Time

1 hour

### Target group

All groups

Approximately 30 participants in a group

### Objectives

At the end of this session, the participants will be able to:

- Refer to Fundamental Rights Chapter of the Constitution
- Identify key elements with regard to selected Fundamental Rights: Freedom from torture, right to equality, freedom from arbitrary arrest and detention, freedom of expression, assembly and association, & right to information
- Understand key steps with regard to seeking information under the Right to Information Act

### Tools needed

- Flip chart paper & pens
- 30 Print outs of the ANNEX at the end of this session plan
- 30 print outs of the Fundamental Rights Chapter of the Constitution. Constitution in Sinhala & Tamil can be found here:
  - ✓ English <https://www.parliament.lk/files/pdf/constitution.pdf>
  - ✓ Sinhala <https://www.parliament.lk/files/pdf/constitution-si.pdf>
  - ✓ Tamil <https://www.parliament.lk/files/pdf/constitution-ta.pdf>
- 30 print outs of the Right to Information Act. You can also purchase copies at the Department of Government Printing at LKR 21 per copy.
  - ✓ English [https://www.media.gov.lk/images/pdf\\_word/2016/12-2016\\_E.pdf](https://www.media.gov.lk/images/pdf_word/2016/12-2016_E.pdf)
  - ✓ Sinhala [https://gic.gov.lk/gic/images/stories/pdf/rti\\_sin.pdf](https://gic.gov.lk/gic/images/stories/pdf/rti_sin.pdf)
  - ✓ Tamil <http://www.rticommission.lk/web/images/pdf/act/rti-act-ta-13122018.pdf>

### Preparation

- Slides



## Steps

- Give each participant a copy of the Fundamental Rights Chapter of the Constitution
- Divide the participants into 5 groups. Ask each group to take 20 minutes to read the relevant sections of the Fundamental Rights Chapter and additional print outs carefully, and write down key points in flip chart paper in preparation for a 3–5-minute presentation.
  1. Freedom from torture
  2. Right to equality
  3. Freedom from arbitrary arrest and detention
  4. Freedom of expression, assembly and association
  5. Right to information
- Ask each team to present for a maximum of 5 minutes and highlight key points.
- After all groups have presented take the participants through the slides. Notes for the presentation is provided in the 'Notes' section below.

## Notes:

### Right to Life

The Sri Lankan Constitution does not expressly recognise the Right to Life, but the Courts through case law have read in the right using Arts. 11, 12 & 13 (4). See *Sriyani Silva v. Iddamalgoda, OIC, Police Station, Payagala*<sup>1</sup>. In *Rathnayake Tharanga Lakmali v. Niroshan Abeykoon*<sup>2</sup>, the Supreme Court held that the extra judicial killing of a suspect in police custody violated the right to life.

### Freedom from Torture

Guaranteed under Article 11 of the Constitution and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994.

### Right to Equality

Guaranteed under Article 12 of the Constitution

### Freedom from Arbitrary Arrest & Detention

Guaranteed under Article 13 of the Constitution

### Freedom of Expression, Assembly and Association

Guaranteed under Article 14 of the Constitution

### Right to Information

The State and the public institutions are maintained by the tax collected from citizens. Therefore, it is important that the people have the right to know information about how public funds are being spent by state authorities.

The Universal Declaration of Human Rights in Article 19 states that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". The International Covenant on Civil and Political Rights (ICCPR) provision (Art. 19) is worded in similar terms.

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<sup>1</sup> (2003) 2 Sri LR 63

<sup>2</sup> (SCFR 577/2010)

In 2011, the UN Human Rights Committee published a General Comment on Art. 19 of the ICCPR (Freedom of Opinion and Expression) which acknowledged that the said Article included a general right of access to information being held by public bodies. It further noted that other provisions of the ICCPR also addressed the right of access to information in conjunction with other rights.

Article 14A of the Constitution (added through the 19<sup>th</sup> Amendment – 2015) guarantees the Right to Information.

Right to Information Act (No.12 of 2016) also reinforces this right.

### Note to Facilitator

Request the participants to turn to the following sections and examine the content:

- S.43 of the Act on definition – what is information & who is a public authority
- S.23-29 on the procedure to get information
- S.35, S.36 & S.40 on accessing information
- S.5 on exceptions, and
- Sections on the Appeal Process

### Restrictions on FR

Article 15 of the Constitution lists certain restrictions on Fundamental Rights:

- (1) The exercise and operation of the fundamental rights declared and recognized by Articles 13(5) and 13(6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.
- (2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.
- (3) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(b) shall be subject to such restrictions as may be prescribed by law in the interests of
  - a. racial and religious harmony.
- (4) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(c) shall be subject to such restrictions as may be prescribed by law in the interests of
  - b. racial and religious harmony or national economy.
- (5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to Restrictions on fundamental rights such restrictions as may be prescribed by law in the interests of national economy or in relation to –

- (a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and
  - (b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.
- (6) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy.
- (7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.
- (8) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

### Existing law to continue in force

Article 16 of the Constitution states that all existing law continues to be in force despite being inconsistent with the Fundamental Rights Chapter. This is a **main gap in Sri Lanka's law on rights**.

- (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.
- (2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

### Remedy for FR Violation

Art. 17 of the Constitution states that 'Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter'.

Article 126 of the Constitution states the process by which a person whose Fundamental Rights have been violated can access a judicial remedy.

- (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.
- (2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.
- (3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.
- (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.
- (5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

#### **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994**

The prohibition of torture is one of the most universally recognised human rights and has attained status as a *jus cogens* or peremptory norm of general international law, also giving rise to the obligation *erga omnes* (owed to and by all States) to take action against those who torture. Sri Lanka incorporated the Convention Against Torture into Sri Lankan law by enacting the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994'.

The Act criminalises the act of torture, inhuman and degrading treatment as a serious offence to be tried in the High Court and imposing on conviction a sentence of a minimum of seven years and a maximum of ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees. The offence was also classified as a cognizable and a non-bailable offence.

In practice the progress using this Act has been slow due to mainly the State's lack of will e.g. delays by the Attorney General (AG) Department, refusal to indict specific perpetrators, increased political interference, etc. Cases need to be filed by the AG via the Police and this leads to conflict of interest as it is mostly the Police who are the perpetrators and the AG's department might be

called upon to defend them. Even though hundreds of complaints are made and cases filed only few come to judgment level and it is thought that accessing the Supreme Court through a fundamental rights application is a better option.

A recent (June 2021) report by the Law & Society Trust found that between 2010 and 2018 the Human Right Commission (HRCSL) **received three complaints of torture every two days while less than one percent of the complaints were prosecuted.** In 25 years of the Act only **nine convictions** have been secured. The report also noted that there are no medical, psychosocial or protection state sponsored support services specifically designed and available to survivors of torture and their families.

### **International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007**

Another law that protects rights in Sri Lanka is the ICCPR Act.

The ICCPR Act was enacted to give effect to some of the provisions of the ICCPR to which Sri Lanka is a signatory. One of the principal aims of the Act is to protect persons from speech that incites violence and discrimination.

Section 3(1) of the ICCPR Act provides:

“No person shall...advocate national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.”

The narrow subset of “hate speech” that is prohibited under the ICCPR Act has two specific features. First, there must be advocacy of hatred towards a (1) national, (2) racial, or (3) religious group.

Unfortunately, the Act does not prohibit hatred towards other groups, such as gender groups, or towards specific individuals. Second, the advocacy must constitute incitement of a particular kind. The types of “incitement” that are prohibited are listed in the Act: incitement to (1) discrimination, (2) hostility, or (3) violence. Therefore, what is prohibited is only speech that constitutes a particular kind of “incitement”.

Source: <https://www.veriteresearch.org/2019/06/24/iccpr-act-sri-lanka/>

A person may, by way of a petition, apply to the High Court within three months against the infringement or imminent infringement by executive or administrative action, of any human rights stipulated in the Act. Punishment under the Act provides for rigorous imprisonment for a term not exceeding ten years

## ANNEX

### Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994

#### 1. Short title

- This Act may be cited as the Convention Against Torture and other Cruel. Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994

#### 2. Torture to be an offence

(1) Any person who tortures any other person shall be guilty of an offence under this Act.

(2) Any person who"

(a) attempts to commit;

(b) aids and abets in committing

;

(c) conspires to commit,

(3) The subjection of any person on the order of a competent court to any form of punishment recognized by written law shall be deemed not to constitute an offence under subsection (1).

(4) A person guilty of an offence under this Act shall on conviction after trial by the High Court be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees.

(5) An offence under this Act shall be a cognizable offence and a non-bailable offence, within the meaning, and for the purposes, of the Code of Criminal Procedure Act, No. 15 of 1979

#### 3. Acts done during state of war &c. or on order of Superior Officer not to be a defence to an offence under this Act

For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this Act . was committed"

(a) at a time when there was a state of war, threat of war., internal political instability or any public emergency;

(b) on an order of a superior officer or a public authority,

shall not be a defence to such offence.

## 12. Interpretation

In this Act, unless the context otherwise requires

" Convention " means the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York on December 10, 1984;

" public officer " means a person who holds any paid office under the Republic ;

" torture" with its grammatical variations and cognate expressions, means any act which causes severe pain, whether Physical or mental, to any other person, being an act which is"

(a) done for any of the following purposes that is to say"

(i) obtaining from such other person or a third person, any information or confession;  
or

(ii) punishing such other person for any act which he or a third person has committed,  
or is suspected of having committed ; or

(iii) intimidating or coercing such other person or a third person ; or

(b) done for any reason based on discrimination,

and being in every case, an act which is done by, or at the initiation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.



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## Session 04: UN contribution to Human Rights

*An activity followed by a discussion.*

### Time

1 hour

### Target group

All groups

Approximately 30 participants in a group

### Objectives

At the end of this session, the participants will be able to:

- Identify organs of the UN
- Distinguish between charter-based & treaty-based human rights mechanisms
- Name the key international human rights treaties
- Understand the contribution of UN to the monitoring of human rights

### Tools needed

- Projector & screen
- Flip chart paper & markers
- Glue stick
- Print out of the annex

### Preparation

- Slides
- Flip chart paper: Divide flip chart paper in to 4 columns. Write down at the top of each column, the titles: UN organs established by the UN Charter, Charter-based mechanisms, Human Rights Treaties, & Treaty-based mechanisms.
- Print out the annex at the end of the session plan and cut-out each item ready to be distributed among the participants.

### Steps:

- Distribute the cut-out items from the Annex among the participants.
- Instruct the participants to listen carefully so that they can identify to which category (among the 4 categories identified in the flip chart) their item belongs.
- Conduct the lecture assisted by slides. Notes are provided below. Stop the lecture at appropriate times to give participants an opportunity to stick their papers on the flip chart.
- Stop the lecture at appropriate times to give participants an opportunity to ask questions.
- When you approach the part on cases decided by the UN Human Rights Committee, provide the participants an opportunity to speculate the outcome.
- At the end of the session, invite the participants to examine the completed flip chart.

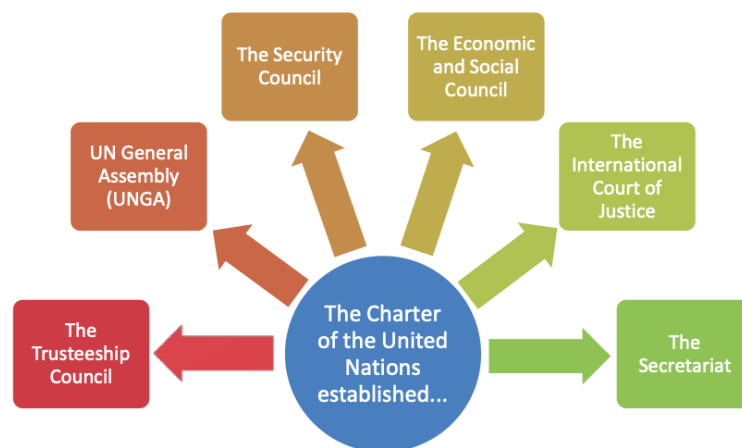


## Notes:

The UDHR set out 30 Articles in fundamental rights and freedoms of all human beings. However, there was no way to enforce these rights. Therefore, the UN developed certain enforcement mechanisms to protect and promote human rights.

Some of these human rights mechanisms derive power from the UN Charter. They hold broad human rights mandates and address an unlimited audience. The UN charter was briefly discussed in the previous session during the discussion on the Birth of the UN in 1945. It is the founding document of the UN. UN Charter established as principal organs of the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat, and set out powers and functions of each of the organs.

The six principal organs of the UN, as established by the Charter of the United Nations, are:



The UN human rights mechanisms that derive power from the UN charter are called Charter-based bodies.

### Charter based mechanisms

#### 1. Human Rights Council

The Human Rights Council held its first meeting on 19 June 2006. This intergovernmental body, which meets in Geneva 10 weeks a year, is composed of 47 elected United Nations Member States who serve for an initial period of 3 years and cannot be elected for more than two consecutive terms. The Human Rights Council is a forum empowered to prevent abuses, inequity and discrimination, protect the most vulnerable, and expose perpetrators.

The Human Rights Council is a separate entity from OHCHR (Office of the High Commission for Human Rights). This distinction originates from the separate mandates they were given by the General Assembly. Nevertheless, OHCHR provides substantive support for the meetings of the Human Rights Council, and follow-up to the Council's deliberations.

In 2007, the Council adopted 3 procedures and mechanisms aimed at protecting human rights.

- [Universal Periodic Review](#) mechanism which serves to assess the human rights situations in all United Nations Member States
- [Advisory Committee](#) which serves as the Council's "think tank" providing it with expertise and advice on thematic human rights issues
- [Complaint Procedure](#) which allows individuals and organizations to bring human rights violations to the attention of the Council.

The Human Rights Council has had many inter-governmental meetings and debates on SOGIE. It has expressed concern over violence and discrimination based on sexual orientation and gender identity multiple times and in 2016 appointed an Independent Expert to investigate and report on the issue. A sizeable majority of Member States (115) have also made specific commitments to combat violence and discrimination against LGBTI people as part of the Universal Periodic Review.

In 2011 and 2014, the Human Rights Council passed resolutions in which it expressed concern regarding violence and discrimination against LGBT persons and requested reports from the High Commissioner for Human Rights. The High Commissioner's two reports, published in 2012 and 2015 respectively pointed to a pattern of systematic violence and discrimination directed at LGBTI people in all regions – from discrimination in employment, health care and education, to criminalization and targeted physical attacks, even killings.

## 2. Special Procedures

Special Procedures is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations, or thematic issues in all parts of the world.

Special Procedures are either an individual – a Special Rapporteur or Independent Expert, or a Working Group. They are prominent, independent experts working on a voluntary basis, appointed by the Human Rights Council.

Special Procedures' mandates usually call on mandate-holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories – known as country mandates (for example, Myanmar), or on human rights issues of particular concern worldwide – known as thematic mandates (for example, Torture, SOGI, etc). All report to the Human Rights Council on their findings and recommendations, and many also report to the General Assembly. They are sometimes the only mechanism that will alert the international community to certain human rights issues, **as they can address situations in all parts of the world** without the requirement for countries to have had ratified a human rights instrument.

### Independent Expert on SOGI

United Nations Human Rights Council created in 2016, through Resolution 32/2, the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (“IE SOGI”). In June 2019 the HRC renewed the mandate through Resolution 41/18.

Working method: visits, individual communication, research

The IE on SOGI follows an intersectional approach. The IE believes that analysing root causes requires a multidimensional assessment of all factors, including historical, socio-cultural, political and anthropological, that concur to create an understanding of what is perceived as a norm in relation to gender, sex, and sexual desire in a given place and at a given time, and as a result, particular experiences of privilege, or violence and discrimination.

Individuals and organisations can file petitions to the IE SOGI, so that victims of violence based on SOGI can report violations and seek a remedy through “allegation letters” or “urgent actions.” The IE SOGI will write to the State concerned and raise the issue officially.

Another type of communication (“other letter”) provides for the possibility to comment and provide advice on laws, policies, and practices with a view to aligning them with international human rights standards. Given the importance of carrying out the consideration and decision-making process, in relation to communications in an environment free from suspicion of interference from third parties (including States), all work connected to individual communications is carried out under the auspices of resources administered by OHCHR. In the view of the IE SOGI communications can be an extraordinarily valuable tool for protection (more than 70 communications issued as of now).

### Treaty based mechanisms

The UN also developed human rights mechanisms that derive power from treaties. Treaties are human rights instruments to which state parties have consented to by ratification. The concept is that once you agree to be bound by the treaty, you have an obligation to protect the rights recognised in the treaty.

There are 9 core international human rights instruments.

1. ICERD - International Convention on the Elimination of All Forms of Racial Discrimination
2. ICCPR - International Covenant on Civil and Political Rights
3. ICESCR - International Covenant on Economic, Social and Cultural Rights
4. CEDAW - Convention on the Elimination of All Forms of Discrimination against Women
5. CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
6. CRC - Convention on the Rights of the Child
7. ICMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
8. CPED - International Convention for the Protection of All Persons from Enforced Disappearance
9. CRPD - Convention on the Rights of Persons with Disabilities

Each of these instruments has established a committee of experts to monitor implementation of the treaty provisions by its State parties. Some of the treaties are supplemented by Optional Protocols dealing with specific concerns. The Optional Protocol to the Convention against Torture has also established a committee of experts.

Altogether there are **ten** human rights treaty bodies that monitor implementation of the core international human rights treaties by state parties:

1. Committee on the Elimination of Racial Discrimination (CERD)
2. Committee on Economic, Social and Cultural Rights (CESCR)
3. Human Rights Committee (CCPR)
4. Committee on the Elimination of Discrimination against Women (CEDAW)
5. Committee against Torture (CAT)
6. Committee on the Rights of the Child (CRC)
7. Committee on Migrant Workers (CMW)
8. Subcommittee on Prevention of Torture (SPT)
9. Committee on the Rights of Persons with Disabilities (CRPD)
10. Committee on Enforced Disappearances (CED)

Periodically, these Committees invite state parties to report on the status of their human rights. Local civil society organisations are provided opportunity to submit shadow reports. After considering State Party Reports and Shadow Reports, the Committees make Concluding Observations.

Some of the committees established by these Treaties have commented on LGBT rights and the intersectional relationship with the issues addressed in the relevant treaty. Human Rights Committee, ESCR Committee, CEDAW Committee & CRC Committee are examples.

Human Rights Committee that seeks to enforce the rights recognised in the ICCPR, has heard cases on rights violations of LGBTIQ people.

### Human Rights Committee Decisions

In the case of *Toonen v. Australia* (1994) the Human Rights Committee (HRC) held that laws criminalising homosexuality constituted an unlawful interference with the right to privacy, protected and guaranteed by Article 17 of the ICCPR, and the guarantee to enjoy the right under Article 2.1 (non-discrimination).

### ICCPR Provisions

#### Art. 2(1):

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or **other status**.

#### Art. 17:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

#### Art. 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, **sex**, language, religion, political or other opinion, national or social origin, property, birth or **other status**.

Toonen, was a gay Australian citizen, resident in the State of Tasmania. He argued that sections 122 and 123 of the Tasmania Criminal Code charging unnatural sexual intercourse and indecent practice between males violated his rights: not to be discriminated (Art.2(1) of the ICCPR), to privacy (Article 17 of the ICCPR) and to equal protection under the law without any discrimination (Article 26 of the ICCPR). The Committee found a violation of Article 2 (1) and 17 (1) but did not consider it necessary to consider a violation of the non-discrimination provision of Article 26. The Committee decided that the enjoyment of the right to privacy was guaranteed under Article 2(1) of the ICCPR and interpreted 'sex' in Article 2 (1) to include 'sexual orientation'.

**It has been argued that the use of the 'other status' provision under Articles 2 (1) and 26 of the ICCPR would have been better to include sexual orientation than under 'sex'.**

In *Young v. Australia* (2003), Mr. Young applied for a war veteran's dependant pension. The Federal Department of Veteran Affairs refused to consider his application because his partner of 38 years was also male. The law stated that to be a member of a couple, the persons must be of the opposite sex. Mr. Young complained that he was being discriminate on the grounds of his sexual orientation. The HRC found that the State Party had violated Article 26 of the ICCPR by denying Mr. Young a pension based on his sex or sexual orientation.

Similarly in *X v. Colombia* (2005), the HRC pointed out that the prohibition against discrimination under Article 26 comprises also discrimination based on sexual orientation, and that differences in benefit entitlements between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry or not, with all the ensuing consequences. The Committee concluded that the victim of a violation of Article 26, is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation.

In addition to the work of the charter-based mechanisms and treaty-based mechanisms discussed above, the Office of the United Nations High Commissioner for Human Rights (OHCHR), which is a department of the Secretariat of the United Nations has also made special contribution to the promotion of human rights of LGBT people.

#### **OHCHR Contribution**

In 2012 and in 2019 the OHCHR published a booklet titled *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* which set out five core international human rights law obligations of States to protect LGBT rights:

These are:

- (1) protecting individuals from homophobic and trans-phobic violence,
- (2) preventing torture and cruel, inhuman, and degrading treatment of LGBTIQ persons,
- (3) decriminalizing homosexuality,
- (4) prohibiting discrimination based on sexual orientation and gender identity, and
- (5) respecting the freedom of expression, association, and peaceful assembly of LGBTIQ persons.

## Annex:

ICERD -	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR -	International Covenant on Civil and Political Rights
ICESCR -	International Covenant on Economic, Social and Cultural Rights
CEDAW -	Convention on the Elimination of All Forms of Discrimination against Women
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC -	Convention on the Rights of the Child
ICMW -	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CPED -	International Convention for the Protection of All Persons from Enforced Disappearance
CRPD -	Convention on the Rights of Persons with Disabilities
Committee on the Elimination of Racial Discrimination (CERD)	
Committee on Economic, Social and Cultural Rights (CESCR)	
Human Rights Committee (CCPR)	
Committee on the Elimination of Discrimination against Women (CEDAW)	
Committee against Torture (CAT)	
Committee on the Rights of the Child (CRC)	
Committee on Migrant Workers (CMW)	
Subcommittee on Prevention of Torture (SPT)	
Committee on the Rights of Persons with Disabilities (CRPD)	
Committee on Enforced Disappearances (CED)	
Special Procedure- Special Rapporteur	
Special Procedure- Independent Expert	
Special Procedure- Working Group	
Human Rights Council	
Universal Periodic Review	
Advisory Committee	
Human Rights Council Complaint Procedure	
UN General Assembly	
UN Security Council	
UN Economic and Social Council	
UN Trusteeship Council	
International Court of Justice	
UN Secretariat	

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# Session 05: Sri Lanka's Adherence to International Human Rights Standards

*Presentation and Q &A*

## Time

45 minutes

## Target group

All groups

Approximately 30 participants in a group

## Objectives

At the end of this session, the participants will be able to:

- Critically examine Sri Lanka's adherence to human rights obligations

## Tools needed

- Projector & screen

## Preparation

- Slides

## Steps

- Begin by explaining that in the next 45 minutes you will discuss Sri Lanka's adherence to International Human Rights Treaties.
- Recall the core International Human Rights Treaties identified in the session on UN's contribution to human rights.
- Proceed to present the slides. Notes for the presentations can be found in the 'Notes' section below.
- Provide opportunities for the participants to engage by posing questions.
- At the end of the session, ask the room if there are any questions and provide responses to the questions.



## Notes

### Sri Lanka's adherence

Sri Lanka is a member of the United Nations and has ratified all the core international human rights treaties. Sri Lanka also has the responsibility to submit Periodic State Reports on its adherence to the treaty provisions to the Treaty Committees whose mandate it has accepted. Sri Lanka's human rights record is assessed by the Human Rights Council during the Universal Periodic Review.

### What is the Universal Periodic Review?

The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. Currently, no other universal mechanism of this kind exists.

Source: <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>

Sri Lanka's next UPR in the 4<sup>th</sup> Cycle is between Jan – Feb 2023. State Report Deadline is October 2022.

### At Human Rights Council during the UPR (2017)

In the 3<sup>rd</sup> UPR Cycle Sri Lanka was reviewed in November 2017. During the 28th UPR Working Group Sessions, Sri Lanka received 10 SOGIESC related recommendations.

Representatives of the Government of Sri Lanka supported 3 and noted 7 recommendations. During consultations the State highlighted developments including the promise to expedite constitutional reforms and ensuring a strengthened fundamental rights chapter that provides for specific rights such as the right to life and non-discrimination based on sexual orientation and gender identity.

The government also made a commitment to reform the Penal Code of Sri Lanka to ensure that all of offences contained in the Code are in compliance with international human rights standards and stated that the commitment is reflected in the National Human Rights Action Plan 2017-2021 approved by the Cabinet of Ministers.

Further reading:

[https://ilga.org/downloads/28TH\\_UPR\\_WORKING\\_GROUP\\_SESSIONS\\_SOGIESC\\_RECOMMENDATIONS.pdf](https://ilga.org/downloads/28TH_UPR_WORKING_GROUP_SESSIONS_SOGIESC_RECOMMENDATIONS.pdf)

### Before the Human Rights Committee (2014)

In 2014, the then Sri Lankan government made representation before the UN Human Rights Committee that Article 12 of the Constitution included non-discrimination on the basis of sexual orientation and gender identity.

The Human Rights Committee recommended that Sri Lanka amend its Penal Code and consider amending Article 12 of its Constitution to explicitly state that sexual orientation and gender identity were prohibited grounds for discrimination. It also recommended that Sri Lanka strengthen measures to protect against violations of the rights of lesbian, gay, bisexual, transgender and intersex persons as well as strengthen awareness raising and training on their rights. (Paragraph 8 of Concluding Observations 2014)

### CEDAW Committee recommendation (2017)

The CEDAW Committee's Concluding observations on the eighth periodic report of Sri Lanka included the following observation:

10. The Committee welcomes the ongoing reform process of the Constitution. However, it remains concerned about the limited participation of women in the process. It takes note of the reply of the State party concerning the proposal of the subcommittee on fundamental rights of the Constitutional Assembly **to specifically include sexual orientation and gender identity as a ground for non-discrimination** in order to clarify any uncertainty as to whether discrimination based on sexual orientation is prohibited under the right to equality. However, the Committee observes a lack of clarity on the State party's acceptance of the proposal.

Furthermore, although article 12 (2) of the Constitution guarantees equality of women and men, the Committee notes with concern the following:

- (a) Article 12 (2) does not prohibit direct and indirect discrimination against women, as required in article 1 of the Convention;
- (b) Article 16 (1) of the Constitution does not allow judicial review of discriminatory laws that existed prior to the enactment of the Constitution;
- (c) Laws and policies do not address intersecting discrimination.

11. The Committee **recommends** that, within a clearly defined time frame, the State party...
  - (b) Give due consideration to the proposal made by the subcommittee on fundamental rights of the Constitutional Assembly **to include sexual orientation and gender identity as a prohibited ground for discrimination;**

### CEDAW Committee decision in *Rosanna Flamer-Caldera v. Sri Lanka* (March 2022)

- Committee found that criminalization of consensual same-sex sexual activity between women under Section 365A of the Penal Code violated their right to non-discrimination under the CEDAW Convention.
- Called on Sri Lanka to decriminalize consensual same-sex sexual conduct between women.
- Committee held that Sri Lankan authorities subjected Rosanna to gender-based discrimination violence and didn't take any legal or other measures to respect her right to a life free from gender-based violence.
- Committee said that repealing laws that prohibit consensual same-sex relationships is essential to protecting individuals against violence, discrimination, and harmful gender stereotypes.
- Committee urged Sri Lanka to take specific and effective measures to ensure a safe and favorable environment for women human rights defenders and female activists, and to take immediate and effective action to stop the threats, harassment and abuse.
- Committee noted Rosanna could not approach the police and file complaints against the threats and harassment that she was subjected to, given that the criminalization of same-sex sexual activity rendered her vulnerable to arrest and prosecution. Under the Convention, women should have access to State protection and remedies offered through criminal law and not subjected to discrimination while accessing those mechanisms.
- This is a landmark decision.

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## Session 06: The Indian Experience

*Presentation and Q &A*

### Time

30 minutes

### Target group

All groups

Approximately 30 participants in a group

### Objectives

At the end of this session, the participants will be able to:

- Recall India's journey towards decriminalising sex between same-sex partners

### Tools needed

- Projector & screen

### Preparation

- Slides

### Steps:

- Begin by explaining that in the next 30 minutes you will recollects India's journey towards decriminalising sex between same-sex partners
- Proceed to present the slides. Notes for the presentations can be found in the 'Notes' section below.
- Provide opportunities for the participants to engage by posing questions such as 'what do you think this means?', and 'what do you think happened next?'
- Give participants an opportunity to reflect on similarities and differences in the Sri Lankan and Indian judicial system
- At the end of the session, ask the room if there are any questions and provide responses to the questions.

**Notes:**

***Navtej Singh Johar v. Union of India***

Indian Supreme Court judgment on decriminalisation of sex between consenting same-sex adults (2018)

Historical literary evidence indicates that homosexuality has been prevalent across the Indian subcontinent throughout history, and that homosexuals were not necessarily considered inferior in any way until about 18th century during British colonial rule. However, Indian Penal Code introduced by the British in 1860 criminalised same-sex relationships between consenting adults.

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 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.

In 2009, in the landmark case of *Naz Foundation v. Govt. of NCT of Delhi*<sup>3</sup>, a two-judge bench of the Delhi High Court held that criminalisation of sex between same-sex adults violates the fundamental rights protected by India's Constitution. This case was filed by *Naz Foundation, an organisation made up of LGBTIQ+ activists*. The verdict resulted in the decriminalization of same-sex sexual activity involving consenting adults throughout India.

However, this case was later overturned by the Supreme Court of India in *Suresh Kumar Koushal vs. Naz Foundation*<sup>4</sup>, in which a 2-judge bench reinstated Section 377 of the Indian Penal Code.

Despite this, another case was filed by Indian LGBTIQ+ activists in 2016.

On 6 September 2018, the Supreme Court of India ruled unanimously in *Navtej Singh Johar v. Union of India*<sup>5</sup> that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex".

Judges found that Section 377 discriminated against individuals on the basis of their sexual orientation and/or gender identity, violating Articles 14 (Equality) and 15 (Non-discrimination) of the Indian Constitution. Further, they ruled that Section 377 violates the rights to life, dignity and autonomy of personal choice under Article 21 (Right to Life & Personal Liberty). Finally, they found that it inhibits an LGBT individual's ability to fully realize their identity, by violating the right to freedom of expression under Article 19(1)(a). They all referred to Court's recent judgements in *National Legal Services Authority v. Union of India* (where the Court recognised transgender identity) and *Puttaswamy vs Union of India*<sup>6</sup> (where the Court recognised the fundamental right to privacy).

In partially striking down Section 377, the Bench overruled the case *Suresh Kumar Koushal*. Not only did the Bench find that *Suresh Koushal* failed to recognize how Section 377 violates fundamental rights, but further that it relied on a constitutionally impermissible rationale. *Suresh Koushal* used the miniscule minority rationale, which holds that since only a small minority of

<sup>3</sup> 160 Delhi Law Times 277

<sup>4</sup> Civil Appeal No. 10972 OF 2013

<sup>5</sup> AIR 2018 SC 4321; W. P. (Cr.) No. 76 of 2016; D. No. 14961/2016

<sup>6</sup> Writ Petition (Civil) No 494 of 2012; (2017) 10 SCC 1; AIR 2017 SC 4161

citizens are negatively impacted by Section 377, the Court need not intervene. The Constitution guarantees all citizens, independent of sexual orientation or gender identity, their fundamental rights. The Court is concerned with safeguarding 'constitutional morality', not 'popular morality'. CJ Misra wrote a judgment on behalf of himself and Justice Khanwilkar. In his judgement, he emphasised an individual's right to self-determination. He stressed that the Section 377 fails to recognize an individual's ability to consent. He recognized that Section 377 not only discriminates against individuals on the basis of inherent biological determinants, but also on the basis of an individual's choices. Justice Misra emphasised that the Constitution protects an individual's sexual autonomy and intimate personal choices. He struck down Section 377 on grounds of both 'manifest arbitrariness' and the failure to meet the 'reasonable classification test'.

Justice Chandrachud called Section 377 an "anachronistic colonial law" and added that it had reduced a class of citizens to the margins. He said that non-recognition of the right to sexual orientation also leads to a denial of privacy, a fundamental right recognised in *Puttaswamy*. Regarding gender identity, he noted that human sexuality cannot categorise individuals using a binary male/female construction. He remarked that the decriminalisation of Section 377 is only a necessary first step in the path to guarantee LGBT individuals their constitutional rights and that the Constitution envisages much more.

Justice Nariman emphasised the 2017 Mental Healthcare Act, which recognises that homosexuality is not a disease. He used the Act to show that the distinction between natural and unnatural in Section 377 is manifestly arbitrary and violates Article 14. Furthermore, Justice Nariman stressed that LGBT individuals have the fundamental right to live with dignity under Article 21. He requested that the Court's judgement be highly publicized, so that the stigma against being LGBT is reduced. He requested the government to have its officials, especially police-officials, undergo sensitization training.

Justice Malhotra spoke about the fundamental right to health, which flows from the right to life in Article 21. She pointed out that the stigma associated with being LGBT forces LGBT individuals to live closeted lives. This, in turn, denies LGBT individual access to adequate healthcare. She expressed grave concern about the high incidence of HIV/AIDS and other sexually transmitted diseases in LGBT communities across India.

Source: <https://www.scobserver.in/court-case/section-377-case/plain-english-short-summary-of-judgement>

### **Why can't we use the same arguments to decriminalise sex between same-sex partners in Sri Lanka?**

In India, the judges can determine the Constitutionality of a law. If a law violates fundamental rights guaranteed in the Constitution, judges can pronounce such law invalid. This is called judicial review of legislation.

But in Sri Lanka the Constitution states in Article 80(3) that once a law is passed, no Court can question the validity of such law. Therefore, after a law is passed, the Courts cannot determine the law invalid even if it violates fundamental rights. In other words, there is no judicial review of legislation in Sri Lanka. Article 16 of the Sri Lankan Constitution states that all written and unwritten laws shall be valid and operative notwithstanding any inconsistency with the fundamental rights recognised in the Constitution.

As a result, all changes to law need to come from the Parliament.

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## Session 07: Yogyakarta Principles

*Participants read the principles in pairs and justify the need for specific rights. A lecture assisted by slides follows.*

### Time

1 hour

### Target group

All groups

Approximately 30 participants in a group

### Objectives

At the end of this session, the participants will be able to:

- Identify the rights recognised in the Yogyakarta Principles
- Articulate the need for certain rights

### Tools needed

- 30 print outs of Annex: Yogyakarta Principles

### Preparation

- Slides

### Steps:

- Begin by recalling the discussion on Yogyakarta Principles from Day 1.
- Distribute the print outs of the Yogyakarta Principles among the participants
- Request the participants to pair up with the person sitting on their right, take 10 minutes to go through the principles, find out ONE Principle that interests them the most, and reflect on why they think the particular right is important. What would happen if this right is violated?
- After 10 minutes ask the room about what rights they were most intrigued by. Ask them why they think it is important to protect the specific rights. Take 20 minutes for this discussion. Give opportunities to participants to ask questions.
- After the discussion, proceed to conduct a lecture assisted by slides.
- Notes for the lecture are provided below.

### Notes:

#### **Yogyakarta Principles (2006)**

In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a



universal guide to human rights which affirm binding international legal standards with which all States must comply. The Yogyakarta Principles have been referred to in national and international courts, as guidance on how to apply international human rights standards to LGBTI persons.

The Yogyakarta Principles address the broad range of human rights standards and their application to issues of sexual orientation and gender identity. These include extra-judicial executions, violence and torture, access to justice, privacy, non-discrimination, rights to freedom of expression and assembly, employment, health, education, immigration and refugee issues, public participation, and a variety of other rights.

The principles affirm the primary obligation of States to implement human rights. Each Principle is accompanied by detailed recommendations to States. The principles also emphasise, however, that all actors have responsibilities to promote and protect human rights. Additional recommendations are therefore addressed to the UN human rights system, national human rights institutions, the media, non-governmental organisations, and others.

**Preamble:** The Preamble acknowledges human rights violations based on sexual orientation and gender identity, establishes the relevant legal framework, and provides definitions of key terms.

**Rights to Universal Enjoyment of Human Rights, Non-Discrimination and Recognition before the Law:**

Principles 1-3 set out the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law.

Example: Laws criminalizing homosexuality violate the international right to non-discrimination (decision of the UN Human Rights Committee).

**Rights to Human and Personal Security:** Principles 4-11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention.

Example: The death penalty continues to be applied for consensual adult sexual activity between persons of the same sex, despite UN resolutions emphasizing that capital punishment may not be imposed for this reason.

**Economic, Social and Cultural Rights:** Principles 12-18 highlight the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, education and health.

Example: Lesbian and transgender women are at increased risk of discrimination, homelessness and violence (report of UN Special Rapporteur on adequate housing).

**Rights to Expression, Opinion and Association:** Principles 19 to 21 emphasize the importance of the freedom to express oneself, one's identity and one's sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peacefully in public assemblies and events, and otherwise associate in community with others.

Example: A peaceful gathering to promote equality on the grounds of sexual orientation and gender identity was banned by authorities, and participants were harassed and intimidated by police and extremist nationalist shouting slogans such as "Let's get the fags" and "We'll do to you what Hitler did with Jews" (report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance).

**Freedom of Movement and Asylum:** Principles 22 and 23 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity.



Example: Refugee protection should be accorded to persons facing a well-founded fear of persecution based on sexual orientation (Guidelines of the United Nations High Commissioner for Refugees).

Rights to Participation in Cultural and Family Life: Principles 24-26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity.

Example: States have an obligation not to discriminate between different-sex and same-sex relationships in allocating partnership benefits such as survivors' pensions (decision of the UN Human Rights Committee).

**Rights of Human Rights Defenders:** Principle 27 recognizes the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas.

Example: Human rights defenders working on sexual orientation and identity issues worldwide "have been threatened; their houses and offices raided, they have been attacked, tortured, sexually abused, tormented by regular death threats and even killed....[of concern] is an almost complete lack of seriousness with which such cases are treated by the concerned authorities." (Report of the Special Representative of the UN Secretary-General on Human Rights Defenders).

**Rights to Redress and Accountability:** Principles 28 and 29 affirm the importance of holding rights violators accountable, and ensuring appropriate redress for those who face rights violations.

Example: The UN High Commissioner for Human Rights has expressed concern about "impunity for crimes of violence against LGBT persons" and "the responsibility of the State to extend effective protection." The High Commissioner notes that "excluding LGBT individuals from these protections clearly violates international human rights law as well as the common standards of humanity that define us all."

**Additional Recommendations:** The Principles set out 16 additional recommendations to national human rights institutions, professional bodies, funders, NGOs, the High Commissioner for Human Rights, UN agencies, treaty bodies, Special Procedures, and others.

Example: The Principles conclude by recognizing the responsibility of a range of actors to promote and protect human rights and to integrate these standards into their work. A joint statement delivered at the UN Human Rights Council by 54 States from four of the five UN regions on December 1, 2006, urges the Human Rights Council to "pay due attention to human rights violations based on sexual orientation and gender identity" and commends the work of civil society in this area, and calls upon "all Special Procedures and treaty bodies to continue to integrate consideration of human rights violations based on sexual orientation and gender identity within their relevant mandates." As this statement recognizes, affirmed by the Yogyakarta Principles, effective human rights protection truly is the responsibility of all.

### **Yogyakarta +10 (2017)**

On 10 Nov 2017, a panel of experts published the Yogyakarta Principles Plus 10 which supplements the original 29 Yogyakarta Principles and sets out nine additional principles covering a range of rights dealing with information and communication technologies, poverty, and cultural diversity, to name a few. There are also 111 Additional State Obligations, a number of which arose with regards to the original 29 Principles, including in areas such as torture, asylum, privacy and health, and the protection of human rights defenders.

The nine additional principles are:

Principle 30 - The Right to State Protection

Principle 31 – The Right to Legal Recognition

Principle 32- The Right to Bodily and Mental Integrity

Principle 33 – The Right to Freedom from Criminalisation and Sanction on the Basis of SOGIESC

Principle 34 – The Right to Protection from Poverty

Principle 35 – The Right to Sanitation

Principle 36 – The Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies

Principle 37 – The Right to Truth

Principle 38 – The Right to Practise, Protect, Preserve and Receive Cultural Diversity

Source:

[https://www.amnestyusa.org/pdfs/YogyakartaPrinciples.pdf?sm\\_au=iVV5402rZ6PZQ066](https://www.amnestyusa.org/pdfs/YogyakartaPrinciples.pdf?sm_au=iVV5402rZ6PZQ066)

**Annex:**

- PRINCIPLE 1** The Right to the Universal Enjoyment of Human Rights
- PRINCIPLE 2** The Rights to Equality and Non-Discrimination
- PRINCIPLE 3** The Right to Recognition before the Law
- PRINCIPLE 4** The Right to Life
- PRINCIPLE 5** The Right to Security of the Person
- PRINCIPLE 6** The Right to Privacy
- PRINCIPLE 7** The Right to Freedom from Arbitrary Deprivation of Liberty
- PRINCIPLE 8** The Right to a Fair Trial
- PRINCIPLE 9** The Right to Treatment with Humanity while in Detention
- PRINCIPLE 10** The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment
- PRINCIPLE 11** The Right to Protection from all Forms of Exploitation, Sale and Trafficking of Human Beings
- PRINCIPLE 12** The Right to Work
- PRINCIPLE 13** The Right to Social Security and to Other Social Protection Measures
- PRINCIPLE 14** The Right to an Adequate Standard of Living
- PRINCIPLE 15** The Right to Adequate Housing
- PRINCIPLE 16** The Right to Education
- PRINCIPLE 17** The Right to the Highest Attainable Standard of Health
- PRINCIPLE 18** Protection from Medical Abuses
- PRINCIPLE 19** The Right to Freedom of Opinion and Expression
- PRINCIPLE 20** The Right to Freedom of Peaceful Assembly and Association
- PRINCIPLE 21** The Right to Freedom of Thought, Conscience and Religion
- PRINCIPLE 22** The Right to Freedom of Movement
- PRINCIPLE 23** The Right to Seek Asylum
- PRINCIPLE 24** The Right to Found a Family
- PRINCIPLE 25** The Right to Participate in Public Life
- PRINCIPLE 26** The Right to Participate in Cultural Life
- PRINCIPLE 27** The Right to Promote Human Rights
- PRINCIPLE 28** The Right to Effective Remedies and Redress
- PRINCIPLE 29** Accountability
- PRINCIPLE 30** The Right to State Protection
- PRINCIPLE 31** The Right to Legal Recognition
- PRINCIPLE 32** The Right to Bodily and Mental Integrity
- PRINCIPLE 33** The Right to Freedom from Criminalisation and Sanction on the Basis of Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics
- PRINCIPLE 34** The Right to Protection from Poverty
- PRINCIPLE 35** The Right to Sanitation
- PRINCIPLE 36** The Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies
- PRINCIPLE 37** The Right to Truth
- PRINCIPLE 38** The Right to Practise, Protect, Preserve and Revive Cultural Diversity



## ABBREVIATIONS

<b>HRCSL</b>	Human Right Commission of Sri Lanka
<b>LGBTIQ</b>	Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning/Queer
<b>UDHR</b>	Universal Declaration of Human Rights
<b>AG</b>	Attorney General
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CAT</b>	Convention against Torture
<b>CRC</b>	Convention on the Rights of the Child
<b>ICMW</b>	International Convention on the Protection of the Rights of All Migrant Workers
<b>CPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CMW</b>	Committee on Migrant Workers
<b>SPT</b>	Subcommittee on Prevention of Torture
<b>CED</b>	Committee on Enforced Disappearances
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights





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.



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