



'EQUALITY IN SOUTH ASIA: WHERE DO WE GO FROM HERE?'

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iProbono hosted a virtual conversation, **"Equality in South Asia: Where do we go from here?"**, to discuss progress and challenges with respect to equality law and policy in the region. Moderated by iProbono's Managing Director, **Mariam Faruqi**, the session brought together **Aisha Mughal**, former UNDP Expert Consultant to the Ministry of Human Rights, Government of Pakistan, **Aritha Wickramasinghe**, iProbono's Country Representative in Sri Lanka and Equality Law Director, and **Vivek Divan**, Head, the Centre for Health Equity, Law & Policy, India. This event was organised as part of the Skoll Foundation's Ecosystem Day.



Mariam Faruqi: What inspired you to become advocates of equality? Can you tell us about how your personal experiences shaped your decision to become champions of equality and anti-discrimination?

Vivek Divan: I come from a generation that had to cope with the HIV epidemic - which was especially difficult for a queer man. 25 years ago, most countries, including India, did not speak openly about sexuality or HIV. The HIV epidemic revealed to me how inequality was manifesting in the most problematic way. It was making the disempowered even more vulnerable. As a lawyer, I was aware that gay sex was a criminal offence and, as a queer man, that notion obviously did not sit well with me. It made me question whether the law and policy environment was empathetic towards those who were unequal and it also made me think about what we needed to do to address public health challenges such as HIV which only deepen social and legal inequalities. I was interested in these intersectionalities in inequality and it inspired me to become an advocate for equality.

Aritha Wickramasinghe: I grew up in Sri Lanka in the midst of a civil war. We were aware that the unequal treatment of people, especially the minority communities of Sri Lanka, was at the root of this war. As a child who avidly followed the news, I became aware of the issues that children - and especially underprivileged children - faced. With this understanding, I founded a child rights organisation. We would visit other schools and teach children about their rights. So this entire discourse on rights and inequality has been foundational to my identity.

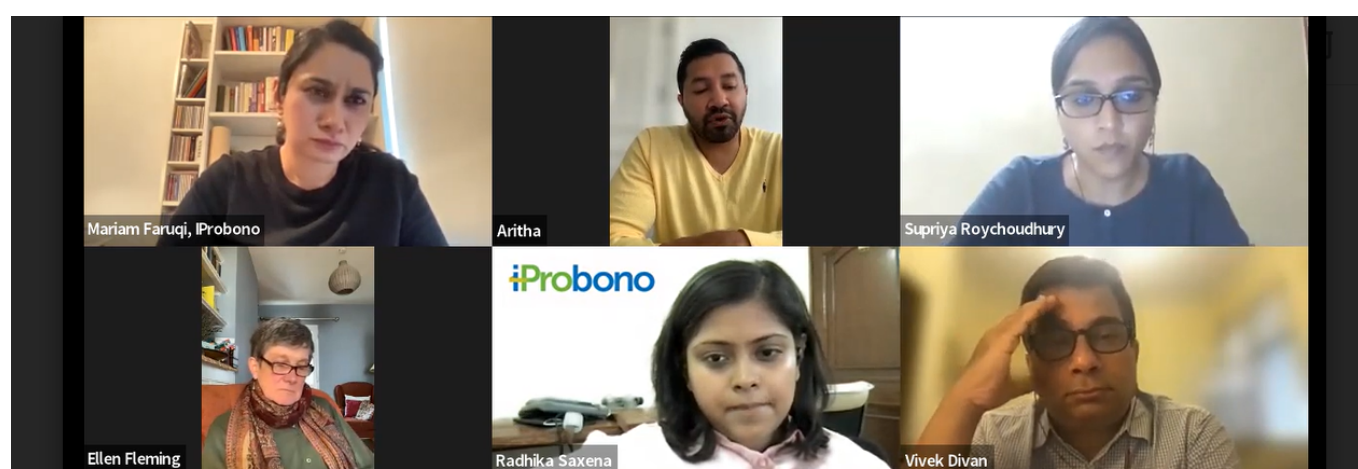
When I came to terms with my sexual orientation at the age of 15, I became aware of how people like me faced discrimination on a day to day basis. This realisation is what prompted me to pursue a career in law. Many of us aspire to become lawyers because we are passionate about justice and seek a more just society.

Aisha Mughal: This issue is very close to my heart, as it is for all activists, because it is our personal journeys that have turned us into the activists we are today. Being a transgender woman in Pakistan, I feel that I do not fit into gender binaries or adhere to gender norms. Growing up, I struggled with my identity as I was trying to fit into the boxes that society has created for men and women. That was when I came across the 'Khawaja Sira' community, a transgender community present in Pakistan, India and Bangladesh. I became aware of my privilege as an educated person who had access to healthcare and livelihood, unlike so many others from my community. I decided then that I would use my privilege to speak up for my community and advocate for them. The transgender movement is strengthening day by day. We are able to work with the government and international civil society, to raise our voices. And today our voices matter.

Mariam Faruqi: It would be helpful for our audience to understand the current state of Equality Law in your respective countries. What can you tell us about that?

Aritha Wickramasinghe: In terms of the socio-political context, Sri Lanka is in the midst of its worst economic and political crisis. However, we began working on these issues even before the start of the current crisis. In terms of what it means to be gay from a legal perspective: we were part of the British empire and we shared a penal code with its other colonies. However, unlike the Indian constitutional system, there is

no provision for judicial review of legislation that is unconstitutional. Any change to the penal code in Sri Lanka requires an Act of Parliament and we have not yet reached that point. As a result, homosexuality or same sex sexual relations remains a criminal offence in the country. For a long time, this myth had been peddled that this law is benign and LGBT+ people were only occasionally harassed by the police. Over the years iProbono has exposed to the public several cases where the Sri Lankan police not only prosecuted LGBT+ people in accordance with these laws but also tortured them - we have seen instances of forced anal and vaginal examinations as well as violent assault involving wires and baton poles. In fact, Sri Lanka is one of nine countries that conducts force anal and vaginal examinations. It is a terrible situation, and based on the cases iProbono has taken up, we estimate that roughly 8-9 LGBT+ persons are prosecuted annually although the actual number is likely to be much higher. In most situations, when the police detain LGBT+ people, they are sent to the magistrate's courts after being remanded. Here, the accused pleads guilty and is subjected to a fine in order to be released. The magistrate's cases aren't reported, so it is difficult to track the actual number of prosecutions.



But we have been seeing some positive developments too. Since 2014, the Attorney General of Sri Lanka has repeatedly been stating that discrimination against LGBT+ people is unconstitutional because it violates the Right to Equality. We've also witnessed an interesting Supreme Court judgment on a case related to two gay men caught having sexual relations in a public space. When the accused in this case appealed their sentence, the Supreme Court took into consideration the fact that this relationship was consensual. It did not issue a custodial sentence. Even though the act was conducted in public, the accused were prosecuted under anti-gay sex laws rather than public indecency laws. The court's interpretation made the law impotent by stating that if there was consent, there would be no punishment. The judgement set a significant precedent and we've been using it in our advocacy work and magistrate court proceedings. We also recently witnessed a positive outcome in a case related to the unlawful confinement of an adult lesbian woman. The police attempted to prosecute her and forced her to undergo psychiatric assessment and physical examination in order to prove that she is a lesbian. We challenged this attempt in court. The court stated that the accused does not have a mental disorder and no crime had been committed. The case was dismissed. And finally, we have also seen how transgender people in Sri Lanka can affirm their gender identity by changing their birth certificates, national identity cards, and passports. Of course this does not imply that there is no discrimination against transgender persons. But introducing gender certification via an administrative process rather than legislative one was an innovative step - the parliamentary process can be quite politicised and controversial.

Vivek Divan: The way that “LGBTQ” is used as a catch-all is something that needs further reflection because we are all at different stages on our journey towards emancipation. In 2018, we were decriminalised by a Supreme Court judgement. The Supreme Court directed the Indian government to - and to quote from the judgement - “take all measures to ensure that this judgement is given wide publicity through the public media”. It went on to say that the government should “initiate programmes to remove and finally eliminate the stigma associated” with queer people (I use ‘queer people’ as a catch-all phrase to refer to all queer folk). The Supreme Court’s order to the Indian government to educate the public about queer people through the public media is significant because it implies that all state functionaries should be sensitised to these issues. I can say with certainty that the Indian government has not followed the Supreme Court quotation that I just read out - in terms of actually explaining this judgement to all and sundry. In general, there has been greater sensitisation towards transgender issues partly because of the ground-breaking judgement in 2014, and the legislation and rules that followed, which recognised equality for transgender people.



India is a diverse country. Some governments have always been progressive on these issues. But others have held back and not engaged in a sensitive way at all. What has changed since the 2018 judgment is that you mostly do not see state functionaries (largely the police) using the law against queer people - whether they are trans or gay men or queer women - unlike the period before decriminalisation when the police thought it was acceptable to actually use the threat of criminal law to harass queer people. But I believe that there are still ways in which regular people harass queer people and I think that part of the effort to publicise the verdict should have involved sensitising citizens on why this judgement is so important in a democratic society. So for instance, you'll still see the harassment of queer women, trans people, and gay men by their families, the blackmailing of gay men in public spaces or on digital dating apps. You'll also witness a less sensitive response from the police when these men actually go to the police station with their lawyer to file a complaint. That sensitisation amongst the police force would have happened if the judgement had been publicised effectively. I think a lot of laws don't get implemented even though they mean well and actually read well on paper.

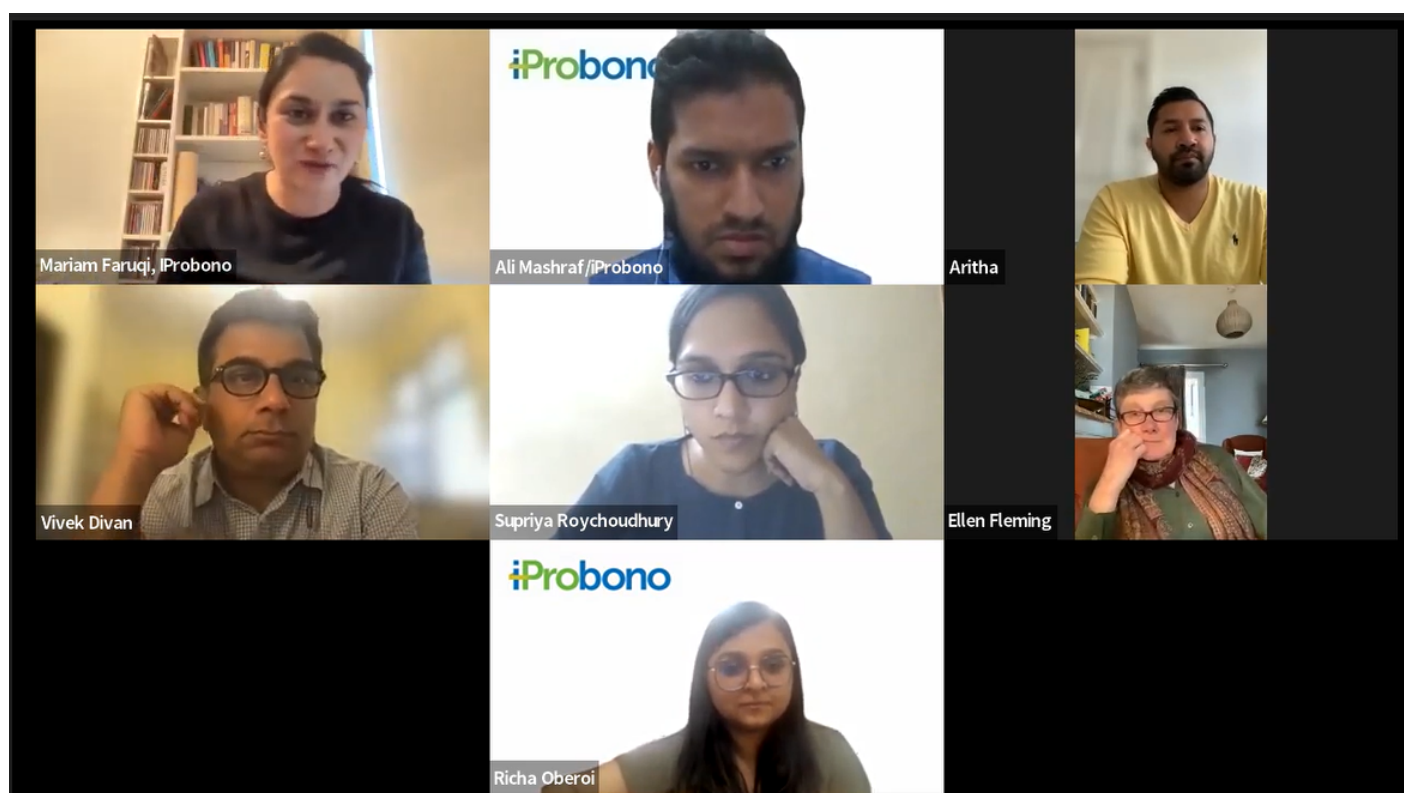
At the same time, I should also add that cases have been filed to assert gay people's right to marriage. In India there are two laws that govern marriage - The Hindu Marriage Act, which governs marriage for Hindus in India; and the Special Marriage Act, that allows anyone to get married irrespective of religious affiliation. In a few instances, courts have been urged to recognise same-sex couples and grant them the right to marry under the existing laws. There have been other interesting legal developments too. A court in Chennai recognised a trans woman's right to

marry a cis man. Courts have also affirmed the rights of queer women who have faced kidnapping, extortion, and other wrongdoings against them and their families.

Aisha Mughal: In 2018, the Transgender Persons Protection of Rights Act was passed, and in 2020, the rules for this legislation were passed. We all know that implementation of law is always the biggest challenge. But I think the most important right – the right to identification – is currently being implemented in Pakistan for trans men and women (which will allow them to get their genders registered on their identification cards). This is an important step. People also have the option of modifying their gender markers and names on their passports; this is also a very positive step. No medical evaluation is required for this. Pakistani law thus grants the right to self-determination. As far as implementation is concerned, though, the problem is that most of the government machinery is not sensitised to the law. We have been trying to sensitise them for four years now. When I served as a Trans Rights Expert with the Ministry of Human Rights in Pakistan, it did a good job of sensitising other government stakeholders such as the police, passport issuing authorities, and health care providers. But there is still a long way to go. The challenge that we're facing at the moment is that this law has been challenged in the Federal Shariat Court. The petitioners have claimed that this law violates the Islamic Shariat. The biggest achievement of this law is that it gives us the right of self-determination and that very right has been challenged in court now. This is one of the biggest hurdles that we as trans people currently face in Pakistan.

I want to emphasise here that the reason this law is being challenged is because gender and sexuality are still taboo in our country. We do not talk about these concepts. Universities do not teach gender studies and it is unsettling to see our policy makers, parliamentarians and even the judges unable to differentiate between sex and gender. People still consider intersex to be the 'real' transgender, which gets on my nerves: this distinction between real and fake transgender. We saw this play out in a recent hearing too, where judges demanded that the government define the term 'transgender' and explain the basis for arriving at this definition. We have enlisted experts to work on this. In the last hearing, we took permission from the judges to have our experts come to court and sensitise and educate everyone about gender and sex and why medical scrutiny is not important for identification. We are hopeful that we will be able to win this case. But as you are likely aware, Pakistan is in political turmoil. One of our biggest supporters, the Federal Human Rights Minister, Madame Shireen Mazar, is no longer in office. She raised her voice in parliament when Senator Mushtaq moved an amendment bill in the parliament, and stated on the record that this would further victimise transgender people. We need such brave parliamentarians on our side.

Having said that, right now we are concerned with the implementation of this law. So far, the government has established a protection centre for trans people in Pakistan and has also tried to develop different incentives for the trans community. In 2019, Health Sehat cards were provided to the trans community to ensure their health rights. This is important as Section 12 of the Act talks about the right to transition as well as the right to hormone replacement therapy and other procedures. But the process of implementation has slowed down.



Mariam Faruqi: What possibilities do you see for collaborative action on LGBT+ rights among civil society in South Asia? How do we facilitate greater cross-regional learning in the region?

Aritha Wickramasinghe: Sri Lanka has definitely benefited from learning from other countries in the region. I have been in touch with Vivek for many years now and have been following his work on decriminalising homosexuality in India. We are fighting the same fight and share very similar laws. So it has been useful to learn about the kinds of strategies and tactics that are being used in India and to explore how we can adopt them; how we can document the steps that have been taken to arrive at the current position. We have also worked very closely with Aisha and are looking at what Pakistan has done in terms of its gender law in order to try and replicate a very similar law for Sri Lanka. Over the last year, we have been working on the Transgender Protection Bill and have had several consultations with the trans community. We have studied Pakistani law for inspiration.

Interacting with Aisha has helped us to understand current challenges in the implementation of law and we hope to learn from this and factor this in when we draft Sri Lankan law to protect trans rights. One thing we realised when speaking to Aisha was that in Pakistani law there is no enforcement mechanism or penal punishment when provisions of the law are violated. We used that learning to ensure that there is some kind of penalty, through a fine or jail time, for people who are not following the law in Sri Lanka. We have also been working closely with our Bangladeshi counterparts at iProbono. We share with them our learning from the Indian and Pakistani contexts. So there really has been an incredible amount of regional cross-learning here. It's fantastic to see how much we've learnt and grown by working together.

Vivek Divan: I think a lot of this depends on where you are on this journey. We have learnt a lot from Nepal which was never colonised and so doesn't have the equivalent of Section 377. It is interesting when Aritha spoke about the lack of judicial review in Sri Lanka - this is quite different from the Indian context. So there are differences across contexts and the lessons we take away need to be adjusted accordingly. One of the lessons we've tried to share with our counterparts in the region is to make activism as bottom-up and community-driven as possible. Indian litigation to decriminalise homosexuality took about 20 odd years to reach a final resolution and victory, and it was a process of empowerment for so many. The other important lesson we've tried to share is the importance of applying an intersectional lens to the issue of queer marginalisation: to make allies with the gender movement, with the healthcare community, with allies in the corporate world. It makes us all realise that one person's marginalisation is really the marginalisation of all.

I think to convey that is both powerful and strategic. It is difficult work. By working closely with other movements in India, the conversation on queer marginalisation in India has become more mainstream. That has held us in good stead. It is important to do this, but I speak as a cis queer man, not as someone who represents the trans experience in India. The activism around trans rights will require a different approach. But given the shared trans history in South Asia, I think there are many important alliances to be made here.

Mariam Faruqi: What are you feeling optimistic about?

Aritha Wickramasinghe: I am really optimistic about seeing legal change in Sri Lanka. In the last two years, we've seen significant changes in how politicians and society at large speaks about LGBT+ issues. About two years ago, we started a campaign with Sri Lanka's largest print and social media organisation to highlight LGBT+ voices and share their, and their families', stories. It was a very powerful campaign and the political narrative around these issues has since changed. We see more and more politicians, including the Justice Minister to the President of Sri Lanka - as unpopular as he is right now - openly calling for LGBT+ equality. In fact, just a few weeks ago, iProbono was part of a coalition that submitted to the Penal Code Reform Committee of the Justice and Youth Ministry a proposal to reform the penal code that criminalises homosexuality. Unfortunately, both those ministers have since resigned due to Sri Lanka's economic and political fallout. But at least we have a piece of legislation that is ready for inputs from the community. Almost the entire opposition in Parliament is united in their efforts to decriminalise homosexuality. There is a lot of support and I am very hopeful that we will see some change very soon.



Vivek Divan: I am optimistic about younger people, generally. I think there is a way in which being queer or having queer friends in certain milieu in India is acceptable. Conversations today are happening in ways that just never would earlier. This is partly because the media has been extremely supportive about queer expression. But it's a certain milieu; I cannot speak in general terms. Still, it is a very positive thing. I hope that this translates into a larger number of queer people occupying public spaces and becoming active and fully-participating citizens. I am also optimistic about the role of Hindi mainstream cinema in shifting the discourse. We've seen a handful of movies of late, maybe three or four, which do not oversimplify or patronise queer people. I'm not talking about trans people here because on-screen representations of the trans community have been visible in Hindi cinema for some time now. I'm talking about cis gay men and lesbians being represented in a reasonably decent way in mainstream Hindi cinema. They have been represented phenomenally in Malayalam cinema for many years now but it's good to see this in mainstream Hindi cinema nowadays too. Hopefully such cultural representations will translate to a more equitable society. But who knows how things will play out.

Aisha Mughal: Looking at the bright side, the petition before the Shariat Court has sparked more dialogue and discussion about transgender rights. This is a good thing. I would say that we have been using our platforms to create more awareness, not only among the Shariat Court judges, but across the broader government machinery. One particularly positive development I'd like to share is that whereas earlier it was activists such as myself who took the lead in sensitising the government machinery to trans issues and the right to self-determination, today it is the Shariat Court judges who are putting pressure on the government to explain the basis on which they came up with the Act. It has forced the government to defend the law and elevate its understanding of the nuances of trans identity and identification. I'm hopeful that we will win this case, and when we do, it will create even more awareness about trans identity and trans rights.

Mariam Faruqi: I'd like to thank all of our panellists for such an enriching conversation today. Thank you all so much.



iProbono is a social justice organisation whose mission is to enable people to access their rights. We do this by:

- Representing people in need
- Strengthening the impact of civil society
- Advocating for policies that promote equality and end discrimination