

Legal Workshop on Equality and Non-Discrimination Law

Workshop Report, Mumbai, 12 – 13 December 2009

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Introduction and Aims

The Equal Rights Trust and the Human Rights Law Network (HRLN) organised a national training workshop for over 35 Indian lawyers, paralegals and legal activists in Mumbai on 12 and 13 December 2009 as part of the project *Promoting better implementation of equality and non-discrimination law in India* which began in May 2009. The purpose of the workshop was to develop the capacity of NGOs and lawyers in India to implement equality and non-discrimination law, making use of national and international equality standards and best practice, based on the Declaration of Principles on Equality. It featured training and discussions on a range of issues, including overviews of equality and non-discrimination law; gender discrimination; disability rights; equality monitoring and enforcement bodies; and sexual orientation and gender identity.

The workshop had four main aims:

- 1) Increasing the knowledge and use of international and comparative equality and non-discrimination law by Indian legal practitioners and activists;
- 2) Developing Indian legal practitioners and activists' familiarity with key Indian jurisprudence on equality and non-discrimination, particularly laws and judgments related to gender, disability and sexual orientation;
- 3) Empowering workshop participants to act as disseminators of the knowledge and expertise acquired during the workshop;
- 4) Encouraging workshop participants to engage with key anti-discrimination concepts and to adopt a unified perspective of equality (covering all grounds of discrimination) in their work.



To achieve these aims, the workshop, the first of two to be conducted as part of the project, assembled a group of national and international equality practitioners that are experts in the issues covered by the workshop to act as trainers. To emphasise the linkages and complementary aspects of international and comparative law and Indian law, each session partnered international trainers with Indian trainers. The trainers for each session were as follows: in Session 1, “Overview of Equality and Non-discrimination Law”, the trainers were Michael Rubenstein and Colin Gonsalves. Session 2, “Gender Discrimination”, was conducted by Alice Leonard and Flavia Agnes. Amita Dhanda and Oliver Lewis served as trainers for Session 3, “Disability Rights”. Session 4, “Role of Monitoring and Enforcement Bodies”, was delivered by Neil Wooding and Kalpana Kannabiran, and Session 5, “Sexual Orientation”, featured as trainer Aditya Bandopadhyay. Each trainer conducted an interactive workshop session with the aforementioned training objectives in mind over the course of the two days of the workshop. A group training exercise was also organised to give participants the opportunity to apply the knowledge gained through the interactive sessions.

The workshop opened on 12 December with a short introduction by Human Rights Law Network’s Legal Officer, Kartik Sharma. He introduced the purpose and aims of the workshop and the basis upon which HRLN and ERT identified and developed the need for the project. ERT’s Legal Officer Jarlath Clifford then introduced the mission and purpose of The Equal Rights Trust. He drew attention to the advantages of utilising a unified perspective on equality and argued that in

the context of India many significant discrimination issues could be addressed through a unified perspective which examines all grounds of discrimination.

Session 1: Overview of Equality and Non-discrimination Law

Session 1 began with a presentation by Michael Rubenstein, who introduced the concepts of equality and discrimination as applied and understood in law. Mr Rubenstein spoke on the need to protect against discrimination on the grounds of gender, race, religion or belief, age, disability, sexual orientation, gender identity and social status. Within each of these areas, he unpicked several different manifestations of discrimination, such as pregnancy and maternity discrimination in the context of gender; the meaning of “belief”, specifically whether or not this concept included philosophical or political values; and the complexity of gender identity discrimination in the case of intersexed people.



Following on from this, his discussion focused on a more detailed analysis of gender discrimination in employment and the meaning of “equal” in this context. For example, should employees be judged upon the nature of the work that they do or the value of this work to the company?

Mr Rubenstein discussed the ways in which economic pragmatism in the business world can often result in gender discrimination as the pull of market forces supersedes principles of equality. The complexity of proving sexual harassment was also discussed and the issue as to whether any test applied should be objective or subjective was also explored. Moving on from gender, the different facets of racial discrimination were identified and shown to include distinctions on the grounds of nationality, ethnicity and language as well as more traditional concepts of racism.

Mr Rubenstein then turned to address the notion of positive action and positive discrimination. He explained that positive action was an important instrument that was necessary for achieving equality. Discussing a positive prohibition on discrimination, he stated that laws should proscribe discrimination in social security, and access to goods, facilities and services such as healthcare. Hereafter he examined the different forms of discrimination that manifest in daily life, referring to the definitions of direct, indirect, perceived, associative, and multiple discrimination as well as harassment and describing how such discrimination occurs in practice. Finally, he gave an overview of the different remedies that should be available in the event of unlawful discrimination. In relation to the burden of proof, it was explained that it should be for the defendant to prove that no discrimination has taken place. Mr Rubenstein stressed that sanctions for a breach of the right to equality need to be effective, proportionate

and dissuasive, which might include changing policy or organisational procedure. The presentation was concluded by listing several other remedial options such as the entitlement to compensation in the form of pecuniary or non-pecuniary damages and court-ordered injunctions.



The second speaker of the session was Colin Gonsalves, who talked about recent developments in Indian equality and non-discrimination jurisprudence. He identified Articles 14, 15, 16 and 46 of the Indian Constitution and its jurisprudence as a strong source of equality protection. Mr Gonsalves referred to the case of *Raghunath Rao v Union of India* (AIR 1993 SC 1267) in which the right to equality was held to be

a fundamental right of the Indian Constitution and that no constitutional amendments can be made to take away or abridge this fundamental right. He also explored the case of *S.R.Bommai v Union of India* (1994 3 SCC 1) which dealt specifically with the issue of religion and asserted that secularism was also a basic feature of the Constitution.



His presentation then turned to the “Doctrine of Classification” in relation to “equality before the law”. He noted that classifications should be reasonable and that any difference identified between groups of people should be understandable. In addition, it was stressed that distinctions between groups should have a rational nexus to the object of the legislation. The discussion was then broadened and the question of whether morality should ever be a factor in determining the reasonableness of distinctions between groups of people was raised.

Following this discussion, Mr Gonsalves put forward the view that there ought to be guarantees against arbitrary treatment and this should be formulated as a positive obligation on the state which requires a duty to introduce policies to ensure that all people are able to enjoy the equal protection of laws. He drew together the notions of arbitrariness and the concepts of justice, explaining that

any commitment to non-arbitrary treatment should be based on the principles of natural justice.

How equality can be both procedurally and substantively achieved was then considered. Mr Gonsalves stated that there was not only a need for procedural integrity but there was also a requirement that the substantive element of all laws be fair, just and reasonable – and that internal checks and balances were necessary to ensure consistency of the executive. Towards the end of the session, specific groups vulnerable to discrimination were identified and the case was made that positive discrimination for groups such as Dalits and women was necessary in order to reduce their inequality. In his closing remarks Mr Gonsalves stated that legal aid and an independent judiciary capable of review on the basis of reasonableness and proportionality was fundamental to the fight against inequality.

Session 2: Gender Discrimination

Alice Leonard commenced the second session by building on what Mr Rubenstein had discussed with regard to direct and indirect discrimination. She began by recalling the experience of discrimination in the United Kingdom in the 1970s, highlighting the gender gap inherent in the social fabric of the nation at the time. She drew on examples from many spheres of social life such as the differentiation between the numbers of male and female university students and the stereotypically gendered roles that women took on if they entered into the labour market. Ms Leonard then discussed the emerging legislation that marked the beginning of sex equality law in the United Kingdom through the Sexual Discrimination Act of 1976. She discussed the major developments in equality jurisprudence in the 1970s and 1980s

which created counterweight to the prevalence of stereotypical assumptions about women. This stereotyping, she explained, was particularly visible in industries such as engineering and oil where there was a reluctance to recruit women due to the belief that they could not cope with the physical nature of the work.

She then compared UK sex discrimination law and the Indian jurisprudence on sex discrimination to show that many of the same



generalised assumptions about women were prevalent both in India and the UK. Ms Leonard moved on to talk about the emerging concept of indirect discrimination which first developed in the United States and then migrated to the United Kingdom appearing in the Sex Discrimination Act of 1976. She reflected on the importance of this concept in overcoming deep-rooted inequalities and urged participants to think strategically about how indirect discrimination affects them, their clients and their work. Finally, she laid out the different ways in which this legislation had been interpreted in the British courts. She provided several examples of employers who indirectly discriminated against women by providing redundancy pay only to full-time workers with the knowledge

that women were much more likely to work on a part-time basis due to child care duties. Following the presentation, participants separated into groups and undertook a case study exercise which required them to apply the legal standards and concepts presented by Ms Leonard. Two case studies were given to the workshop participants. Case study 1 involved women in the judiciary of India and required participants to “issue spot” in respect to direct and indirect discrimination and think about what evidence was necessary to bring a successful case of discrimination. Case study 2 involved the employment of women on the railways of India. This case study also required participants to think critically about the equality issues involved, spot any potentially discriminatory elements within the case study scenario and develop arguments supporting the position that the



discrimination which occurred in the railway industry in India was not justifiable. The groups spent time discussing and analysing the case studies and presented their conclusions to the workshop.

The second trainer of this session was Flavia Agnes who spoke about equality and discrimination in family law, including inheritance, marriage and divorce. She began

this lively interactive session by stressing the complexity of assessing gender discrimination in India due to the tradition of legal pluralism and the overlap between religious, civil and customary laws. Ms Agnes stated from the outset that all laws in India pertaining to the family were built upon patriarchy and relied heavily upon traditional interpretations of woman as the chaste wife and the virginal daughter.

Moving on from this general assumption, each religious tradition's specific personal laws were examined. Beginning with Hindu law, Ms Agnes described the salient features of the law reforms that occurred in the 1950s which attempted to transform the religion's values on gender. For example, the Hindu Succession Act of 1956 which ended the practice of testamentary succession and allowed widowed women full access to their husband's estate. Despite some developments such as this one, a prevailing gender inequality still exists in the Hindu tradition. For example, women who are not in legally recognised monogamous relationships fail to benefit from the changes made to inheritance laws.

The flaws in other legal developments such as the Hindu Marriage Act of 1955 were then presented. Because of the different nature of the roles of men and women in the marital home, the legitimate grounds for divorce were very different for men and women. Additionally, though both men and women are entitled to maintenance payments following a divorce, stereotypical conceptions of women prevail and they are far less likely to receive payments if they are portrayed as sexually promiscuous.

Ms Agnes then discussed how Muslim laws affect gender equality in India. She asserted that there had been some developments, es-

pecially in relation to maintenance payments, but the choice to offer women a lump sum rather than a monthly allowance was seen as a missed opportunity to develop a uniform civil code. The issue of polygamy was raised once more and compared with Hindu polygamy, with Ms Agnes asserting that Muslim women were slightly better off as polygamous marriages were recognised in the Muslim tradition and thus Muslim women did receive maintenance payments. To continue her analysis, Ms Agnes then looked at Christian law. The main challenge for Christian women, she stressed, was the denial of rights of divorce on the ground of cruelty – a ground which was not officially recognised until 2001. To conclude, Ms Agnes set out that there are still many discriminatory elements in secular statutes that disadvantage women, as well as customary practices that are prevalent across much of India.



Session 3: Disability Rights

Session 3 began with an icebreaking activity by asking each person in the room to introduce themselves and to say the first word that came to their minds when they thought of disability. The responses from the attendees were quite varied and included descriptions such as “disadvantage,” “suffering,” “misunderstood” and “challenge”. Oliver

Lewis then began the training with the challenging task of presenting an overview of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which came into force in 2008. Describing the history and the philosophy behind CRPD, he described how existing human rights mechanisms were inadequate for people with disabilities. He moved on to discuss who exactly would be covered by CRPD. Drawing together the ideas of disability and equality, he emphasised the importance of a person's ability to participate equally in society. He also noted that the concept of disability is fluid and ever evolving within CRPD.



Following these introductory remarks, Mr Lewis turned to look at the principles contained in CRPD, which, to some extent, moved beyond the concept of disability and brought together ideas of equality. The training continued with an interactive session which required participants to form into groups and examine separate UN Conventions in order to make comparisons with CRPD. Following on from this, the discussion turned to look at the practicalities of implementing the provisions of CRPD and how the Indian government could ensure the protection of these rights. Mr Lewis stated that implementation must be at both the national and international level and, in order to be effective, monitoring was necessary. Monitoring, it was suggested, could take the form of conferences between state parties as well as committees.

Mr Lewis discussed the different ways in which CRPD could be promoted at the national level, focusing specifically on the importance of independent monitoring bodies as well as the participation of persons with disabilities and civil society more generally. He then introduced the Optional Protocol to CRPD which contains procedures through which individuals can seek remedies if they have suffered a violation of their rights. At the end of his presentation, Mr Lewis placed CRPD within the broader global picture, speaking of its developmental nature and pointing out that its ultimate aim should be to include disability measures in the broader developmental programme in order to achieve the Millennium Development Goals.

Professor Amita Dhanda continued the session by discussing the gap between international disability standards and the domestic law in India. She spoke not only of the need for consistency in the content of any given legislation, but also the need for consistency in the implementation and monitoring of such legislation. Professor Dhanda also highlighted the need for a change in the outlook of domestic legislation. Change was required on many different levels, including a move from a narrowly constructed medical conception of disability, to a more encompassing social formulation of the concept. She stated that India needed to leave behind its welfarist approach to people with disabilities and move to a more sophisticated rights-based approach. Additionally, the government of India must be encouraged to ensure the participation of disabled per-

sons in policy decisions rather than merely their representation. The discussion then addressed the current deficiencies in Indian disability law. Professor Dhanda spoke of the problem of defining disability, which in the Indian law is exhaustive and overly medical. This discussion built on from Mr Lewis' previous observations about the fluidity and evolutionary character of the concept of disability. She highlighted the deficiencies in the law relating to employment, the lack of a specific disability allowance in social security provisions, and the practice of developing rehabilitation programmes outside of government. It was pointed out that, apart from the overt deficiencies in the Indian laws, basic and necessary elements were absent in the legislation. Professor Dhanda referred particularly to the lack of a commitment to the life, liberty and integrity of persons with disabilities.

Professor Dhanda then commented on the conflicts that exist within Indian domestic laws. She spoke of mental health laws, the issues of contract formation, guardianship and the exclusionary provisions which prevented people with disabilities from accessing several legal rights. At the implementation level, Professor Dhanda highlighted the different ways in which the international standards could be incorporated into the domestic sphere. She spoke of the need for effective planning and resource allocation as well as concrete reforms in the domestic law and more general awareness raising.

Addressing the issue of monitoring both at the national and international level, Professor Dhanda emphasised that the need for a multi-disciplinary approach was key. Under the auspices of the Disability Commissioner, both human rights institutions and disability organisations should be actively involved in the monitoring of the implementation of

CRPD. At the international level, country reports should be undertaken with the support of national governments.

The Session was characterised by a spirited and inclusive discussion.

Session 4: Role of Monitoring and Enforcement Bodies

Session 4 began with Dr Neil Wooding explaining the role and powers of the United Kingdom Equality and Human Rights Commission (the Commission). He introduced the remit of the Commission and the ways in which it wished to re-shape the approach to equality. The Commission aimed to promote a more integrated approach to equality, bringing together several different types of discrimination and amalgamating them under the broad and encompassing title of equality. According to Dr Wooding, they aimed to promote the appreciation of difference and to incorporate human rights into the campaign for equality.

The discussion turned to look at the aims of the Commission with respect to the Equality Act of 2006. Dr Wooding explained that the primary goals were for all individuals to achieve their full potential as well as the promotion of the need to respect human rights and the diversity of society. Within these goals, dignity and worth of all individuals should be accommodated. These broad aims, it was highlighted, contain specific goals, for example, the need to strengthen good relationships between individuals, reducing inequality and eliminating discrimination.

Having laid out the aims of the Commission, Dr Wooding then set out the different roles that the organisation performs. At the policy level he discussed responsibility for enforcing the law and influencing the development

of legislation. In addition, Dr Wooding pointed out that there was a strong need to promote good practice and facilitate campaigns in order to engage stakeholders in the field of equality. It was explained that the Commission also performs a regulatory role to promote compliance with the law. Reminding participants about the themes touched on the disability rights session, Dr Wooding discussed the enforcement role of the Commission which included, among other things, powers to seek judicial reviews and injunctions and to conduct investigations. Intelligence-sharing was also an important function of the Commission in respect to enforcement.

To conclude his talk, Dr Wooding identified some of the difficulties faced in enforcing and promoting the values of equality. He stated that enforcement alone would not automatically result in transformational change. Additionally he highlighted the need for a multi-disciplinary approach to problem-solving that was not overly legalistic. He pointed out that many of these problems were complex and the result of long-standing cultural and social phenomena. He exposed some tensions that exist between the Commission and other organisations in the regulation of equality promotion.

Professor Kalpana Kannabiran continued Session 4 with a discussion of the role of monitoring and enforcement bodies in India. To contextualise the discussion, Professor Kannabiran began with an overview of the recent human rights movement in India and the acknowledgement that real access to justice for all was a major concern in the country. Professor Kannabiran discussed how this movement had advanced and was today taking the form of the move towards the creation of an Equal Opportunity Commission in India. She recognised recent attempts to

enforce the right to life and liberty constitutionally and the efforts of jurists to draw upon international mechanisms in order to strengthen such guarantees. However, it was noted that despite these attempts there were still gaps in enforcement. Professor Kannabi-



ran also noted the positive impact that “Commissions of inquiry” had had, but warned that such inquiries were still undermined by fair trial issues.

Having examined the setbacks associated with the current system of monitoring and enforcement, the proposed Equal Opportunity Commission and the findings of the Expert Group were discussed. Professor Kannabiran introduced the concept of “parity of status” which was identified as key to achieving equality. The trainer then discussed the shortcomings of the 2008 Equal Opportunity Commission Bill. She identified the need for further thought, including on an expansion of the meaning of the term “deprived”, and also on the proposed “deprivation index” that would act as a measure for identifying groups in need of assistance. Professor Kannabiran went on to examine in detail how this could work in practice by analysing the relationship between discrimination, deprivation and diversity.

In relation to procedural matters, the need for a clear understanding of the jurisdiction and scope of the Commission was identified. Professor Kannabiran then discussed what the Expert Group had termed the “indices of recognition” and proposed the idea that the definition of “deprived group” should not be of a fixed character, but should be dynamic and all-encompassing. To conclude and bring together many of the issues that had been raised in her discussion, Professor Kannabiran posed questions about the mandate of the Equal Opportunity Commission and how any proposed mandate could encompass solutions to the concerns of the Expert Group.

Session 5: Sexual Orientation

The final session of the workshop was presented by Mr Aditya Bandopadhyay and generated a great deal of interest among the participants. India is a country that has only just decriminalised homosexual activity and offers no protection to LGBT individuals from outright discrimination in any aspect of economic, social and political life. Mr Bandopadhyay described the extent to which sexual minorities are mistreated and discriminated against by their friends, family, government officials, especially the police. The session was very forthright and graphic in its portrayal of the brutalities inflicted on feminised males and transgendered individuals and brought the severity of their plight home to many present for the first time. Ac-

ording to Mr Bandopadhyay, the roots of discrimination lie in “shame-based” eastern cultures where masculinity is a privileged state and any male who does not conform to this ideal is persecuted by the entire society. His presentation generated a great deal of interest among the trainees who then engaged with him in a frank and open question and answer session.

Final Panel Discussion and Future Steps

The entire panel of trainers assembled for a final question and answer session, where the workshop participants asked questions on all topics covered in the workshop and discussed possible strategies to achieve equal rights in India through litigation, activism and campaigning for more progressive litigation on issues related to equality and non-discrimination.

The issues and concerns discussed in this workshop are a key source of information for identifying (i) the challenges that practitioners and activists experience in India, and (ii) the conceptual difficulties that are present in Indian law. These issues and concerns will also be a key source of information and direction in drafting the legal Handbook which will be produced in the framework of this project. Consequently, the experience, knowledge and expertise gained by workshop participants will be disseminated to a broader audience through the publication of the Handbook.

¹ Jarlath Clifford is Legal Officer at The Equal Rights Trust. Photo credits: Subhash Chandra Vashishth